

Pawnbrokers and Second-hand Dealers Act 1996

Final Report



DEPARTMENT OF **FAIR TRADING**

NSW Consumer Protection Agency

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1. Executive Summary and Recommendations

1.1 Background to the review

The review has been undertaken as part of the NSW Government's commitment under National Competition Policy (NCP) to review all of its legislation which restricts competition. The National Competition Principles Agreement requires that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs of the restriction and that the objectives of the legislation can only be achieved by restricting competition. This report is the finding of the review of the NSW Pawnbrokers and Second-hand Dealers Act 1996, undertaken by the Department of Fair Trading.

1.2 The regulation of second-hand dealers and pawnbrokers

The Department of Fair Trading is the government body responsible for licensing pawnbrokers and second-hand dealers in New South Wales. The Act provides for a licensing system with entry criteria based upon the applicant being of suitable character. As at 7 November 2001 there were 1,091 licensed second-hand dealers, 6 licensed pawnbrokers and 347 licensed second-hand dealers/pawnbrokers.

Queensland, Western Australia, the Australian Capital Territory and the Northern Territory operate licensing regimes for pawnbrokers and second-hand dealers which are broadly similar to that in New South Wales. Tasmania, Victoria and South Australia regulate pawnbrokers and second-hand dealers by a system of registration. NCP Reviews of legislation regulating second-hand dealers and pawnbrokers have been completed in Victoria and Western Australia. Reviews are currently being conducted in Queensland, the Northern Territory and the Australian Capital Territory.

1.3 The Act's objectives

The Review identified the following implied objectives of the legislation:

- Regulate the dealing in certain categories of second-hand goods (high risk of theft goods) in order to limit the traffic in stolen goods through pawnbroker and second-hand dealer businesses;
- Rapid provision to the Police Service of up-to-date information on the sale/pawn of second-hand goods to enhance the enforcement capability of the Police Service to combat property theft;
- Require pawnbrokers and second-hand dealers to be more vigilant about clients who offer goods for sale or pawn particularly in regard to documentation that clients are required to produce to substantiate their identity and their title to the goods;

- Constrain the exercise of market power in respect of the provision of pawnbroking services; and
- Provide a mechanism to facilitate the return of stolen property to rightful owners quickly and equitably.

1.4 Economic justification for government intervention

While competition is generally consistent with economic efficiency goals and the interest of the community as a whole, there may be situations where there is conflict with certain social objectives, for example, the protection of consumers, employees and the environment and the control of socially undesirable activity. Governments may also implement restrictions on competition for reason of ‘market failure’. Governments argue that it is in the ‘public interest’ to restrict competitive outcomes in such instances¹. In this context, the merits of proceeding with anti-competitive legislative reform are subject to a public interest test set out in the Competition Principles Agreement².

While not explicitly couched in terms of market failure, some of the Act’s objectives could be seen as addressing some perceived failure or imperfection of an unfettered market. On the whole, the objectives are aimed at preventing the socially undesirable activity of property crime within the pawnbroking and second-hand dealing industries. However, it is also an objective of the Act to address an imbalance in information between pawnbrokers and their customers regarding the rights and obligations under a pawn agreement.

The Review determined that the implied objectives contained in the Act are still relevant and that legislation is needed to address these objectives.

Whether the Pawnbrokers and Second-hand Dealers Act is the most appropriate mechanism to achieve the implied objectives contained in the Act was examined by the Review.

1.5 Effects of the licensing regime on competition

In assessing whether the licensing regime established by the Act was the most appropriate mechanism, the Review looked at the impacts on competition. In this regard, the licensing regime was found to impact on competition in the following ways:

<i>Type of restriction</i>	<i>Impact on competition</i>
Control on entry	<ul style="list-style-type: none"> ▪ pawnbrokers and persons who deal in prescribed second-hand goods must be licensed
Control on prices or production levels	<ul style="list-style-type: none"> ▪ pawnbroker’s location is limited by the requirement that business must be operated from fixed premises
Imposition of significant costs in complying with the legislation	<ul style="list-style-type: none"> ▪ compliance costs are imposed by the licensing regime eg keeping records in a computer format, licence fees, retaining goods for a period before onselling, verification of customer identification and having to sell unredeemed goods at public auction if the amount lent on the goods is greater than \$50.

¹ National Competition Council, *Considering the Public Interest under the National Competition Policy*, November 1996, p3.

² Clause 1(3) of the Competition Principles Agreement

1.6 Alternate regulatory options

Having assessed the regulatory impacts on competition, the Review then examined alternate regulatory options to the current licensing regime. In this regard, the Review concluded that:

- A *negative licensing regime* is likely to impose fewer costs on pawnbrokers and second-hand dealers, however it would be ineffective in achieving the objectives of the Act. Under such a system there would be no screening process to preclude unsuitable persons from the industries, such as persons with a criminal record for crimes involving fraud or dishonesty. Further, with a negative licensing system it is very difficult to ascertain exactly who is participating in the industries. Negative licensing schemes would also impose a cost on government in terms of administration and enforcement, with no offsetting revenue from licensing.
- A *self or co-regulation* model may impose fewer costs on traders. However, the current industries do not exhibit the necessary characteristics that are required for self or co-regulation, such as evidence of a strong industry group which covers a substantial number of industry members or evidence that the industry as a whole is supportive of self or co-regulation by the industry association. In addition, it is noted that no umbrella industry association exists for second-hand goods. Accordingly, it is considered that such an option, whilst likely to impose less restrictions on competition, would not achieve the objectives set out in the Act.
- *Deregulation* is likely to result in lower costs for pawnbrokers, second-hand dealers and the government and would have a beneficial impact on competition within the industry. However, it is considered that this would be outweighed by the cost of increased traffic in stolen goods through pawnbroking and second-hand dealing outlets and increased an imbalance in information between pawnbrokers and their customers regarding the rights and obligations under a pawn agreement. Whilst New South Wales has in place other consumer protection laws under the common law or statutes such as the Fair Trading Act and the Sale of Goods Act, there is nonetheless a difficulty in relying on generalist consumer protection laws to the exclusion of other specific protection.
- The *current licensing regime* places restrictions on competition and imposes costs on the industries, government and the community. However, it is determined that the benefits of the restriction to the community as a whole outweigh the costs and that the objectives of the legislation can only be achieved by restricting competition by way of a licensing regime. Licensing is considered essential in that it screens out undesirable persons from trading in second-hand goods which are at high risk of theft. It also facilitates the interception of stolen goods by providing the Police with a comprehensive list of persons who provide the services of pawnbroking and second-hand dealing. Additionally, a positive licensing system also has the added advantages in terms of conduct regulation.

Conclusion

Although the current licensing regime restricts competition, it is considered that it is the regulatory option which best achieves the objectives of the Act and provides the greatest net public benefit in that it:

- reduces the risk of the community as a whole, including pawnbrokers and second-hand dealers, being associated with the disposal of stolen goods; and
- reduces the risk of economic loss to consumers who pawn and later redeem goods.

The Review considers that public interest in prevention of theft and individual economic safety necessitates continued government intervention in the form of licensing.

The conclusion of the Review is that sole reliance on market forces and existing laws of general application are an inadequate mechanism for the overall regulation of the second-hand dealing and pawnbroking market. Rather, it is considered that these general laws, when combined with a licensing system, provide an effective framework for regulation of this market, in order to achieve the objectives set out in the Act.

Negative licensing is not considered an appropriate alternative to the current licensing system and given that there is not a comprehensive industry body covering pawnbrokers or second-hand dealers it is the Review's view that the option of self or co-regulation is not feasible.

Given that the rationale for licensing the second-hand dealing industry relates predominantly to externalities, that is, costs to persons from whom goods are stolen for disposal through the industry, rather than an imbalance of information between the trader and consumer, consumer information strategies are not considered to be an appropriate alternative to licensing. However, it is noted that in relation to the pawnbroking industry there is concern that those pledging goods to pawnbrokers in an unregulated market would often be inadequately informed of the costs and other conditions of the transaction. Consumer education could assist in this regard, however, it is considered that disclosure requirements on pawnbrokers in relation to the rights and obligations of the pawn transaction would be more effective.

However, notwithstanding the conclusion that the current licensing system provides a net public benefit and therefore should be retained, it is determined that on the balance of evidence the greatest net public benefit arises from an *enhanced licensing model*. Accordingly, the Review process has provided the opportunity to:

- examine the general effectiveness of the legislation;
- ensure that the Act's objectives are being achieved to their fullest extent; and
- reduce the regulatory burden.

1.7 Recommendations

Following an evaluation of the current provisions contained in the Act, the Review recommends amending the legislation:

- so it is more effective and efficient in achieving its objectives;
- so as to reduce the regulatory burden for licensees;
- for the purposes of clarification and consistency.

Specifically, in this regard, it is recommended to amend the legislation as follows:

1. Presumption for carrying on business

Reduce the presumption for when a person is considered to be carrying on business of buying or selling second-hand goods to selling 6 days in any 12 month period

2. Prescribed classes of second-hand goods

- (1) Clarify that DVDs, mini discs and other similar items be specifically included in the “compact (laser read) disc” class of goods.
- (2) Clarify that computer game cartridges and Playstations be specifically included in the “computer hardware and software” class of goods.
- (3) Clarify that electric or electronic pianos be specifically included in the “musical instruments” class of goods.
- (4) That the Department of Fair Trading continue to monitor the prescribed second-hand goods list to ensure that only high risk of theft goods are prescribed.

3. Definition of selling

- (1) That the term ‘selling’ prescribed second-hand goods be defined in the Act to include bartering, brokering, exchanging or offering to sell or otherwise dealing in second-hand goods.
- (2) Clarify that selling includes tendering and sales by agents of a second-hand dealer.

4. Restriction on the Act’s operation

- (1) Make clear that the Act does not apply to persons who have tendered successfully to conduct a recycling program on behalf of a local government.
- (2) That the restrictions on the operation of the Act be continually reviewed by the Department of Fair Trading to ensure that the Act is not regulating known low risk areas for stolen goods.

5. Restrictions on obtaining a licence

- (1) Refuse individual licence applications if the applicant is a director of, or a person concerned in the management of, or an officer who appears to have control or substantial control of, a body corporate who is precluded from holding a licence due to the revocation of the licence by a court as a consequence of an offence or due to revocation or suspension of the licence as a result of disciplinary action by the Director-General.
- (2) Refuse corporate licence applications if any of the directors of the company have been a director of, or a person concerned in the management of, or an officer who appears to have control or substantial control of, a body corporate who is

precluded from holding a licence due to the revocation of the licence by a court as a consequence of an offence or due to revocation or suspension of the licence as a result of disciplinary action by the Director-General.

- (3) Refuse a licence application if the applicant is considered not to be, in addition to the other entry requirements set out in the Act, a fit and proper person for the purposes of holding a licence.
- (4) Refuse a licence application if the applicant has been disqualified from holding an equivalent licence in a corresponding Australian jurisdiction.
- (5) Provide the Director-General with the power to impose, revoke or vary licence conditions at any time, not just upon the grant or renewal of the licence.
- (6) Provide that the Director-General may exercise the same discretion that is currently vested in the Administrative Decisions Tribunal when assessing whether to grant a licence to an applicant who has been convicted of an offence involving dishonesty in the last 10 years.
- (7) Require that licensees must inform the Department in writing within 28 days of being convicted of an offence involving dishonesty.

6. Evidence of identity

- (1) Expand the evidence of identity, which persons offering to sell or pawn goods must satisfy, to include documentation issued by the government of another country.
- (2) In relation to second-hand dealing, insert a general regulation making power into the Act to provide for reduced identification of identity for the supplier of goods for prescribed circumstances or activities. This will enable regulations to be made for the purpose of reducing the identification requirements in relation to such things as:
 - Goods purchased from sellers overseas; and
 - Goods purchased from government agencies.
- (3) Remove the anomaly which requires licensees to obtain date of birth details from a corporation offering to sell or pawn goods.

7. Records which must be kept by licensees

- (1) That clause 14(2)(f) be amended to make clear that licensees must record the price they paid when purchasing an item.
- (2) Provide what is a 'fair and reasonable description' of goods in relation to CD's, mobile phones and items with bar codes.
- (3) Remove the word "or" from section 28(2)(a) to ensure that a serial number is always recorded when available, and to clarify that records need to be kept for all parts of goods that have an identifiable serial number.

- (4) Remove an anomaly which requires licensees to record the date of birth of a corporation offering to sell or pawn goods but require licensees to record the company's ABN.
- (5) Remove the requirement to record the signature under clause 14 (2) (a), as in the majority of cases this information is recorded electronically, and a signature is already required on the ownership statement as per Form 2 of the Regulations which is prescribed under section 15 (3) of the Act.
- (6) Insert into the Act a provision which creates an offence for licensees to use or divulge information collected for the purposes of the Act, for any purpose which is not stipulated in the Act. An exception to this prohibition is where the person to whom the information relates consents to the information being used for purposes other than those set out in the Act.

8. Reduction in record keeping requirements

Insert a regulation making power into the Act for the purpose of exempting a person, a class of persons or persons who are engaged in a particular trade, from compliance with certain record keeping requirements. This will allow regulations to be made to reduce record keeping requirements in relation to such things as imported goods.

9. Time limit for recording records

Require second-hand dealers to record transaction details in relation to goods by the close of business of the day that such goods come within their possession. However, if a second-hand dealer receives goods at any premises other than the business premises notified to the Department of Fair Trading, they are required to record the transaction as soon as possible.

10. Furnishing Records to the Police

Review the timeframes for the furnishing of records to the police once the on-line computerised system is fully operational.

11. Market promoters

Oblige market promoters to require unlicensed stallholders to produce the same evidence of identity that persons offering to sell or pawn goods are required to produce.

12. Retention periods

- (1) Provide that the 14 day retention period for second-hand goods commences once the transaction has been recorded.
- (2) Exclude from the 14 day retention period for second-hand dealers, goods purchased from government agencies by way of tender/auction.

13. Recovery of alleged stolen goods

- (1) Transfer the jurisdiction for the hearing of disputes regarding the ownership of goods to the Fair Trading Tribunal or its successor the Consumer Trader and Tenancy Tribunal.
- (2) Impose an obligation on dealers to display prominently a sign advising persons of the mechanism that enables disputes regarding the ownership of goods to be resolved.
- (3) Modify the mechanism for the recovery of stolen goods to provide for the following:
 - i If the claimant can substantiate title to the goods to the Police, the licensee will be notified by the Police that they have 28 days, from being advised, to make an application to the Tribunal disputing the return of the goods to the claimant. (The claimant must be able to provide Police with written documentary evidence or a statutory declaration. In addition, the claimant must have also reported the theft of the item to the Police).
 - ii The goods are to remain in the possession of the licensee for 28 days, or if the licensee applies to the Tribunal within that 28 day period, until such time that the matter is determined by the tribunal. The goods cannot be sold or altered in any way during this period of time.
 - iii If the licensee does not apply to the Tribunal in that 28 day period, title to the goods is immediately vested in the claimant and must be surrendered to the claimant.
 - iv Failure by a licensee to comply with the Police notification would be an offence under the Act and grounds for possible revocation of licence.
 - v If an application is made, the Tribunal would then determine the rightful owner of the goods.
 - vi Create an offence for a person to knowingly make a false claim to the title of stolen goods.

14. The pawn agreement

- (1) Require the following information be included in the pawn agreement:
 - i an itemised statement of all fees and charges that are or may become payable and, if any of the fees/charges are not ascertainable at the time of the agreement, a statement of how those fees and charges will be determined;
 - ii the premises where the goods will be located during the redemption period, and if the goods are moved, the name and address of the location of the goods;

- iii if the pawn ticket covers more than one item – a statement of whether or not the items may be separately redeemed; and
 - iv the date before which the goods pawned may be redeemed.
- (2) Require the interest to be paid on the amount lent to be expressed as an amount in dollar terms to be paid for each week or month, as the case may be, of the loan.
 - (3) Require the pawnbroker to provide the customer with a prescribed notice that sets out comprehensively the rights and obligations of the consumer at the time the pawn agreement is entered into.
 - (4) Require that a pawn agreement cannot be varied other than by extending the original redemption period by mutual agreement. If either party wishes to make any other variation to the pawn agreement then by mutual agreement the original pawn agreement must be paid out and a new agreement entered into. If the redemption period is extended by mutual agreement, then the pawn agreement must contain the new redemption period, any new fees and charges that are or may be payable and the date of the agreement to extend the redemption period.

15. Interest rates

- (1) Make clear that interest on a pawn ceases to run at the expiry of the loan agreement.
- (2) Ensure that customers can pay interest instalments on a monthly basis.
- (3) Require pawnbrokers to display prominently the rate of interest and the fees and charges they charge at their business premises.

16. Sale of forfeited goods

- (1) Allow pawnbrokers to have the option of selling unredeemed goods at either their business premises or at auction.
- (2) Require pawnbrokers to sell forfeited goods in a manner conducive to securing the best price reasonably obtainable. If the pawnbroker does not comply with this requirement, it is an offence against the Act. If in any proceedings a question arises as to whether a pawnbroker has complied with the requirement, the onus of proving compliance is on the pawnbroker.
- (3) Require pawnbrokers to advise pawners, at the time of entering into the pawn transaction, which disposal method would apply to the item if the item was unredeemed.
- (4) Require pawnbrokers to include in the pawn agreement the cost associated with the proposed method of sale.
- (5) Require pawnbrokers, where an unredeemed item is sold on the pawnbrokers premises, to record the transaction details including the price paid for the goods,

the date the goods are sold and the name and address of the person who purchased the goods, if the value of the goods exceed \$50.

17. Surplus proceeds

- (1) Require pawnbrokers to notify the pawner, by way of registered post, of any surplus monies over \$50 in relation to the sale of unredeemed goods. Such notification must be made within 14 days of the sale of the unredeemed goods. However, pawnbrokers are exempted from this requirement if the pawner has elected in writing that they not be notified of any surplus.
- (2) Pawnbrokers will be exempted from this requirement if the pawner has elected in writing that they not be notified of any surplus.

18. Disposal of pawned goods

- (1) Where a pawnbroker sells or transfers the business to another person, the rights and obligations of the pawnbroker in relation to each pawn ticket issued are transferred to that person. The pawnbroker must notify each pawn ticket holder of the transfer (or the pawnbroker who has assumed the rights).
- (2) Include a provision in the Act for the disposal of unredeemed goods in cases where the licence has been surrendered or not renewed.

19. Pawnbrokers to physically retain pawned goods

Clarify that pawned goods are to be kept at the business or storage premises to which the licence applies until the redemption period expires.

20. Disciplinary provisions

- (1) Enable the Director-General to serve a show cause notice:
 - i on a licensee who has (or whose employee has) contravened a provision of the Act or the regulations (whether or not the person has been prosecuted or convicted of an offence in respect of the contravention);
 - ii on a licensee who is (or whose employee is) convicted of an offence involving dishonesty since the time their licence was issued or last renewed
 - iii on a former licensee (a person who in the last 12 months has held a licence under the Act or has been a director or secretary of a corporation that, within the period, has held a licence under the Act).
- (2) Provide that if a corporation contravenes any provision of the Act or regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.

- (3) Make clear that the Director-General has the discretion to determine not to take disciplinary action in relation to a matter (even when satisfied that the grounds contained in a notice to show cause have been substantiated).

2. Background to the Review

2.1 National Competition Policy and the review of laws that restrict competition

The review of the Pawnbrokers and Second-hand Dealers Act 1996 has been undertaken as part of the NSW Government's commitment under National Competition Policy to review, by July 2002, all of its legislation which restricts competition.

The aim of the National Competition Policy is to promote and maintain competition in order to increase economic efficiency and community welfare, while continuing to provide for consumer protection. The Government believes that, provided the public interest is safeguarded, competition will benefit the people of NSW by creating a stronger and more vital economy.

The National Competition Principles Agreement establishes principles for pro-competitive reform of government business enterprises and removal of impediments to markets where they are not in the public interest. The Agreement requires that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs of the restriction and that the objectives of the legislation can only be achieved by restricting competition.³ Thus in order to retain restrictive legislation it is necessary to demonstrate why it is in the public interest to do so. All NSW legislation has been examined to determine whether it establishes market entry barriers or requires conduct which has the potential to restrict competitive behaviour in the market. This report is the finding of the examination of the NSW Pawnbrokers and Second-hand Dealers Act 1996.

2.2 Market failure and consumer protection

Legislative controls are usually imposed by government to address problems that arise from the provision of services in an unregulated environment. These are sometimes known as "market failures." An example of such a problem is where there is an imbalance of information between service providers and consumers, limiting the ability of the consumer to make informed choices when seeking service providers. However, regulation may also restrict competition among service providers. This may result in new problems or costs for business, consumers and government that are not justified in relation to the nature of the problem which the intervention was seeking to address. Alternatively, regulation may not be effective in addressing the identified problems.

The purpose of this review of the Pawnbrokers and Second-hand Dealers Act 1996 was to consider:

- the objective of government regulation of pawnbrokers and second-hand dealers;
- whether regulatory intervention is still justified;
- the impact of the current Act on competition within the industries; and

³ Competition Principles Agreement. Sub-clause 5(1)

- whether the government objective could be met by any less restrictive mechanism.

2.3 The review process

It is the Government's policy to ensure that the review process takes into account the full range of public benefits of the legislation and that all views are thoroughly considered before any reforms are proposed. To achieve this a Steering Committee, chaired by the Department of Fair Trading, was established to conduct the review. It was made up of representatives from the:

- New South Wales Police Service;
- Cabinet Office;
- Attorney-General's Department; and
- Department of Fair Trading.

A Reference Group was also established to provide advice to the Steering Committee. The Reference Group comprised representatives of:

- Cash Converters;
- the Boating Industry Association of Australia;
- the Jewellers Association of Australia;
- the Australian Antique Dealers Association;
- the Law Society of New South Wales;
- the Consumer Credit Legal Centre;
- the Auctioneers & Valuers Association of Australia;
- the Australian Finance Conference;
- the Pawnbrokers Association of NSW; and
- the NSW Council of Social Services.

The Steering Committee produced an Issues Paper in order to:

- identify the issues relevant to the impact of the legislation on competition within the industry;
- stimulate discussion within the community; and
- assist interested individuals and organisations who wished to lodge a submission to the review.

Copies of the paper were distributed to all licensed second-hand dealers and pawnbrokers in the State and sought responses on the issues it raised, as well as any other relevant matter. Forty five submissions were received from the parties listed in Appendix A.

Although the emphasis of this review was on anti-competitive aspects of the legislation, areas in which the laws could be made more efficient and equitable were also considered during the review process.

2.4 The final report

The Steering Committee has prepared this Report for consideration by the Minister for Fair Trading and the New South Wales Government in satisfaction of the review requirements under the Agreement. It has been based upon the Committee's analysis of the issues raised during the review, including those provided by way of written submissions.

3. Regulation of pawnbrokers and second-hand dealers

3.1 Introduction – The provision of pawnbroking and second-hand dealing services

Second-hand dealing and pawnbroking are similar businesses in that they both involve obtaining pre-owned goods for re-sale. However, they are distinct, in that pawnbroking involves the business of lending money on the security of pawned goods. The person “pledging” the goods is able to reclaim them if repayment is made in accordance with the pawn agreement.

The Department of Fair Trading is the government body responsible for licensing pawnbrokers and second-hand dealers in New South Wales. As at 7 November 2001 there were 1,091 licensed second-hand dealers, 6 licensed pawnbrokers and 347 licensed second-hand dealers/pawnbrokers. (It is the general practice in New South Wales for pawnbrokers to also hold a second-hand dealers licence).

Licensed second-hand dealers appear to be widely distributed throughout the State and deal in goods ranging in value from a few dollars to many thousands of dollars. Some dealers trade in general items, whilst others specialise in niche markets. With the introduction of the Pawnbrokers and Second-hand Dealers Act 1996, it is now the case that dealers in second-hand goods are only required to hold a licence if they trade in certain high risk of theft goods, for example, televisions and video recorders.

The majority of licensed second-hand dealers are located in metropolitan Sydney (approximately 61 per cent) however, the industry is also well established in Wollongong (approximately 18 per cent) and northern New South Wales (approximately 11 per cent). In general, pawnbroking and second-hand dealing businesses are local in their sphere of operation, but activities such as dealing in antique jewellery, for example, may have a much wider scope, including importing stock from overseas.

3.2 The Pawnbrokers and Second-hand Dealers Act 1996

The long title of the Pawnbrokers and Second-hand Dealers Act is as follows:

An Act to provide for the licensing and regulation of pawnbrokers and dealers in certain classes of second-hand goods; to repeal the Pawnbrokers Act 1902, the Second-hand Dealers and Collectors Act 1906 and the Hawkers Act 1974; to amend certain Acts consequentially; and for other purposes.

There is no clear statement of objectives contained in the legislation.

Listed below is a summary of the *major provisions* contained in the Act and regulations.

Licensing Regime

Persons who carry on the businesses of pawnbroking or persons who carry on the business of buying or selling second-hand goods are required to be licensed. The Act defines second-hand goods as any goods of a class or description prescribed in the regulations. For this purpose, the regulations prescribe various classes of second-hand goods which are considered to be at high risk of theft.

The Act creates entry barriers into the pawnbroking and second-hand dealing industries, for example:

- applicants must not have committed an offence involving dishonesty within the last 10 years; and
- unless exempted, licensees must, as a condition of their licence, use electronic means of creation and storage of records.

Business requirements

The legislation requires pawnbrokers and second-hand dealers to maintain records in relation to such things as the person selling or pawning the goods, a description of the goods, the date the transaction takes place and the price paid for the goods.

Licensees must, before accepting any goods offered for pawn or sale by a customer, obtain prescribed documentary evidence of the customer's identity. In addition, licensees must not accept goods for sale or pawn without first requiring the customer to complete a prescribed declaration, regarding the ownership of the goods. The legislation also requires licensees not to accept goods offered for pawn or sale if the licensee has reasonable grounds to believe that the goods concerned are not the property of the customer. Licensees who suspect, for any reason, that goods in their custody may have been stolen or unlawfully obtained, are required to immediately inform an authorised officer of the cause of that suspicion.

In general second-hand dealers must hold goods for 14 days after receipt. A minimum 3 month retention period applies to pawned goods. Authorised officers who suspect, on reasonable grounds, that goods in the possession of a licensee have been stolen or unlawfully obtained, can direct that the goods be retained by the licensee for 56 days. If necessary, a further 56 day notice can be served on the licensee.

Mechanism for Recovering Goods Alleged Stolen

The Act establishes a mechanism for recovery of goods alleged to be stolen. If a person identifies their stolen property in the possession of a pawnbroker or second-hand dealer, they can lodge a claim over those goods on the spot. The goods must be then held by the licensee for a 28 day period. This period gives the claimant time to initiate recovery proceedings if the parties cannot resolve the matter themselves. However, once court action is commenced, the licensee must not sell or dispose of the goods until the court determines the ownership of the goods.

Disciplinary Procedures and Compliance

The Director-General of the Department of Fair Trading may take certain action against a licensee, including revocation and suspension of the licence and show cause proceedings if the licensee has engaged in improper conduct.

Where such action has been taken against a licence, the licensee may apply to the Administrative Decisions Tribunal for a review of the action.

The maximum court imposed fines for offences under the Act presently range from \$1,100 to \$11,000.

The Act provides that Police or Department of Fair Trading officers may impose 'on the spot fines' by way of penalty notices on licensees found in breach of certain provisions of the legislation which are prescribed in the Regulation. Licensees who are convicted of offences under the Act may incur demerit points against their licence.

Pawnbroker's records of pawns

The Act specifies that the record of the pawn agreement must be made and given to the pledgor. The pawn must include the following information:

- a) a fair and reasonable description of the goods;
- b) the total amount lent on the goods, together with the rate of interest charged by week, month, or other period, as the case may be, and any other charges,
- c) an equivalent annual interest rate; and
- d) the name and residential address of the owner of the goods.

Sale of forfeited goods /application of sale proceeds

The legislation requires that unredeemed goods over \$50 be sold at public auction. Pledgors may claim the surplus sale proceeds where goods have been sold for more than the amount of the loan, plus interest and charges, within a 12 month period after the sale.

3.3 Other Legislation

The provision of pawnbroking and second-hand dealing services is also subject to the general consumer protection laws such as the Commonwealth Trade Practices Act 1974, administered by the Australian Competition and Consumer Commission, and the Fair Trading Act, administered by the NSW Department of Fair Trading. These include a range of provisions which prohibit practices that seek to exploit or misinform the community, such as deceptive conduct, false representations and misleading advertising. A major policy objective of the Fair Trading Act is that consumers can expect that the information they are given about the product or service they are buying is accurate so that they can choose those that best satisfy their needs. If consumers are misled, the Fair Trading Act can require that traders remedy the situation.

In the case of a dispute between a consumer and a pawnbroker or second-hand dealer, the consumer could seek to resolve the dispute by lodging a complaint with the Department of Fair Trading. If the matter cannot be resolved with the assistance of the Department the consumer may have access to the Fair Trading Tribunal or its successor the Consumer Trader and Tenancy Tribunal under the Consumer Claims Act 1998 for resolution of the dispute or else could seek redress through the civil court system.

3.4 The regulation of pawnbrokers and second-hand dealers in other jurisdictions

Pawnbrokers and second-hand dealers are regulated in all Australian jurisdictions. A summary of legislation regulating pawnbrokers and second-hand dealers in other jurisdictions is provided at Appendix D.

NCP Reviews of legislation regulating second-hand dealers and pawnbrokers have been completed in Victoria and Western Australia. Reviews are currently being conducted in Queensland, the Northern Territory and the Australian Capital Territory.

4. Objectives of legislation regulating pawnbrokers and second-hand dealers

4.1 Regulatory objectives of government

The National Competition Council has identified that typical goals and targets of legislative objectives might be to⁴:

- improve economic efficiency;
- achieve certain social welfare, distributional or equity targets;
- improve occupational or consumer health and safety;
- influence regional development;
- attract investment;
- achieve particular environmental targets or sustain natural resource stocks; and
- facilitate adjustment.

The Council of Australian Government (COAG) has agreed that government intervention in markets should generally be restricted to situations of market failure and that each regulatory regime should be targeted on the relevant market failure or failures.⁵

The National Competition Council has identified the following market failures which may warrant legislative intervention by government:

Type of market failure	Description
public goods	<ul style="list-style-type: none">• These goods will tend to be under-produced because they are <i>non-excludable</i> (ie people who have purchased the good cannot stop others using it up) and <i>non-rivalrous</i> (ie the good is not used up with use). Typical examples would be the environment and national defence.
externalities	<ul style="list-style-type: none">• Externalities are the positive or negative impacts of market transactions which are not reflected in prices, and so lead to non-optimal levels of production and consumption. Pollution is commonly cited as a negative externality (because third parties suffer from its production) and education as an example of a positive one (because third parties can benefit from another person's increased knowledge).
natural monopolies	<ul style="list-style-type: none">• Large economics of scale and scope may mean that one producer or provider (a natural monopoly) can supply a good or service at much lower costs than many individual providers separately undertaking an activity.
an imbalance in information	<ul style="list-style-type: none">• An imbalance in information occur where information is not evenly distributed throughout the community. Buyers and sellers of goods or services do not have the same knowledge about quality. This may result in producers being underpaid or consumers deceived.

⁴ National Competition Council, *Guidelines for NCP legislation reviews*, 1999, p30

⁵ Council of Australian Governments, *Report of the Task Force on Other Issues in the Reform of Government Trading Enterprises*, released as part of the first COAG communique, 1991, p22

While market failure is a principal reason for intervention, other factors may motivate direct government intervention in a market in order to:

- facilitate universal access to essential goods and services;
- allocate limited public resources;
- protect consumers, employees and the environment (to overcome problems of externalities and imperfect information in the marketplace); and
- control socially undesirable behaviour such as criminal activity.

4.2 Implied objectives of the Act

To comply with the COAG Competition Principles Agreement, the NSW Government is required to identify the objectives of the Pawnbrokers and Second-hand Dealers Act and to consider whether there is rationale for achieving these objectives through legislation. If it is established that there is rationale for legislative intervention, the precise form of intervention, that is licensing or alternative means, needs to be considered. The examination of this is done in Chapter 5 of this report.

As noted at 3.2 above, there is no clear statement of objectives in the current Act. However, when the Bill was introduced, the second-reading speeches stated that the main purpose of the legislation is to restrict the traffic in stolen goods and to assist the rightful owners of goods in recovering their lost property.

Based on the second-reading speeches and the specific provisions of the Act, the Review identified in the Issues Paper the following implied objectives of the legislation for discussion, including:

- to regulate the dealing in certain categories of second-hand goods (high risk of theft goods) in order to limit the traffic in stolen goods through pawnbrokers and second-hand dealers;
- the rapid provision to the Police Service of up-to-date information on the sale/pawn of second-hand goods to enhance the enforcement capability of the Police Service to combat property theft;
- require pawnbrokers and second-hand dealers to be more vigilant about clients who offer goods for sale or pawn in regard to documentation clients are required to produce to substantiate their identity and their title to the goods;
- constrain the exercise of market power in respect of the provision of pawnbroking services; and
- provide a mechanism to facilitate the return of stolen property to rightful owners quickly and equitably.

While not explicitly couched in terms of market failure, most of the above objectives could be seen as addressing some perceived failure or imperfection of an unfettered market. On the

whole, the objectives are aimed at preventing the socially undesirable activity of property crime within the pawnbroking and second-hand dealing industries. However, it is also an objective of the Act to address an imbalance in information between pawnbrokers and their customers regarding the rights and obligations under a pawn agreement.

4.3 Submissions

In relation to the Act's objectives, the Review sought comments in the Issues Paper from interested parties on the following issues:

- (i) Are the objectives still valid in today's marketplace;
- (ii) What should be the objective of government regulation in relation to pawnbrokers and second-hand dealers; and
- (iii) Can these objectives be achieved by other means.

Only seven submissions addressed the issue of the Act's objectives. In general, the submissions considered that the objectives, as outlined in the Issues Paper, were still valid.

One stakeholder was of the view that the objectives should be more consumer orientated. For example, they should more clearly set out the rights and obligations of consumers, provide owners of stolen goods a legislative right to get their goods back and address unequal bargaining power which may exist between licensees and many of the consumers who use pawnbroker/second-hand dealer services.

A second-hand dealer was of the view that an objective of the Act should be that all second-hand goods, not just those prescribed in the regulations, should be regulated by the legislation. Also charitable organisations and trade-ins should come within the ambit of the legislation. However, no evidence was provided to support this proposal.

One stakeholder expressed the view that other legislation which governs pawnbrokers and second-hand dealers, such as the Fair Trading Act, the Contracts Review Act and the Crimes Act were inadequate in protecting consumers. Accordingly, it was submitted that specific legislation which regulates pawnbroker and second-hand dealer services is considered necessary.

4.4 Conclusions

The Review supports the view expressed in submissions that the objectives outlined in the Issues Paper are still valid. The Review also agrees that the implied objectives contained in the Act can only be met way of direct government intervention.

Strong community expectations for the need to minimise the traffic in stolen goods and to provide consumer protection from loss associated with inadvertently taking possession of stolen goods are considered as the major grounds for government intervention in the second-hand goods industry.

However, government intervention is also considered warranted in the pawnbroking industry due to unbalanced market powers relating to an imbalance in information. Historically, it has been accepted that market forces do not produce a fair market for people needing to borrow money for personal purposes. An unregulated pawnbroking market may produce unfair transactions because individual borrowers often lack the information necessary to challenge those brokers whose practice it is not to disclose the price (and other potential costs) of an advance in credit in terms they can readily understand.

5. Restriction on competition and regulatory options

5.1 Restrictions on Competition

The goal of National Competition Policy is to remove restrictions on competition to enable Australian businesses to compete efficiently while maintaining appropriate levels of community protection. As mentioned previously, an underlying principle of National Competition Policy is that legislation should not restrict competition unless the benefits to the community as a whole outweigh the costs of the restriction and the objective of the legislation can only be achieved by restricting competition.⁶

The National Competition Council has suggested seven ways in which legislation may limit competition⁷. These are set out in the following table:

Type of restriction	Examples
Control of entry or exit	<ul style="list-style-type: none"> ▪ Creates or protects a single buyer or seller ▪ Limits the number of operators through licences ▪ Allows licences to be freely traded ▪ Restricts new competitors with similar products from entering the market ▪ Restricts who can own or operate a business
Controls on price or production	<ul style="list-style-type: none"> ▪ Limits the size of the operation ▪ Restricts the hours of trading ▪ Affects the location of where a business may operate ▪ Affects in any way the price that otherwise may be determined by the market
Controls quality	<ul style="list-style-type: none"> ▪ Imposes quality standards ▪ Restricts any range of quality from the market
Controls advertising	<ul style="list-style-type: none"> ▪ Limits who may promote or advertise ▪ Limits how a product or service may be promoted
Controls type of inputs	<ul style="list-style-type: none"> ▪ Limits access to important infrastructure ▪ Prevents adoption of innovative methods of production and/or marketing
Imposes significant costs	<ul style="list-style-type: none"> ▪ Imposes specific levies which are not levied on all other industries ▪ Imposes high administrative or compliance costs
Discriminates	<ul style="list-style-type: none"> ▪ Advantages one firm over another ▪ Restricts consumer access ▪ Benefits one group of consumers over another

⁶ *New South Wales Government Policy Statement on Legislation Review*, June 1996.

⁷ National Competition Council *Legislation Review Compendium*, 1997

The question which was raised in the Issues Paper was whether the costs borne by business and the community are reasonable given the benefits provided. Regulatory processes should be designed to minimise the costs of administration to government and of compliance by individuals and businesses and maximise the benefit for consumers and the community as a whole.

The principal business requirements of the Act, which were identified in the Issues Paper as potentially having an impact on competition, can be summarised as follows:

- (i) People who carry on the business of buying or selling second-hand goods or pawnbroking must hold a licence;
- (ii) The criteria which must be satisfied to obtain a second-hand dealers and/or pawnbrokers licence, including the mandatory condition(s) attaching to those licences;
- (iii) The records second-hand dealers and pawnbrokers must keep in relation to a sale or pawn transaction;
- (iv) Steps to establish evidence of identity and title to supplier of goods must be followed;
- (v) Goods must be retained for a certain period prior to being sold, redeemed or forfeited;
- (vi) A mechanism applies to the recovery of alleged stolen goods which are in the possession of a licensee; and
- (vii) In the case of pawnbrokers, restrictions placed on the pawn agreement, the sale of forfeited goods and the application of sale proceeds.

Submissions

A number of submissions indicated that the Act does place restrictions on competition, but these restrictions are considered necessary.

However, other submissions indicated that the Act was anti-competitive as it imposes extra costs, especially in relation to computerised records and licence fees, places second-hand dealers at a disadvantage from competition from unlicensed and interstate dealers and auctioneers and is a disincentive to people entering the industry.

A number of submissions were of the view that there were benefits to the community which should be balanced against the restrictions and costs imposed by the Act. In this regard, it was submitted that if there was a lack of standards in complying with the Act then community faith in pawnbrokers would reduce. It was also maintained that computerisation and increased government intervention have resulted in improving the image of the industries. However, one submission was of the view that the Act produced a net public deficit, as pawnbroking has the highest cost of entry and has the most complicated regulations.

Review comments/position

The principle of the Competition Principles Agreement guiding the current review is that the costs arising from the restrictions outlined above should be outweighed by the benefits they produce, and the objective of the legislation, as canvassed in Chapter 3, can only be met by restricting competition.

This paper assesses the current requirements to determine whether they accord with the principle outlined above. The extent to which the legislative provisions of the Act impose restrictions on competition are detailed in the following table.

How the provisions of the Act restrict competition and their costs and benefits

Provision	BENEFITS				COSTS			
	Nature	Recipient	Description	Level of Benefit	Nature	Incidence	Description	Level of Cost
<i>Licence only required if dealing in certain prescribed second-hand goods</i>	<ul style="list-style-type: none"> Reduces administration costs Increases consumer protection Reduces traffic in high risk of theft goods 	Second-hand dealers, government and community	<ul style="list-style-type: none"> Reduces the number of second-hand dealers caught by the Act. Dealers who chose to deal in non-prescribed goods save on administrative costs necessary to comply with the legislation. This potential cost savings may translate into lower prices charged for non-prescribed second-hand goods Dealers covered by the Act only have to record details for goods on the prescribed list The scope of the Act is narrowed and therefore allows effective targeting of law enforcement activities. The net effect is that only data captured will be that which has direct relevance to law enforcement. This represents a direct saving to both industry and the government 	High	Increases risks to community Size (indirect costs)	Community	<ul style="list-style-type: none"> Not all used goods are being regulated by the Act Increased potential for disposal of non prescribed stolen goods through readily accessible, but deregulated dealerships 	Low
<i>Restrictions on obtaining a licence</i>	<ul style="list-style-type: none"> Increases consumer protection Reduces the traffic in high risk of theft goods 	Community and licensees	<ul style="list-style-type: none"> By ensuring that licence applicants are fit and proper persons to hold a licence and that they are not: <ul style="list-style-type: none"> under 18 years of age an undischarged bankrupt mentally incapacitated, or have been convicted of an offence involving dishonesty within the last 10 years Promotes standards of conduct in the industries to ensure consumer confidence and minimalise criminal activities Improves the industries' reputation Increases the chances that licensees would not be likely "fences" of stolen goods. Consequently the traffic in stolen goods through licensed second hand dealers and pawnbrokers is reduced 	High	<ul style="list-style-type: none"> Creates barriers to entry (direct costs) Reduces competition (indirect costs) Increases administration costs for licensees (direct costs) 	Licensees and customers	<ul style="list-style-type: none"> Licence applicants are denied entry into the industries if they can not satisfy criteria. This may then impact on competition. Payment of licence fees and licence condition to keep computerised records unless exempt – these costs may be passed onto customers 	Medium

Provision	BENEFITS				COSTS			
	Nature	Recipient	Description	Level of Benefit	Nature	Incidence	Description	Level of Cost
<i>Evidence of identity</i>	<ul style="list-style-type: none"> Increases consumer protection Facilitates an audit trail Reduces the traffic in high risk of theft goods 	Community, licensees and Police	<ul style="list-style-type: none"> Reduces the risk that licensees will be dealing in stolen goods Assists Police in apprehending property thieves and increases the chance of stolen property being returned to the rightful owner Provides licensees with a definitive list of what evidence is acceptable. This reduces the chance of insufficient or unacceptable documentation being provided. 	High	<ul style="list-style-type: none"> Increases administration costs for licensees (direct costs) Restricts persons who can use second-hand dealer and pawnbroking services (indirect costs) Personal privacy concerns 	Licensees and customers	<ul style="list-style-type: none"> Keeping records in relation to evidence of identity is time consuming and imposes costs for licensees. These costs may then be passed onto consumers Some persons wishing to sell or pawn goods may not be able to satisfy the evidence of identity criteria. Personal information regarding evidence of identity is sent to the Police. 	Medium
<i>Title of supplier</i>	<ul style="list-style-type: none"> Increases consumer protection Reduces the traffic in high risk of theft goods 	Community, licensees and Police	<ul style="list-style-type: none"> Establishes a procedure which assists in ensuring that persons offering to sell/pawn goods are the owners of the goods or have the authority of the owners to sell/pawn the goods. Procedure is flexible in that it allows persons to sell or pawn goods, notwithstanding that they do not have documentary evidence to substantiate that they own the goods Provides the licensee with evidence (which could be relied upon in court proceedings) that they accepted the goods on the basis that the seller/pawner had good title to the goods Assists Police in apprehending property thieves and increases the chance of stolen property being returned to the rightful owner Reduces the risk that licensees will be dealing in stolen goods 	High	Increases administration costs for licensees (direct costs)	Licensees	<ul style="list-style-type: none"> Licensees must not accept goods without the declaration, this increases costs due to time involved in completing the process and the keeping of records. 	Medium
<i>Record keeping requirement</i>	<ul style="list-style-type: none"> Increases consumer protection Facilitates an audit trail 	Community, licensees, Police	<ul style="list-style-type: none"> Requiring licensees to keep prescribed records facilitates an audit trail of stolen goods which assists Police in apprehending property thieves and increases the chance of stolen property being returned to the rightful owner 	High	Increases administration costs for licensees (direct costs)	Licensees and customers	<ul style="list-style-type: none"> Time involved in recording transaction details in relation to prescribed second-hand goods. The cost involved in record keeping could be passed onto consumers. 	High

BENEFITS					COSTS			
Provision	Nature	Recipient	Description	Level of Benefit	Nature	Incidence	Description	Level of Cost
	<ul style="list-style-type: none"> Reduces traffic in high risk of theft goods 		<ul style="list-style-type: none"> Reduces the risk that licensees will be dealing in stolen goods 					
Retention of goods	<ul style="list-style-type: none"> Increases consumer protection Reduces the traffic in high risk of theft goods 	Community and Police	<ul style="list-style-type: none"> In general, goods must be retained for a 14 day period before they can be dealt with The retention period stops the movement in stolen goods and gives Police time to locate such goods and for them to be claimed by the rightful owners Goods suspected of being stolen can be ordered to be retained for two consecutive periods of 56 days which also allows investigations involving those goods to continue without the goods changing hands A minimum retention period of 3 months for pawned goods ensures that pledgors have an adequate period to repay the money they borrowed. 	High	Increases administration costs for licensees (direct costs)	Licensees and customers	<ul style="list-style-type: none"> Goods have to be stored on the business or nominated storage premises for 14 days, therefore increasing licensees costs for storage which may be passed onto customers Licensees must wait at least 3 months before they can sell pawned goods and recoup monies outlaid in principal loan and interest charges. 	High
Recovering stolen goods	<ul style="list-style-type: none"> Increases consumer protection Establishes a mechanism for the return of stolen goods 	Victims of property crime, licensees and Police	<ul style="list-style-type: none"> A person who identifies their stolen property in the possession of a licensee can lodge a claim over those goods on the spot. The goods must be held for 28 days and in that time the claimant may institute proceedings for the recovery of the stolen goods. Ensures that the goods remain in licensee's possession whilst the matter is being determined by the court Provides certainty as to the procedure to be followed when goods in the possession of a licensee have been identified as stolen Assists Police in recovering stolen goods 	High	Increases administration costs for licensees (direct costs)	Licensees and customers	<ul style="list-style-type: none"> Licensees are unable to alter or resell the goods for the period of 28 days whilst awaiting the outcome of the civil proceedings. 	High
Pawn agreement requirement	Increased consumer protection	Pledgors	<ul style="list-style-type: none"> Ensures that the pawning of goods is conducted in a fair and open manner and that there is adequate disclosure of price, terms and costs of the agreement Facilitates competition as consumers are then able to compare terms amongst pawnbrokers and other credit avenues 	High	Increases administration costs for licensees (direct costs)	Licensees and customers	<ul style="list-style-type: none"> Any increase in paperwork will increase the costs of providing the service. These costs may then be passed onto the customer. 	Medium

BENEFITS					COSTS			
Provision	Nature	Recipient	Description	Level of Benefit	Nature	Incidence	Description	Level of Cost
			<ul style="list-style-type: none"> • May alert consumers to the fact that they are paying a high price for credit compared to alternative options which they may qualify to use 					
<i>Sale of forfeited goods</i>	Increased consumer protection.	Pledgors	<ul style="list-style-type: none"> • Ensures that unredeemed goods are disposed of equitably for the best possible market price 	High	Increases administration costs for licensees (direct costs)	Pawnbrokers and customers	<ul style="list-style-type: none"> • Additional costs may be incurred as a result of pawnbrokers being required to follow the procedure set out in the Act for the disposal of unredeemed goods 	Low
<i>Surplus proceeds</i>	Increased consumer protection	Pledgors	<ul style="list-style-type: none"> • Ensures that pawnbrokers have to account to pledgors for surplus proceeds within a 12 month period • Recognises the pawnbroker's right to recover reasonable costs incidental to the sale 	High	Increases administration costs for licensees (direct costs)	Pawnbrokers and customers	<ul style="list-style-type: none"> • Pawnbrokers required to keep the necessary records to determine sale proceeds. The cost of this requirement may be passed onto customers 	Low

5.2 Regulatory options

The review principle under the Competition Principles Agreement requires the Review to determine whether the least restrictive form of intervention is used to achieve the objectives of the Act. In this regard, the Issues Paper identified the following options for consideration:

Option 1: Self regulation & co-regulation

Self regulation occurs when an industry organisation assumes responsibility for setting standards and policing the conduct of persons involved in the industry rather than the industry being regulated by a government agency. Reliance may be placed on general laws such as the Fair Trading Act 1987.

Co-regulation is based on regulation by industry, developed through industry, consumer and government liaison, often backed by government sanctions.

Option 2: Negative licensing

Negative licensing is a regulatory regime which does not impose barriers to entry into an industry, but rather, provides sanctions for specified unsatisfactory conduct. Accordingly, negative licensing offers some control over industry participation, in that any person convicted of nominated offences may at the same time be disqualified (by a court or by automatic operation of the statute) from further pursuit of the relevant form of business activity.

Option 3: Remove regulation

This option involves removal of the current system of licensing for pawnbrokers and second-hand dealers. This would allow for any person, irrespective of their criminal history or financial status, to present themselves to any consumer as a pawnbroker or second-hand dealer. The performance and conduct of pawnbrokers or second-hand dealers would be determined by; market forces, the effectiveness of industry bodies, general consumer protection and fair trading legislation. The sources for consumer redress would include the common law, the Crimes Act and the Fair Trading Act.

Option 4: Licensing (Maintain Status Quo)

The current regulatory framework is by way of licensing. Licensing systems are the most interventionist forms of regulation because the licence acts as a barrier to entry to the industry. As well as the financial and administrative burdens these systems place upon business and government, they tend to increase consumer costs.

Submissions on regulatory options

The five submissions received which specifically addressed the issue of regulatory options overwhelmingly supported maintaining the continued licensing of pawnbrokers and second-hand dealers. However, it should be noted that while many submissions did not address the

issue of regulatory options, they impliedly supported the current licensing regime. In general, the submissions rejected the appropriateness of the other options principally on the grounds that they would be less effective in reducing the traffic in stolen goods and providing consumer protection. However, a range of views were expressed in relation to the persons who should be required to hold a licence under the Act, for example:

- all persons who deal in second-hand goods, irrespective of the type of goods;
- only the big dealerships; and
- only those persons who deal in goods which are at high risk of theft (which is currently the case).

In relation to the issue of whether there were alternatives to the current regulation of licensing, one second-hand dealer stated that second-hand dealer businesses are too varied for self-regulation and that the independent nature of second-hand dealing does not lend itself to co-regulation.

The stakeholders who responded to the issue of whether there was an alternative regulatory option which would provide a net benefit which was greater than the current licensing regime all held the view that there was not.

Other jurisdictions

<i>Jurisdiction</i>	<i>Type of Regulation</i>
TAS	Notification system
ACT	Licensing system
QLD	Licensing system
NT	Licensing system
SA	Notification system
VIC	Registration system
WA	Licensing system

5.3 Evaluation of regulatory options

Option 1: Self regulation & co-regulation

Pawnbrokers and second-hand dealers are a relatively small trade group. Currently, organisations which represent the industries are the:

- Pawnbrokers Association of NSW;
- Australian Antique Dealers Association;
- Cash Converters;
- Boating Industry of NSW; and
- Jewellers Association of NSW

The Review considers that the current industry groups do not exhibit the necessary characteristics that are required for self or co-regulation, such as evidence of a strong industry group which covers a substantial number of industry members or evidence that the industry as a whole is supportive of self or co-regulation by the industry association. In addition, it is noted that no umbrella industry association exists for second-hand goods. Accordingly, it is considered that such an option, whilst likely to impose less restrictions on competition, would not achieve the objectives set out in the Act.

Option 2: Negative licensing

This regulatory option is likely to impose fewer costs on pawnbrokers and second-hand dealers, however, the Review considers it would be ineffective in achieving the objectives of the Act. Significantly, with a negative licensing system there is no screening process to preclude from the second-hand dealing and pawnbroking industries those persons considered an inappropriate risk to consumers and detrimental to law abiding traders, such as persons with a criminal record for crimes involving fraud or dishonesty. Further, with a negative licensing system it is very difficult to ascertain exactly who is participating in the industries.

Negative licensing schemes also impose a cost on government in terms of administration and enforcement, with no offsetting revenue from licensing. However, a licensing scheme requiring the payment of an annual and renewal fee is a revenue neutral system, with the fees collected helping to offset the costs of administering the system. Negative licensing therefore imposes a cost on the wider community that must be funded from general revenues.

Option 3: Remove regulation

This option is also likely to result in lower costs for pawnbrokers, second-hand dealers and the government and would have a beneficial impact on competition within the industry. However, again, it is considered that this would be outweighed by the cost to the community as a whole in the form of increased traffic in stolen goods through pawnbroking and second-hand dealing outlets. It would also lead to increased an imbalance in information between pawnbrokers and their customers regarding the rights and obligations under a pawn agreement which may result in individual borrowers being disadvantaged due to loan terms and conditions being inadequately disclosed.

Whilst New South Wales has in place a scheme of consumer protection under common law or statutes such as the Fair Trading Act, the Trade Practices Act, and the Sale of Goods Act, there is nonetheless a difficulty in relying on generalist consumer protection laws to the exclusion of other specific protection. While they can be effective in some instances, in other ways they may offer little protection to consumers. Consumer laws of general application may ensure that a second-hand dealer does not engage in false or misleading conduct. However, as established in Chapter 4, there are risks from an unregulated second-hand dealing and pawnbroking market.

Additionally, the costs of pursuing any general law remedies may deter some consumers from taking any action.

Even though such crimes as theft, receiving stolen goods and knowingly handling stolen goods are offences under the Crimes Act, the probability of detection and successful

prosecution under this Act is not sufficiently high to deter such criminal activity and accordingly additional regulation is considered warranted.

Option 4: Licensing (Maintain Status Quo)

The Review accepts the position made in most of the submissions that the current licensing regime should be maintained. Although licensing places restrictions on competition and accordingly, imposes costs on the community, it is determined that the benefits of the restriction to the community as a whole outweigh the costs and that the objectives of the legislation can only be achieved through a licensing regime.

Licensing screens undesirable persons from trading in second-hand goods which are at high risk of theft, such as persons who have been convicted of an offence involving dishonesty. Licensing also facilitates the interception of stolen goods by providing the Police with a comprehensive list of persons who provide the services of pawnbroking and second-hand dealing.

The Review considers that only regulating those second-hand dealers who deal in goods which are at high risk of theft is appropriate as it narrows the scope of the Act and therefore allows effective targeting of law enforcement activities. It is noted that this approach contrasts with the previous licensing regime in NSW, which regulated all second-hand goods unless they were specifically excluded.

Statistical data on licensed second-hand dealers and pawnbrokers prior to the introduction of the 1996 Act is difficult to ascertain due to the fact that there was no central licensing register maintained by the Local Courts (who previously administered the legislation regulating second-hand dealers and pawnbrokers), although a 1990 Police Service Report identified 3,548 licensed second-hand dealers and 96 pawnbrokers. With the operation of the Act now only focusing on those goods which are frequently stolen, the number of second-hand dealer licenses have reduced to approximately 1,100 and 350 combined second-hand dealer/pawnbroker licences.

The net effect of only regulating high risk of theft items is that the only data captured will be that which has direct relevance to law enforcement agencies. This represents a direct saving to industry, the Police and the Department of Fair Trading. Dealers who chose to deal in non-prescribed second-hand goods save on administrative costs necessary to comply with the legislation. This potential cost savings may translate into lower prices charged for non-prescribed second-hand goods.

5.4 Conclusions

Although the current licensing regime restricts competition, it is considered that it is the regulatory option which best achieves the objectives of the Act and provides the greatest net public benefit in that it:

- reduces the risk of the community as a whole, including pawnbrokers and second-hand dealers, being associated with the disposal of stolen goods; and
- reduces the risk of economic loss to consumers who pawn and later redeem goods.

The particular nature of the pawnbroking and second-hand dealing industries which, in general public perception and unfortunately in practice in certain areas may have a close

association with trading in stolen goods, requires that due consideration be paid to the extent of regulation necessary to meet community concerns on law and order. The Review considers that public interest in prevention of theft and individual economic safety necessitates continued government intervention in the form of licensing.

The conclusion of the Review is that sole reliance on market forces and existing laws of general application are an inadequate mechanism for the overall regulation of the second-hand dealing and pawnbroking market. Rather, it is considered that these general laws, when combined with a licensing system, provide an effective framework for regulation of this market, in order to achieve the objectives set out in the Act.

Negative licensing is not considered an appropriate alternative to the current licensing system and given that there is not a comprehensive industry body covering pawnbrokers or second-hand dealers it is the Review's view that the option of self or co-regulation is not also feasible.

Given that the rationale for licensing the second-hand dealing industry relates predominantly to externalities, that is, costs to persons from whom goods are stolen for disposal through the industry, rather than an imbalance of information between the trader and consumer, consumer information strategies are not considered to be an appropriate alternative to licensing. However, it is noted that in relation to the pawnbroking industry there is concern that those pledging goods to pawnbrokers in an unregulated market would often be inadequately informed of the costs and other conditions of the transaction. Consumer education could assist in this regard, however, it is considered that disclosure requirements on pawnbrokers in relation to the rights and obligations of the pawn transaction would be more effective.

However, notwithstanding the conclusion that the current licensing system provides a net public benefit and therefore should be retained, it is determined that on the balance of evidence the greatest net public benefit arises from an *enhanced licensing model*. Accordingly, the Review process has provided the opportunity to:

- examine the general effectiveness of the legislation;
- ensure that the Act's objectives are being achieved to their fullest extent; and
- reduce the regulatory burden.

Following an evaluation of the current provisions contained in the Act, the Review recommends amending the legislation so it is more effective and efficient in achieving its objectives. These proposed changes are detailed in the following Chapter.

6. Evaluation of current provisions

6.1 Second-hand goods/second-hand dealers

As noted in Chapter 3.2, the legislation provides that a person must hold a second-hand dealers licence if they *carry on the business of buying or selling second-hand goods*.

Presumption of carrying on business

Section 38 of the Act provides that a person is presumed to be carrying on the business of buying or selling second-hand goods if they, on more than 12 days in any period of 12 months, sold any second-hand goods.

Submissions

Many of the submissions commented on the current presumption for carrying on a second-hand dealers business. Most questioned using selling 12 times in a 12 month period as being the appropriate or correct presumption. The majority of submissions which addressed this issue were of the view that the presumption was not fair to licensed second-hand dealers and allowed a monthly trade which may lead to the proliferation of backyard disposal of stolen goods and thought a more appropriate presumption would be allowing people to sell prescribed second-hand goods 3 or 4 times a year.

The NSW Police Service were of the view that the exception of selling 12 days a year was not appropriate and that the exception should be reduced to a number which better reflects the number of garage sales a typical household might conduct in a given year.

Other jurisdictions

TAS	Presumed to be carrying on business as a second-hand dealer if a person either: <ul style="list-style-type: none">▪ sold second-hand goods other than second hand vehicles or vessels in excess of 6 days or▪ sold 6 or more second hand vehicles or vessels or▪ conducted 6 or more auctions for the sale of second hand goods on behalf of other persons in the preceding 12 months.
SA	Presumed to be carrying on business as a second-hand dealer if a person either: <ul style="list-style-type: none">▪ sold or advertised for sale second-hand goods other than second hand vehicles in excess of 6 days or▪ sold or advertised for sale 4 or more different second hand vehicles or▪ conducted 6 or more auctions for the sale of second hand goods on behalf of other persons in the preceding 12 months.

Review's position/comments

In the second reading speech when the Act was introduced⁸ the then Minister for Fair Trading described the inclusion of the 12 day presumption of carrying on business as a “mechanism which would give the Police guidance in dealing with the dishonest unlicensed dealers who trade sporadically on the fringes of the market through so-called garage sales and the like. This provision provides officers who enforce the Act with a definition within the legislation

⁸ Pawnbrokers and Second-Hand Dealers Bill; Second Reading, the Hon Mrs F Lo Po', Minister for Fair Trading and Minister for Women, 24 April 1996, Legislative Assembly p 439.

of what constitutes the carrying on of business in the trade of second-hand goods. However, it is also noted that it is not reasonable to impose restrictions on those who trade in second-hand goods for a livelihood and leave the backyard trade exempt”.

It is noted that the Bill originally provided that the presumption for carrying on business of a second-hand dealer was selling any second-hand goods more than 6 days in a 12 month period. However, the Bill was altered so as to allow for monthly garage sales. At the time it was argued that monthly sales could constitute the carrying on of a de facto business, the rationale being that not many people would have enough of the prescribed second-hand goods to run a garage sale every month.

The Review supports the majority of the views expressed in the submissions that the current presumption should be reduced. In this regard, it is considered that an appropriate level of selling would be 6 days in any 12 month period (this will bring New South Wales into line with Tasmania and South Australia, which are the only other jurisdictions which have a presumption for carrying on business). As noted above, one of the major reasons for this provision is to allow persons to offload their personal second-hand items via garage sales and markets. Being able to sell second-hand goods for 6 days in a 12 month period is considered sufficient to enable a person to sell average household quantities of the prescribed second-hand goods.

It is considered that this recommendation will have a minimal impact on persons wishing to sell their own second-hand goods. If persons have an unusually high level of such goods, they can use a dealer or auctioneer to sell their surplus. However, it is noted that most items people wish to sell at garage sales and markets do not fall within the prescribed second-hand goods list.

Competition impact

The regulatory net of the Act will be extended as persons who sell prescribed second-hand goods 6 times or more in a 12 month period will now be required to be licensed. However, it is considered that that the impact on competition as a result of the proposal will be minimal, given the small number of persons who sell prescribed second-hand goods 6 to 12 times in a period of a year. The Review is of the view that this proposal will be of net public benefit to the community as a whole, as it will ensure that those people who sell such goods on a more regular basis are subject to the operation of the Act, thus helping to achieve the objectives of the legislation of reducing the traffic in stolen goods.

Recommendation: Presumption for carrying on business

Change the statutory presumption as to when a person is considered to be carrying on the business of buying or selling second-hand goods so that the presumption arises when a person sells goods on 6 days within a 12 month period instead of 12 times as currently applies.

Trade-ins

Clause 6(2) of the regulations provide that a person is not considered to be carrying on business as a second-hand dealer if they, in the course of carrying on a business which does

not require a licence, take prescribed second-hand goods as a trade in and then sells any of those goods.

Submissions

The majority of the 10 submissions which addressed the issue of trade-ins concluded that if the goods traded-in fell into the prescribed second-hand goods list, then they should be covered by the legislation, otherwise stolen goods could be moved through trade-ins and not have to be accounted for.

The NSW Police Service did not raise any concerns with the current exemption regarding trade-ins. However, they suggested that trade-ins should also include any swap which is made, that is, a two for one deal. (This suggestion is considered in the section entitled 'Definition of selling').

One stakeholder noted that trade-ins are often an inducement to receive a small discount on the purchase of new items and that often trade-ins do not work and are discarded.

Another submission raised the possibility that whilst, in general, trade-ins were only used as the part purchase for new goods, it is possible for a dealer to accept the trade in of a \$500 TV on a \$20 dart board, pay out a balance of \$180 and not have to record the purchase, thus leaving a break in the audit trail.

Other jurisdictions

No other jurisdiction has a specific exemption for trade-ins.

Review's position/comments

The rationale for the exemption in relation to trade-ins is that, in general, trade-ins do not represent an avenue for the movement of stolen goods as they are used as a part purchase on other goods and can not be redeemed for cash.

Despite the majority of submissions received being opposed to the trade-in exemption in the Act, no evidence was put forward to substantiate the contention that stolen goods are being disposed of as trade-ins via businesses which do not require a second-hand dealers licence.

The Review is of the view that the status quo be maintained, that is, if a person carries on a business which does not require a licence, for example, selling new goods and in the course of that business takes goods as trade-ins, then they are not considered to be carrying on the business of buying or selling second-hand goods. As noted above, the NSW Police Service supports this position. To ensure effective use of Police and Departmental resources, the Act only focuses on high risk areas for stolen goods. However, only anecdotal evidence suggests that the trade-in exemption is a potential loop hole for the offloading of stolen goods.

Competition impact

The provisions ensure that low risk areas for stolen goods are not covered by the licensing regime, hence reducing the cost to the community as a whole and promoting competition.

Recommendation: Trade ins

Maintain status quo. That is, a person is not considered to be carrying on business as a second-hand dealer if they, in the course of carrying on a business which does not require a licence, take prescribed second-hand goods as a trade in and then sells any of those goods.

Prescribed classes of second-hand goods

The Act defines second-hand goods as any goods of a class or description prescribed that have been used or that are represented by a vendor of the goods to be goods purchased (otherwise by the vendor) previously but unused. Clause 6 of the regulations prescribes certain classes of second-hand goods for this purpose. These classes are:

- a) items of jewellery (including watches) that include gemstones or precious metals;
- b) gemstones and precious metals;
- c) sporting and recreational goods;
- d) musical instruments (other than pianos);
- e) photographic equipment;
- f) portable engine-powered, motorised or air-powered tools and equipment;
- g) microwave cookers and other electric or electronic goods (other than refrigerators, washing machines or other "whitegoods");
- h) computer hardware and software;
- i) compact (laser-read) discs;
- j) watercraft and parts of watercraft;
- k) tool kits;
- l) car accessories; and
- m) mobile phones.

The regulations provide that the following classes of goods are expressly excluded from the definition of second-hand goods:

- motorised wheelchairs and other similar goods designed to carry a person with a disability;
- industrial machinery, or farming machinery that cannot be driven or is not portable.

Accordingly, the Act only regulates those persons who deal in the prescribed second-hand goods. Such prescribed goods are considered to be at high risk of theft because they are highly portable and easily disposed of for cash. The list is composed from Police records of stolen goods⁹ and insurance claims data¹⁰.

⁹ Jochelson R (May 1995:6) *Household break-ins and the market for stolen goods* Crime and Justice Bulletin NSW Bureau of Crime Statistics and Research: Provides a list of the twenty items most commonly recorded by Police as stolen from dwellings in the Sydney Statistical Division, 1990 – 1992:(1) video recorders (2) televisions (3) power tools (4) cameras (5) rings (6) stereos (7) watches (8) compact disc players (9) chains (jewellery) (10) edge trimmers (11) lawn mowers (12) computers (13) microwave ovens (14) bicycles (15) tools – not powered (16) radios (17) photographic lenses (18) walkmans (19) bracelets (20) video cameras. The NSW Police have supplied the most recent list of the top 10 or so categories of property stolen from dwellings for the period July 1999 to June 2000: 1. Home entertainment (this captures CDs) 2. Cash/documents 3. Jewellery 4. Tools 5. Photographic equipment 6. Communications equipment (captures mobiles) 7. Computerware 8. Gardening equipment 9. Bicycles 10. Electrical appliances 11. Sport/leisure equipment.

¹⁰ Insurance Council of Australia and Insurance Australia Statistics have advised that data identifying separate classes of stolen goods is not supplied to them. NRMA has advised the following classes of goods are frequently reported stolen: (1) jewellery (2) TV, stereo, video recorders, CD players, (3) computers and software (4) play stations and computer games (5) whipper snippers, lawn mowers (6) power tools

Submissions

The majority of submissions contained suggestions for the clarification, addition or deletion of a number of items from the classes of goods prescribed in the regulations. The justification for the change was on the basis that the classes were too broad and hence contained items which were of very low value or old. In this regard, submissions suggested that the following classes of goods required amending:

- sporting and recreational goods;
- photographic goods;
- and electronic goods; and
- computer hardware.

In general, the Police submission advised that the current high risk of theft goods list appears to be appropriate at this point in time. While the Police are sympathetic to concerns about records having to be kept about some high risk of theft goods because they are considered to be “low value” or “old in age” they point out the usefulness of some of these goods as “tracer items.” A tracer item is any good that by virtue of its inclusion in the records of second hand goods, assists the Police to link the batch of goods passing through the licensee's business with a particular report of stolen goods made by a victim of property crime. The Police advise that compact disks (CD's) are particularly important in this regard, as many people remember the title and artist of the majority of their CD collection.

A number of members of the Industry Reference Group acknowledged the difficulty of valuing items or assessing the age of items. Old items are not necessarily of low value and in the extreme can become more valuable by the very fact of their old age.

Some submissions also indicated that there appears to be uncertainty as to whether an item falls within a particular class of prescribed goods. The Police submission advised that some licensees consider that some goods are not covered by the list which the Police believe are covered. For example, uncertainty exists as to whether DVDs, mini discs and similar items are covered by the class of goods “compact (laser read) discs” or whether Nintendo games cartridges and similar games are covered by “computer hardware and software”. The Police have suggested that further clarification is required in relation to these classes.

CD's were probably one of the most frequently mentioned problem areas because of the time consuming listing of artist and title details, especially when presented in large quantities by customers and the perceived irrelevance of this information because there is presently no unique serial code for each CD.

Other Jurisdictions

VIC	All second-hand goods are regulated, except for the following exempt goods: <ul style="list-style-type: none">▪ goods collected under a local government recycling scheme▪ kitchenware, including pots, pans and crockery (but not electrical or electrical appliances)▪ cutlery where the price paid for the goods by the second-hand dealer does not exceed \$50▪ factory seconds.
WA	All second-hand goods are regulated, except for the following exempt classes of goods: <ul style="list-style-type: none">▪ goods collected under a local government recycling scheme▪ furniture, including lamps and light fittings (but not electrical or electronic appliances or moveable heaters)▪ boats (but not outboard motors or other marine equipment)▪ household decorative goods, including paintings, prints and drawings▪ kitchenware including pots, pans, crockery and cutlery but not electrical or electronic

	<ul style="list-style-type: none"> ▪ appliances ▪ collectables such as stamps, coins, military memorabilia.
SA	Regulates prescribed classes of second-hand goods only (very similar to NSW). Classes prescribed in addition to those in NSW include: <ul style="list-style-type: none"> ▪ vehicles without their own automotive power ▪ motor vehicles ▪ prescribed motor vehicle components.
NT	All second-hand goods are regulated except for those goods exempted by the regulations. Exempt goods are the same as VIC and WA and in addition include: <ul style="list-style-type: none"> ▪ electrical and electronic appliances or movable heaters where the second hand dealer's retail sale price is less than or equal to \$30.
QLD	All second-hand goods are regulated except for those classes of goods prescribed by the regulations. Classes of goods exempted include used video cassettes.
ACT	Old wares of any kind
TAS	All second hand goods

Review's position/comments

The Review considers that the current classes of prescribed second-hand goods are reasonable and appropriate in light of the objective of the Act to restrict the traffic in stolen goods. It is noted that the lists of most frequently stolen items provided by the Police and the NRMA are covered by the current classes.

However, the Review agrees that a number of the classes require clarification. This will assist licensees in their business by making it clear that certain goods fall within the Act and will also ensure that the Act is updated to reflect advances in technology and the development of new products on the market. In this regard, it is proposed to specifically provide that:

- DVDs, mini discs and other similar items are included in the "compact (laser read) disc" class of goods; and
- computer game cartridges and Playstations and other similar items are included in the "computer hardware and software" class of goods.

Additionally, based on the South Australian prescribed goods list, it is also proposed, for the purposes of clarity, to specifically include electric or electronic pianos in the "musical instruments" class of goods.

In light of the Police Service's submission which highlights the importance of CD's as tracer items, it is considered appropriate that these items continue to be included in the second-hand goods list.

A number of jurisdictions approach the problem of low value goods by nominating a "cut off" value such as the price paid for the goods by the second-hand dealer in the case of cutlery (Victoria) or the retail price assigned by the second-hand dealer (Northern Territory). The Review has given consideration to adopting a similar approach to that used in these jurisdictions in relation to low value items, however, considers that such devices may make it easy for unscrupulous dealers to avoid the operation of the Act, for example, by always assigning a price below the prescribed cut off value.

As with all legislation the Department of Fair Trading administers, it continually monitors the operation of the Second-hand Dealers and Pawnbrokers Act to ensure that it remains relevant and it is achieving its objectives to its fullest extent. Accordingly, the Department will continually review the prescribed second-hand goods list and make any changes that are considered appropriate.

Competition impact

Given that the recommendations are for the purposes of clarification, it is anticipated that the competition impact will be negligible. The majority of licensees already treat items such as DVD's, computer game cartridges and electronic pianos as falling within the prescribed classes of second-hand goods. However, there will be a small number of second-hand dealers, who, as a result of the proposal, will be required to either obtain a licence or begin recording transactions of such goods due to the fact that they were of the view that such goods did not fall within the prescribed goods list.

Recommendation: Prescribed classes of second-hand goods

- (1) *For the purposes of clarification, DVDs, mini discs and other similar items be specifically included in the "compact (laser read) disc" class of goods.*
- (2) *For the purposes of clarification, computer game cartridges and Playstations be specifically included in the "computer hardware and software" class of goods.*
- (3) *For the purposes of clarification, electric or electronic pianos be specifically included in the "musical instruments" class of goods.*
- (4) *That the Department of Fair Trading continue to monitor the prescribed second-hand goods list to ensure that only high risk of theft goods are prescribed.*

Definition of selling

Currently, the Act does not contain a definition of selling.

Submissions

Nearly all of the 8 submissions which were received in relation to this issue were supportive of the Act including a comprehensive definition of selling. In general, they were of the view that a definition would make it clear as to what constitutes a sale and should include such things as swapping, bartering and exchanging goods.

Other jurisdictions

SA	sell includes: <ul style="list-style-type: none">▪ barter or exchange; or▪ offer, or expose, for sale, barter or exchange; or▪ cause or permit to be offered, or exposed, for sale, barter or exchange
QLD	sell includes barter, exchange or agree or offer to sell
TAS	sell includes: <ul style="list-style-type: none">▪ barter or exchange; and▪ offer or expose for sale, barter or exchange; and▪ cause or permit to be offered or exposed for sale, barter or exchange
VIC	second-hand dealer means a person who carries on the business of <i>buying, selling, exchanging or otherwise dealing in</i> second-hand goods
WA	second-hand dealer means a person conducting the business of <i>buying, selling or exchanging</i> second-hand goods

NT	second-hand dealer means a person conducting the business of <i>buying, selling or exchanging</i> second-hand goods
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Review's position/comments

To ensure consistency with the other jurisdictions and for the purposes of clarity, it is considered that the legislation should include a definition of selling which includes bartering, brokering, exchanging, offering to sell or otherwise dealing in second-hand goods. Additionally, it is proposed that such a definition make clear that selling includes tendering and sales by agents of second-hand dealers.

Competition impact

The regulatory net of the Act will be extended as persons who deal in prescribed second-hand goods by way of bartering, exchanging, offering to sell or otherwise dealing in second-hand goods will be required to be licensed. However, it is considered that this proposal will be of net public benefit to the community as a whole, as it will ensure that persons who deal in high risk of theft goods (otherwise than by way of selling) are subject to the operation of the Act, thus helping to achieve the objectives of the legislation of reducing the traffic in stolen goods. It is anticipated that the impact on competition will be minimal, given the small number of persons who would only deal in prescribed second-hand goods other than by way of selling. It must be pointed out that such persons will be able to, for example, swap, barter or exchange high risk of theft goods for 6 days in a 12 month period without needing to be licensed. Anecdotal evidence suggests that most bartering or exchange schemes which currently exist do not involve prescribed second-hand goods.

Recommendation: Definition of selling

(1) That the term 'selling' prescribed second-hand goods be defined in the Act to include bartering, brokering, exchanging or offering to sell or otherwise dealing in second-hand goods.

(2) Clarify that selling includes tendering and sales by agents of a second-hand dealer.

6.2 Restrictions on the operation of the Act

Exclusions from Act's operation

The current legislation contains certain restrictions on the operation of the Act. In this regard, section 4 of the Act provides that the Act does not apply to:

- Dealing in goods which are regulated under separate legislation, for example, firearms and motor vehicles;
- Dealing in second-hand goods in the course of a fund raising appeal;
- The business of an auctioneer; and
- Persons or circumstances prescribed in the regulations.

Currently, the regulations exclude any act or omission by a local government council or an employee of a local government council in conducting a recycling program, selling any goods

collected in a recycling program, or contracting with another person to give that person ownership of goods collected in a recycling program.

Submissions

Fourteen submissions responded to issues relating to the ambit of the Act’s operation.

One submission argued for exemptions from the Act for brokers, agents, consignees and collectors (those dealers who only buy from other second-hand dealer businesses). However, in contrast, another submission considered that such exemptions would be loopholes for dishonest persons.

One submission was of the view that the local government recycling program exemption should be extended to include any government recycling program. There was also a proposal that the exemption be extended to include tip shops (recycling goods salvaged from tips). The submission argued that it is unfair to have to hold a second hand dealers licence to deal in rubbish.

Another submission recommended that not-for-profit organisations and government enterprises should be excluded from the Act’s operation as these organisations are not in the business of purchasing second-hand goods to resell for a profit.

Five submissions were received stating that auctioneers should be covered by the ambit of the Act as they are potential source for stolen goods. Many second-hand dealers were of the view that the administrative costs of complying with the legislation made them uncompetitive when vying for the same business as auction houses.

In the submission made by the NSW Police Service a reference was made to a report by the Bureau of Crime Statistics and Research ‘The Stolen Goods Market in NSW’¹¹ where it states, “...Auctions, which are points of sale for large amount of unredeemed pawns, might offer the potential for mixing illegitimate with legitimate goods. Moreover, the absence of regulations covering the sale of consumer goods through the auctions, makes it potentially possible for them to be used as financial disposal points for stolen goods...”

Other jurisdictions: Exclusions from the Act’s operation

VIC	<ul style="list-style-type: none"> ▪ Licensed auctioneers ▪ Licensed firearms dealers ▪ Persons conducting a fundraising appeal ▪ Goods subject to a hire-purchase agreement or a bailment ▪ Licensed motor car trader (in part)
SA	<ul style="list-style-type: none"> ▪ Second-hand market conducted for charitable purposes ▪ Licensed dealers in second-hand vehicles are exempted from certain provisions of the Act
NT	<p>Pawnbrokers & Second-hand dealers:</p> <ul style="list-style-type: none"> ▪ An auctioneer within meaning of Auctioneer Act ▪ A dealer within meaning of Firearms Act ▪ A motor vehicle dealer <p>Second-hand dealers:</p> <ul style="list-style-type: none"> ▪ Disposal of goods pursuant to the Uncollected Goods Act ▪ Selling of second-hand parts for motor vehicles
WA	<ul style="list-style-type: none"> ▪ Licensed auctioneers

¹¹ R J Stevenson and L M V Forsythe *The Stolen Goods Market in New South Wales: An Interview Study with Imprisoned Burglars*. Bureau of Crime Statistics and Research (<http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/stolengoodsummary>)

	<ul style="list-style-type: none"> ▪ Licensed firearms dealer ▪ Licensed motor vehicle dealer
QLD	Second-hand dealers: <ul style="list-style-type: none"> ▪ Charities ▪ Licensed auctioneers ▪ Licensed motor dealers /motor salespersons ▪ Licensed weapons dealers ▪ Local governments ▪ Person who acquires ownership of new goods and then lets or hires them
TAS	<ul style="list-style-type: none"> ▪ Licensed auctioneers or real estate agents

Review's position/comments

Having examined the submissions, the Review considers that the current restrictions on the operation of the Act are appropriate, especially given that they are very similar to the restrictions of other Australian jurisdictions.

The Review has given consideration to the issue of whether auctioneers should be brought within the ambit of the Act. However, in light of fact that no real evidence has been presented which confirms that a high percentage of stolen goods are being traded through auction houses and that nearly all other States and Territories exclude auctioneers, it is not considered appropriate to bring auctioneers within the ambit of the Act. It should also be noted that chattel auctioneers have been deregulated since 1993 in NSW.

In relation to the issue of regulating auctioneers, it is interesting to note that, in the recent interview study of imprisoned burglars,¹² undertaken on behalf of the Bureau of Crime Statistics and Research, only 2% of burglars used auction houses to offload stolen goods. This compares with 49.2% who sell stolen goods to pawn and second-hand shops. Auction houses were the least most common method of disposal of stolen goods.

For the purposes of clarification, it is proposed to amend the regulations to make clear that persons who conduct a recycling program on behalf of a local government (by way of tender) are not covered by the Act.

Additionally, it is recommended that the restrictions on the operation of the Act be continually reviewed by the Department of Fair Trading to ensure that the Act is not regulating known low risk areas for stolen goods and hence unnecessarily utilising valuable government resources.

Competition impact

The provisions ensure that low risk areas for stolen goods are not covered by the licensing regime, hence resulting in reduced costs to dealers (licence/record keeping only required if dealing in high risk of theft goods) and the government (resources are not wasted regulating low risk areas for stolen goods). Thus providing a net public benefit to the community as a whole and promoting competition.

¹² The Stolen Goods Market in New South Wales: An interview Study with Imprisoned Burglars: Richard J. Stevenson and Lubica M. V. Forsythe, 1998.

Recommendation: Restriction on the Act's operation

- (1) *Make clear that the Act does not apply to persons who have tendered successfully to conduct a recycling program on behalf of a local government or other authority.*
- (2) *That the restrictions on the operation of the Act be continually reviewed by the Department of Fair Trading to ensure that the Act is not regulating known low risk areas for stolen goods.*

6.3 Restrictions on obtaining a licence

As noted in Chapter 3, section 8 of the Act disqualifies a person from holding a licence if they are:

- a) under 18 years of age;
- b) an undischarged bankrupt;
- c) mentally incapacitated; or
- d) convicted of an offence involving dishonesty within the last 10 years.

An applicant for a licence or licence renewal, whose application has been refused, may apply to the Administrative Decisions Tribunal for a review of the refusal. On an application to the Tribunal where the licence was refused on the basis that the applicant has been convicted for an offence involving dishonesty within the last 10 years, the Tribunal may determine that the fact that the applicant has committed the offence concerned should be ignored on one or more of the following grounds:

- a) the triviality of the acts or omissions giving rise to the offence,
- b) the time that has passed since the offence was committed,
- c) the subsequent good behaviour of the offender,
- d) any other ground prescribed by the regulations.

A licence is also subject to any conditions that the Director-General of the Department sees fit, in the public interest, to attach to it on grant or renewal. In this regard, the Act makes it a mandatory condition of a licence to carry on business as a pawnbroker, that the licensee carries on the business only from, or stores the goods of the business only at, the premises nominated in their licence application.

The legislation also requires, by way of a compulsory licence condition, pawnbrokers and second-hand dealers (unless exempt) to maintain computer records. This issue is dealt with in detail at Chapter 6.5.

The cost of obtaining a licence is currently \$347 for a new licence and \$251 upon renewal.

Submissions

Most of the submissions received in relation to the issue of restrictions on obtaining a licence were of the view that the restrictions were adequate and necessary and that it was essential that dealers were of reputable character with no criminal records.

The NSW Police Service submission recommended that anyone who has a controlling interest in a company or is concerned in the management of a company, where that company has had its licence revoked or suspended, should be prevented from holding a licence. Three other stakeholders agreed with the Police in this regard.

The Police were also of the view that, where an individual has had their licence suspended or revoked, they should be precluded from holding a controlling interest or being concerned in the management of a company which holds a licence under the Act. Additionally the Police considered that the Department should be informed immediately if a licensee is convicted of an offence involving dishonesty.

Five stakeholders commented that the licence fees for pawnbrokers and second-hand dealers were excessive, especially for small or part time operators.

Other jurisdictions: Restrictions on carrying on business

VIC	<ul style="list-style-type: none"> ▪ Registration fees (initial \$110, renewal \$30) ▪ Not convicted of a disqualifying offence within last 5 years ▪ Is not a represented person within meaning of the Guardianship and Administration Act ▪ Is not an insolvent
SA	<ul style="list-style-type: none"> ▪ Second-hand dealers and pawnbrokers who propose to commence to carry on business must notify the police at least 1 month prior to so commencing. They must also notify the police of certain particulars ▪ Must not have been convicted of offence against the Act or any offence involving dishonesty ▪ Must not be undischarged bankrupt/insolvent etc ▪ Must not have been in possession of stolen goods on at least 3 separate occasions during the previous 12 months
NT	<ul style="list-style-type: none"> ▪ Must satisfy a character test: <ul style="list-style-type: none"> - good character - no criminal offences involving fraud, dishonesty or physical violence. - of reputable character ▪ Members of the public have opportunity to object to the granting of a licence on specific criteria ▪ Licensee must ensure that during the licence period there is adequate management, supervision and control of the business operations ▪ Second-hand dealer or pawnbrokers licence fees: <ul style="list-style-type: none"> a) Fee on application: <ul style="list-style-type: none"> - Individual \$50, Corporation \$100 b) Fee on grant of licence: <ul style="list-style-type: none"> - 1 year \$150, 2 years \$250, 3 years \$350 ▪ Combined second-hand dealers and pawnbrokers licence fees <ul style="list-style-type: none"> a) Fee on application: <ul style="list-style-type: none"> - Individual \$75, Corporation \$150 b) Fee on grant of licence <ul style="list-style-type: none"> - 1 year \$200, 2 years \$350, 3 years \$450
WA	<ul style="list-style-type: none"> ▪ Licence fees (for 1 year) <ul style="list-style-type: none"> - Pawnbrokers licence, \$217 - Second-hand dealers licence <ul style="list-style-type: none"> a) keep computer records, \$217 b) do not keep computer records, \$278 - Combined pawnbrokers/ second-hand dealer licence, \$250 ▪ Good character/fit and proper person ▪ Must place add in newspaper re intention to be licensee ▪ No offence involving dishonesty, fraud, stealing, within 5 years
QLD	<ul style="list-style-type: none"> ▪ Pawnbroker licence fees: <ul style="list-style-type: none"> - initial \$362 - renewal \$362 ▪ Second-hand dealer licence fees: <ul style="list-style-type: none"> - initial \$217

	<ul style="list-style-type: none"> - renewal \$217 ▪ Over 18 years ▪ Not mentally incapacitated ▪ Fit and proper person ▪ Is not a licensed collector ▪ Not convicted of offence involving dealing or selling goods fraudulently or dishonestly, within 5 years
TAS	<ul style="list-style-type: none"> ▪ Second-hand dealers and pawnbrokers who propose to commence to carry on business must notify the police at least 1 month prior to so commencing. They must also notify the police of certain particulars. ▪ Must be a fit and proper person ▪ Not convicted of offence against the Act or an offence involving dishonesty
ACT	<ul style="list-style-type: none"> ▪ Licence fees: ▪ -initial \$92 ▪ -renewal \$92 ▪ Over 18 years ▪ Fit and proper person

Review's comments/position

The rationale for the licensing of pawnbrokers and second-hand dealers is to promote standards of conduct in the industries to ensure consumer confidence and minimise criminal activity. The criteria for obtaining a licence are objective and are intended to prevent the criminally dishonest or bankrupt from entry into the industries.

Importantly, the Act establishes a mechanism of appeal to the Administrative Decisions Tribunal for applicants who have had their licence application refused.

The Review considers that on the whole these restrictions are appropriate and do not impose unreasonable barriers to entry. The restrictions contained in the New South Wales Act are largely consistent with those restrictions contained in equivalent Acts in other States and Territories. However, it is noted that 5 other Australian jurisdictions include a “fit and proper test” in their licensing criteria. The Review proposes that such a test should also be included in the New South Wales Act. The rationale for this proposal is that it is difficult to anticipate the various circumstances which might render a person unfit to hold a licence. Therefore, inclusion of a ‘fit and proper’ test will provide an appropriate discretion which can be exercised to exclude those persons who do not fall within the specific criteria contained in the legislation, but are considered to be in any other way not fit and proper to hold a licence.

The Review considered that the Act should be amended to allow the Director-General to exercise the same discretion that is currently vested in the Administrative Decisions Tribunal when assessing whether to grant a licence to an applicant who has been convicted an offence involving dishonesty recorded within the last 10 years. A number of appeals before the Tribunal and its predecessor have resulted in the Tribunal exercising its discretion to ignore a conviction of dishonesty and finding that the applicant is not disqualified from holding a licence. Generally, the circumstances sought to be relied upon by the applicants were such that it was highly likely that the Director-General would also have ignored the conviction, had the Director-General had the power to do so. Examples of such circumstance were where the applicant's convictions were more that 9 years old and the subsequent good behaviour of the applicant. Accordingly, applications disclosing circumstances which would warrant an exercise of the Tribunal's discretion to ignore the fact of the conviction could be dealt with and finalised internally within the Department and thereby avoiding the situation where both the Department and the applicant incur further expenses in undertaking legal proceedings.

In addition, the Review recommends that a number of anomalies be addressed which currently exist in relation to licence applications by corporations or individuals who are directors of a company. In this context, it is proposed that the following licence restrictions be imposed:

- Individual licence applications/renewals should be refused if the applicant is a director of, or a person concerned in the management of, or an officer who appears to have control or substantial control of, a body corporate who is precluded from holding a licence under section 33 (revocation of licence by a court as a consequence of an offence) or section 36 (revocation or suspension of licence as a result of disciplinary action); and
- Corporate licence applications/renewals should be refused if any of the directors of the company have been a director of, or a person concerned in the management of, or an officer who appears to have control or substantial control of, a body corporate who is precluded from holding a licence under section 33 (revocation of licence by a court as a consequence of an offence) or section 36 (revocation or suspension of licence as a result of disciplinary action).

The above proposals are consistent with the current provisions of the Act which provide that the Director-General must refuse to grant a licence to a person who is precluded from holding a licence due to the revocation of the licence by a court as a consequence of an offence or due to revocation or suspension of the licence as a result of disciplinary action by the Director-General.

The Review is also of the view that cross border “mutual recognition” considerations should also be clearly understood and appropriately applied during the licence application and assessment process. In this regard, it is noted that the Act already disqualifies a person from holding a licence if they have been convicted of an offence involving dishonesty in New South Wales or elsewhere. However, an anomaly exists in that the Act does not disqualify a person from holding a licence if they have been disqualified from holding an equivalent licence in a corresponding Australian jurisdiction. Additionally there is no obligation in the legislation for the licensee to immediately inform the Department if they are convicted of an offence involving dishonesty.

As mentioned above, the Act provides the Director-General with the power to attach conditions to a licence at the time of the grant or renewal of the licence. To ensure flexibility and again, for the purpose of consistency with other Acts administered by the Department of Fair Trading, such as the Motor Dealers Act and the Travel Agents, it is proposed that the Act be amended to provide that conditions may be imposed, revoked or varied at any time, not just upon the grant or renewal of the licence.

In relation to the concerns raised regarding the level of licence fees, it is noted that these fees were established at a level to ensure cost recovery for licence administration and they are consistent with other comparable licences administered by the Department of Fair Trading. The lower fee structure under the previous legislation reflected the fact that Local Courts did not provide a centralised and computerised licensing data base or the issuing of renewal forms to licensees.

Competition impact

The proposals reduce competition as they impose additional barriers to entry into the second-hand dealing and pawnbroking markets. However, it is considered that the proposals will be

of net public benefit to the community as a whole, as they will ensure that persons/companies who are considered unsuitable to deal in second-hand goods are not eligible to obtain a licence, thus helping to achieve the objectives of the legislation of reducing the traffic in stolen goods. However, it is anticipated that only a very small number of licence applications will be rejected as a result of these proposals.

Recommendations: Restrictions on obtaining a licence

- (1) Individual licence applications should be refused if the applicant is a director of, or a person concerned in the management of, or an officer who appears to have control or substantial control of, a body corporate who is precluded from holding a licence due to the revocation of the licence by a court as a consequence of an offence or due to revocation or suspension of the licence as a result of disciplinary action by the Director-General*
- (2) Corporate licence applications should be refused if any of the directors of the company have been a director of, or a person concerned in the management of, or an officer who appears to have control or substantial control of, a body corporate who is precluded from holding a licence due to the revocation of the licence by a court as a consequence of an offence or due to revocation or suspension of the licence as a result of disciplinary action by the Director-General*
- (3) A licence application should be refused if the applicant is considered not to be, in addition to the other entry requirements set out in the Act, a fit and proper person for the purposes of holding a licence*
- (4) A licence application should be refused if the applicant has been disqualified from holding an equivalent licence in a corresponding Australian jurisdiction*
- (5) Provide the Director-General with the power to impose, revoke or vary licence conditions at any time, not just upon the grant or renewal of the licence.*
- (6) Provide that the Director-General may exercise the same discretion that is currently vested in the Administrative Decisions Tribunal when assessing whether to grant a licence to an applicant who has been convicted of an offence involving dishonesty in the last 10 years.*
- (7) Licensee must advise the Department of Fair Trading in writing within 28 days of being convicted of an offence involving dishonesty.*

6.4 Evidence of identity

Section 15 of the Act requires that licensees must, before accepting any goods offered for pawn or sale by a customer, obtain prescribed documentary evidence of the customer's identity. Acceptable identification includes a drivers licence or other photo identification which appears to be issued by a government authority and which includes the customer's name, address and matching signature. Alternatively, a combination of cards or documents, one of which appears to be issued by a government authority and which includes the

customer's name, address and signature, is acceptable. Licensees are also required to obtain evidence of the customers date of birth. However, such evidence may be in oral or documentary form.

One of the issues raised in the Issues Paper was whether the evidence of identity requirements should be reduced in certain circumstances.

Submissions

The main concern of submissions was that the evidence of identity documentation which can currently be accepted by licensees is far too narrow and hence restricts certain persons from using the services of pawnbrokers or second-hand dealers. Examples given of this were overseas visitors or disqualified drivers.

Several of the submissions expressed the view that it is relatively easy to produce fake identification, although no alternatives were suggested to address this.

In the main, most submissions agreed that the current requirements for obtaining evidence of identity and ownership were sufficient and appropriate, and should only be reduced where the goods are purchased outside the State or from a government agency, provided sufficient records are kept of the goods. Some submissions also argued that evidence of identity should be reduced where goods are purchased from auctions. The rationale contained in the submissions for the lessening of requirements under these circumstances was that these particular transactions are very unlikely to be of a criminal nature and compliance with the legislation is extremely difficult in these situations. In the submission made by the Police Service it was argued that, provided certain records are kept, any reduction to the current requirements for evidence of identity and title of supplier of goods should occur only when the goods are purchased outside the State or from a government agency. A record of the importation or the purchase from the government agency should include details of the goods and how they came to be in the licensee's possession.

Licensees also advised that in cases where second-hand goods are purchased from a person by means of telephone or other electronic means, it is impractical and unreasonable to comply with the current requirements in relation to verification of identity.

Other jurisdictions

QLD	<ul style="list-style-type: none"> ▪ Proof of the name, address, occupation and verification of the name and address of person selling/pawning. ▪ Customers required to state whether they are the owner of the article and if not who is and how they came to be in possession of the goods.
NT	<ul style="list-style-type: none"> ▪ Ascertain the person's full name and current residential address. ▪ Verify the person's identity by way of: <ul style="list-style-type: none"> - a passport (either current or expired less than 24 months); - a motor driver's licence (must bear a photograph); or - prescribed means (that is, by any document issued by a State, Territory, local government or Commonwealth. This information can be provided in up to 2 documents). ▪ <u>Exempt from identification requirements if conducting a lawn sale.</u>
SA	<ul style="list-style-type: none"> ▪ Name and address of the person from which the goods originated. ▪ Proof of identification can be any two documents that do not originate from the person, one of which is issued by a government or statutory authority of a State, Territory, local government or Commonwealth. ▪ Documents must include a photograph, name, residential address and signature. ▪ Imported goods are not required to fulfil the evidence of identity requirements although the dealer

	<p>must keep records in regard to the description of the goods, any identifying marks and the dates on which they entered Australia.</p> <ul style="list-style-type: none"> ▪ If the transaction is by way of telephone or fax, the seller is not required to produce the prescribed ID.
VIC	<ul style="list-style-type: none"> ▪ Verify identity by way of passport or driver's licence, which bears a photograph of the person or by another prescribed form (identification provided by a birth certificate, a certificate of Australian Citizenship, marriage certificates or licences issued under the Firearms Act 1996; cards issued by the Commonwealth Department of Social Security or the Department of Veterans' Affairs; or cards issued by a tertiary education institution. In the case of incorporated bodies, certificates of registration or incorporation). ▪ If a second-hand dealer purchases second-hand goods from a person by means of telephone or other electronic means then that second-hand dealer is only required to obtain a copy of the above identifying documentation.
WA	<ul style="list-style-type: none"> ▪ Ascertain full name and current residential address. ▪ Verify person's identity by way of: <ul style="list-style-type: none"> - a passport (either current or expired less than 24 months); - a motor driver's licence (must bear a photograph); or - prescribed means (that is, by certain documents issued by specific State, Territory, local government or Commonwealth agencies). ▪ Second-hand dealers are not required to verify identification if the dealer enters into a contract under which the goods are obtained by the dealer: <ul style="list-style-type: none"> - from outside WA; - or at an auction; - from a licensee; or - from a public utility ▪ Second-hand dealers must record the name and address of any person offering goods for sale, even if they are from outside the state or obtained through such an auction.
TAS	<ul style="list-style-type: none"> ▪ Record the full name and current residential address of the person from whom the goods have been bought or received and particulars of the documentary proof of the person's identity. The documentary proof is not specified, as long as it contains the person's name and address.

Review's comments/position

The legislation which previously regulated pawnbrokers and second-hand dealers did not require persons seeking to offer goods for sale or pawn to prove their identity. In contrast, the current Act requires licensees to ascertain the identity of such persons and to take reasonable steps to ensure that they own the goods.

Obtaining the identity of the person trading the goods is considered to be the core element of the audit trail. It is not considered unreasonable to require licensees to be fully satisfied as to the identity of the persons they are permitting to trade second-hand goods. Licensees are free to trade or not to trade with a person offering the goods on a commercial basis. By electing to trade the dealer accepts responsibility for establishing the identity of the person offering the goods thus providing the audit trail required for enforcement purposes.

Requiring proof of identity reduces the likelihood of people giving false names which cannot be traced or prove difficult to trace if required. This in turn makes it more difficult for people to dispose of stolen goods via pawnbrokers or second-hand dealers and thereby reduces the flow of stolen goods through these outlets.

The rationale for the prescribed level of identification is that most people carry various cards and personal documents, so that a combination of these would supply sufficient proof of identity in readily available form. This approach overcomes the difficulties which may be experienced by those persons who do not have a single document, such as a driver's licence, which satisfies all of the prescribed criteria.

It is considered that the requirements in the legislation for evidence of identity appear to be sufficient for the purpose of establishing an audit trail for goods which may have been stolen. The main break in the trail occurs when fake or forged identification is used, however, the Act currently provides that licensees must not accept identification which, on the face of it, bears any indication of forgery or tampering.

In the National Police Research Unit Report on Approaches to Pawnbroker and Second-hand Dealer Legislation, it states that “the requirement of some sort of photographic identification would be of value to Police in the pursuit of those who are trying to sell or pawn stolen goods.”¹³ Although it also notes that “both the verification of the identity of the seller/pledgor and the proof of ownership requirements may have the unintended consequence of driving the traffic in stolen goods away from the regulated pawn and second-hand industry to areas such as pubs which are both unregulated and difficult to regulate.”

It is considered that the current provisions in the NSW legislation strike a balance between requiring verified identification for the purposes of having a continuous audit trail without being too onerous, which would encourage the use of alternative means of disposal and non-compliance with the legislation. There was no submission from the NSW Police Service for any increased proof of identity.

One of the issues that emerged during the consultation period was that it was virtually impossible for overseas visitors to comply with the evidence of identity requirements under the Act, as at least one document is required to be issued by a government of a State or Territory of the Commonwealth or the Commonwealth government.

The Review recommends that the prescribed identification criteria be expanded to accept documentation which has been issued by the government of another Country, such as a passport. This is consistent with the approach taken by Western Australia, Victoria and the Northern Territory (Queensland and Tasmania have no prescribed acceptable forms of documentation, which consequently allows for the use of passports). However, overseas visitors will not be able to rely solely on their passport for identification, as passports do not contain a person’s current address. Hence, overseas visitors will have to produce further documentation which includes their temporary place of abode whilst in Australia.

Furthermore, the Review recommends that a general regulation making power be inserted into the Act to provide for reduced identification for the supplier of goods for prescribed circumstances or activities. This will enable regulations to be made for the purpose of reducing the identification requirements in cases where the risk of theft is considered to be low, for example:

- Goods purchased from sellers overseas (importers of goods have to comply with strict customs requirements and hence the goods are unlikely to fall into the high risk of theft category); and
- Goods purchased from government agencies (the owner of the goods is established).

The Review also proposes that the regulations be amended to address a current anomaly of licensees having to obtain date of birth details from a corporate supplier of goods.

¹³ NSW Policy Service Audit and Evaluation Services, National Police Research Unit Report, Approaches to Pawnbroker and Second-hand Dealer Legislation, 1997, Report Series No: 131.1, pg 4.

Competition impact

The proposals are likely to increase competition as they reduce the evidence of identity requirements in circumstances where the risk of stolen goods is considered to be low. A reduction of evidence of identity requirements should result in decreased costs for licensees and allow more customers to use the services of second-hand dealers and pawnbrokers.

Recommendation: Evidence of identity

- (1) That the prescribed list of identification be expanded to include documentation issued by the government of another country.*
- (2) In relation to second-hand dealing, that a general regulation making power be inserted into the Act to provide for reduced identification for the supplier of goods for prescribed circumstances or activities. This will enable regulations to be made for the purpose of reducing the identification requirements in relation to such things as:
 - *Goods purchased from sellers overseas; and*
 - *Goods purchased from government agencies.**
- (3) Address an anomaly which requires licensees to obtain date of birth details of a corporate supplier of goods*

6.5 Records

Records keeping requirements generally

The regulations require pawnbrokers to keep records of:

- (a) the name, address, date of birth and signature of the pledgor or his or her agent;
- (b) a contract number for each transaction in which goods are pawned;
- (c) the date on which any pawn was taken, forfeited, sold or otherwise dealt with;
- (d) the sale price of any forfeited item sold; and
- (e) the location of the goods that are not kept at the business or storage premises.

The regulations require second-hand dealers to keep records of:

- (a) the name, address, date of birth and signature of the vendor or consignor or his or her agent;
- (b) a contract number for each transaction in which goods are bought or sold;
- (c) the date on which any goods were purchased, taken on consignment, sold or otherwise dealt with;
- (d) the name and address of the purchaser of goods sold by the licensee (otherwise than at a market), except in cases where the value of the goods does not exceed \$50;
- (e) a description of the goods including any characteristics specified in section 28(2) of the Act that appear on or in connection with the goods. (Among other things, section 28(2) requires a fair and reasonable description of the goods to be recorded);
- (f) the price paid for any goods purchased; and
- (g) the location of the goods that are not kept at the business or storage premises.

The regulations also require all licensees to record the following information in relation to their business:

- (a) evidence of any search in public registers;
- (b) features peculiar to any card or document relied on for customer identification; and
- (c) in relation to jewellery, such particulars as the Commissioner of Police, by one or more notices served on the licensee, may specify.

Submissions

17 submissions were received which addressed issues relating to record keeping requirements.

The Police advised in their submission that:

- generally they do not support any move to reduce the record keeping requirements.
- there have been a number of instances of second-hand dealers recording vague descriptions of high risk of theft goods, despite the Act's requirement that a "fair and reasonable" description of the goods be made. Accordingly, they suggest that the term "fair and reasonable" be further defined for specific goods, for example, CD's (require the artist and title to be recorded), mobile phones (require the IMEI number to be recorded) and items with bar codes (require the bar code to be recorded).
- there is no valid reason why second-hand dealers who operate from market locations should be exempt from the requirement of having to record the name and address of the purchaser of goods sold by the second-hand dealer where the value of the goods exceed \$50.

A number of submissions considered that the current record keeping requirements were reasonable and sufficient for establishing an audit trail.

However, one submission stated that record keeping places an enormous strain on small country licensees and that a number of small second-hand stores had been forced to close as a result. Another submission proposed that the name and address of the purchaser of a second-hand good should not be necessary as many people refuse to buy items because of this requirement.

For consumer protection reasons, one submission suggested that the purchase price paid by the second-hand dealer for the goods should be recorded on the grounds that many goods are pawned or sold to dealers for a fraction of their market value.

Review's position/comments

Given the possibility of second-hand dealing and pawnbroking businesses being used as a conduit for the disposal of stolen goods, the legislation requires licensees to record certain information so as to establish an audit trail. The Review considers that the level of records which must be recorded by licensees to be the minimum required for the Police to effectively and efficiently track stolen goods traded through second-hand dealers and pawnbrokers. However, apart from the key element of maintaining an audit trail for stolen goods there are sound commercial and consumer protection grounds for requiring the maintenance of appropriate records and the provision of essential information to consumers.

Importantly, it is noted that second-hand dealers are only required to maintain records in relation to prescribed second-hand goods. This is in contrast to the previous legislation which required licensees to record details in relation to all second-hand goods traded, with the

exception of a number of goods specifically excluded by the regulations. Accordingly, the burden of keeping records was greatly reduced when the Act was introduced in 1997.

The Review is of the view that ambiguity exists in relation to clause 14(2)(f) of the Pawnbrokers and Second-hand Dealers Regulation, which requires second-hand dealers to record the price paid for any goods purchased. As currently drafted, it is unclear whether the clause requires the recording of the price paid by the dealer when acquiring the item or the price paid by the customer when purchasing the item from the dealer. Accordingly, it is proposed that the clause be amended to make clear that licensees must record the price they pay to purchase a second-hand good.

Clause 14(2)(a) of the Regulations requires the recording of the vendor's signature. There are however two reasons why this requirement is no longer necessary. First, most of these records are now kept in an electronic format by licensees and it is not possible to 'sign' an electronic record. Second, section 15(3) of the Act requires the completion of an ownership statement as per Form 2 of the Regulations. This form requires the vendor to sign that they have title of the goods, thus the signature is already captured.

To also ensure that sufficient descriptions of goods are kept and again to make certain that an adequate audit trail is maintained, it is recommended that the legislation make provision for what is a fair and reasonable description for CD's, mobile phones and items with bar codes. (In regard to the description of CD's, it is noted that the Northern Territory legislation specifically requires licensees to record the name and artist and title of the disc).

The Act currently requires that a serial number or other identifying number of the goods must be recorded. It is proposed that this provision be clarified to first ensure that when goods have a serial number as well as other identifying numbers that it is the serial number that is recorded. Second it is proposed that the provision be further clarified to specify that the serial numbers for all detachable parts of the goods be recorded. For example, it should be clarified that each component of a stereo should have the serial number recorded, including the speakers, the same would apply to a mobile phone and its battery.

As noted above, the Act does not require second-hand dealers operating from a market location to record the name and address of purchasers of goods. In light of the fact that all States and Territories, with the exception of Queensland and the Australian Capital Territory, do not require second-hand dealers to record any details regarding the purchaser of goods, it is proposed that the status quo be maintained in relation to this issue. It is also considered that purchasers of second-hand goods would be very reluctant to provide details of their name and address in a market environment.

The Review also proposes that the regulations be amended to address the current anomaly of having to record the date of birth details of a corporate supplier of goods. However, it is considered that if the supplier of goods is a corporation, it should be a requirement that the dealer has to record the company's ABN.

Finally, the Review considers that it is appropriate to insert a privacy requirement into the Act which makes it an offence for licensees to use or divulge information collected for the purposes of the Act, for example, evidence of identity of customers, for any purpose which is not stipulated in the Act. An exception to this prohibition would be where the person to whom the information relates consents to the information being used for purposes other than those

set out in the Act. Such a proposal is considered necessary to ensure that a customer's personal privacy is protected.

Competition impact

Given that the recommendations are for the purposes of clarification, it is anticipated that the impact on competition will be negligible. By removing the requirement for vendors to sign the electronic record licensees will no longer need to print a hard copy of the record in order to comply with the legislation so that the vendor's signature can be included. This will significantly reduce administration costs for the licensee without reducing consumer protection as the capturing of the signature is already required under other provisions of the legislation.

Recommendation: Records which must be kept by licensees

- (1) That clause 14(2)(f) be amended to make clear that licensees must record the price they paid when purchasing an item.*
- (2) That the legislation make provision for what is a 'fair and reasonable description' in relation to CD's, mobile phones and items with bar codes.*
- (3) Remove the word "or" from section 28(2)(a) to ensure that a serial number is always recorded when available, and to clarify that records need to be kept for all parts of goods that have an identifiable serial number.*
- (4) Address an anomaly which requires licensees to records the date of birth of a corporate supplier of goods but require the company's ABN to be recorded.*
- (5) Remove the requirement to record the signature under clause 14(2)(a), as in the majority of cases this information is recorded electronically, and a signature is already required on the ownership statement as per Form 2 of the Regulations which is prescribed under section 15 (3) of the Act.*
- (6) That a provision be inserted into the Act which creates an offence for licensees to use or divulge information collected for the purposes of the Act, for any purpose which is not stipulated in the Act. An exception to this prohibition would be where the person to whom the information relates consents to the information being used for purposes other than those set out in the Act.*

Reduction of record keeping requirements

The Issues Paper raised the issue as to whether the record keeping requirements should be reduced in certain circumstances such as goods imported from overseas and goods purchased from government agencies by tender/auction.

Submissions

Goods imported from overseas

A number of submissions considered that the record keeping requirements should be reduced for imported goods because the goods were mainly purchased from reputable dealers and subject to numerous other checks or inspections, for example, overseas legislation and customs.

A counter view was provided by another submission, which proposed that goods could be stolen, shipped out and then sent back to Australia and consequently the record requirements should not be reduced.

Goods purchased from government agencies by tender/auction

One submission argued that requirements should be reduced as it was easy to establish the supplier and signatures for books were not available.

Another argued that requirements should be reduced because there was little chance of receiving stolen goods. Two other submissions argued that the requirements should be reduced but provided no rationale.

Compact Disks

Several submissions proposed a reduction in the record keeping requirements for CD's on the basis that keeping detailed records for such goods was time consuming, impractical and placed a substantial impost on business. (The issue of record keeping requirements for CD's is discussed earlier in this Report at Chapter 6.1)

Date of birth

Many stakeholders raised the anomaly in relation to obtaining and recording date of birth details in cases where the supplier of goods is a company.

Generally

The Police have advised in their submission that they do not support any move to reduce the record keeping requirements under the legislation.

Five other submissions indicated that the record keeping requirements in the above circumstances should not be reduced. One of these submissions stated that the requirements were not onerous and the information would be easy to obtain provided it was a *bona fide* sale. Another of these submissions stated that the purpose of the records was to provide an audit trail.

Another submission suggested that articles below a certain retail value (for example \$20) need not be recorded.

Other jurisdictions: Reduced record keeping requirements

	General reductions	Imported goods	Goods purchased at auction
SA	NA	Records required for imported goods: <ul style="list-style-type: none"> ▪ accurate description of the goods; ▪ unique identification number of the transaction; and ▪ dates on which the goods entered Australia. 	Second-hand dealers are not required to obtain: <ul style="list-style-type: none"> ▪ written confirmation of prescribed information from each person from whom the dealer buys or receives goods; or ▪ verify the identity of person from whom the dealer buys or receives goods.
VIC	NA	Second-hand dealers are considered to have satisfied the record keeping requirements in	A second-hand dealer must keep a record which is signed by the auctioneer which contains:

		<p>relation to imported goods if they:</p> <ul style="list-style-type: none"> ▪ produce on demand the documents of consignment and relevant customs documents; and ▪ enters into their record book a reference to identify the documents. 	<ul style="list-style-type: none"> ▪ an accurate description of the goods, ▪ the identifying mark/number assigned to the goods; ▪ the full name and address of the auctioneer; ▪ the date the goods were received ▪ the price paid for the goods; and ▪ the name of the person acting on behalf of the second-hand dealer in the transaction.
TAS	Regulation making power for the purpose of exempting a person, a class of persons or persons who are engaged in a trade from compliance with the record keeping.	NA	NA
WA	Contains a general exemption, which provides that all or any of the provision of the Act may be prescribed by the regulations as provisions which do not apply to persons or classes of persons or to goods or classes of goods.	NA	NA

Review position/comments

The Review considers that a regulation making power should be inserted into the Act, similar to that contained in the Tasmanian legislation, for the purpose of exempting a person, a class of persons or persons who are engaged in a particular trade, from compliance with the record keeping requirements. This will allow regulations to be made to reduce record keeping requirements in relation to such things as imported goods which are considered to be of low risk of theft based on the fact that persons who import goods into Australia have to comply with strict requirements and procedures, such as:

- on arrival, imported goods are placed into premises/warehouses which are licensed by customs and cannot be released until a “customs entry” is completed by a customs broker employed by the importer. (This consists of a commercial invoice and a freight document).
- the commercial invoice must contain the name of the supplier, the consignee, a description of the goods, how many goods are being imported and the cost of the goods.
- the invoice is then recorded with an identifying number and must be kept as a record on the premises of the importer or the customs broker for a period of 5 years.
- the commercial invoice is used to determine how much money is owed to customs and once the customs entry and the money is paid then the goods can be released from the holding area.

Competition impact

Making regulations for the purpose of exempting second-hand dealers who trade in prescribed areas from having to keep certain records will reduce business administration costs for those dealers.

Recommendation: Reduction in record keeping requirements

That a regulation making power be inserted into the Act, similar to that contained in the Tasmanian legislation, for the purpose of exempting a person, a class of persons or persons who are engaged in a particular trade, from compliance with the record keeping requirements. This will allow regulations to be made to reduce record keeping requirements in relation to such things as imported goods.

Prescribed time limit for recording transactions

While the legislation sets out the records which a dealer in prescribed second-hand goods is required to keep, it does not specify a time limit in which a licensee must record the details of a particular transaction. This is in contrast to pawnbrokers who are required to make a record of the pawn agreement at the time they take possession of the goods pursuant to that agreement.

Submissions

The Police requested in their submission that the legislation be amended to require second-hand dealers to record transaction details at the time the transaction is entered into.

One submission was of the view that for records to be reliable and readily accessible by law enforcement officers, transaction details should be recorded immediately after each transaction.

A range of time limits was suggested for recording transaction details, for example, immediately after it is concluded, at the close of business on the day of the transaction, at close of business the following day, at least monthly and within a 12 week period.

A number of submissions were of the view that at times, extenuating circumstances may exist which make it impossible for licensees to record details during or immediately after the transaction took place.

Other Jurisdictions

SA	Second-hand good records must be made as soon as possible after the goods are received by the dealer
VIC	Second-hand dealer and pawnbroker records must be made during or immediately after every transaction in which the second-hand dealer receives second-hand goods. However, if a second-hand dealer or pawnbroker receives goods at any premises other than those notified to the administering authority, they must record the transaction as soon as practicable after the transaction.
WA	Second-hand dealer records must be made as soon as the information becomes available to the dealer.
NT	Second-hand dealer records must be made as soon as the information becomes available to the dealer
QLD	Second-hand dealers must record all transaction details forthwith, unless the resale value of the goods is less than \$50 (except where the goods bear identifying marks or are jewellery or precious metals).

Review's comments/position

Timeliness and accuracy of record keeping is an integral component of the measures included in the legislation, aimed at limiting the traffic for stolen goods and protecting consumers. It is also an essential part of good business practice.

There are a number of factors which must be taken into consideration when determining what is an appropriate time to record information following a transaction, such as:

- Generally, the sooner details are recorded the more accurate they are likely to be. This increases the probability of recovering stolen goods.
- Licensee accessibility to record keeping systems, for example, a computer. In some instances it may be necessary for licensees to make interim written records, which can then be entered into the computer system at a later time.
- Any existing requirements contained in the Act which impacts on the timeliness of record keeping. For example, licensees are required to electronically transmit computer records to the Police within 3 working days of the records being made or in accordance with other arrangements made by the Police with the licensee. Additionally, authorised persons may require licensees to immediately produce for inspection any record required to be kept by the licensee under the legislation.

It is noted that nearly all other Australian jurisdictions require second-hand dealers to record transaction details within a stipulated timeframe. Without a timeframe it allows unscrupulous second-hand dealers to avoid the recording requirements of the Act, which are fundamental to it's operation. Further, amending the legislation to include a timeframe for when goods must be recorded would assist licensees by providing clarification as to when records must be made. It would also bring the second-hand dealing provisions in line with those for pawnbrokers. However, it is considered that any stipulated timeframe must be flexible enough to accommodate legitimate circumstances that would prevent licensees complying with that timeframe.

The Review considers that the approach taken by Victoria is appropriate as it imposes an immediate requirement to record details, unless compliance is not practical or possible due to the transaction being entered at premises other than the business premises nominated. However, the Review considers that this approach should be modified to allow second-hand dealers to record transaction details by the close of business of the day that the goods come within their possession. This provides greater flexibility and ensures that dealers will be able to comply with the timeframe.

Competition impact

This proposal will result in the imposition of business costs on second-hand dealers. However, it is anticipated that such costs will be minimal given that most second-hand dealers, as a part of good business practice, would already record transaction details during or immediately after every transaction. The proposal will ensure that the objectives of the Act are being met and will address a loop hole which currently exists in the legislation.

Recommendation: Time limit for recording transactions

Require second-hand dealers to record transaction details by the close of business of the day that the goods come within their possession. However, if a second-hand dealer receives goods at any premises other than the business premises notified to the Department of Fair Trading, they are required to record the transaction as soon as possible

Computerised records

Pawnbrokers and second-hand dealers are required, by way of a condition of their licence, to keep their records in a computer format. In this regard, the condition of a licence requiring the keeping of computer records provides:

“You must use electronic means of creation and storage of records for the purposes of sections 16 and 28 of the Pawnbrokers and Second-hand Dealers Act, 1996, using software which complies with the specifications issued by the New South Wales Police Service titled ‘Pawnbroker and Second-hand Dealer System.’

However, the legislation exempts, on a yearly basis, second-hand dealers from the requirement to keep computer records if:

- the second-hand dealer held a second-hand dealers licence under the Second-hand Dealers and Collectors Act 1906, immediately before 30 April 1997; and
- the gross receipts of the dealer’s business relating to all second-hand goods (that is, not just those second-hand goods prescribed by the Regulation) totalled \$150, 000 or less in the previous financial year.

Applications for an exemption from the requirement to keep computer records are made at the time licensees apply to renew their licence. An exemption application must be supported by:

- an income tax return or an audited financial statement for the previous financial year; and
- a statutory declaration stating that the gross receipts of the business in the last financial year were \$150, 000 or less.

Submissions

Two submissions proposed that paper records should be adequate. One licensee advised that computer records seem less relevant in country towns where there is a low trade in high risk of theft goods and the licensee personally knows most of their customers.

There was support both for and against the existing computerisation exemptions and the option of widening the exemptions.

The Police regard the present exemptions to computerisation as being somewhat artificial and arbitrary. The Police are concerned that the exempted group can still be affected by the traffic in stolen goods and the exemption currently leaves a gap in the computerised audit trail system. To avoid such gaps the Police consider there should be no exemptions to the computerisation requirements.

Several submissions supported the existing computer exemptions. However, some submissions expressed the view that the exemptions should be widened to include second-hand dealers who:

- do not operate full-time business;
- have been in business for 10 years with a good record; and
- deal exclusively with government departments and major corporations.

One submission stated that the criteria used for exempting second-hand dealers from the requirement to keep computer records should be reviewed and that it would be more relevant to base gross receipts on high risk of theft goods rather than the gross receipts relating to all second-hand goods.

Other submissions considered that the exemptions should be either reduced or removed for the following reasons:

- computerisation is a necessary cost of running a second-hand dealer business;
- computerisation is necessary in order to maintain the objective of tracing stolen goods;
- it is easy for dealers to keep turnover below \$150, 000 per year and gain exemption; and
- smaller businesses should be required to keep the same records as larger businesses.

Concerns with the cost of computerisation were raised in several submissions. Another submission considered that licensees should not have to comply with the legislation until an on-line centralised recording was operating efficiently.

One submission maintained that the need for an income tax return and a statutory declaration to support an exemption application is unnecessary. It was suggested that either document should suffice and that a copy of the tax assessment and not the whole return should be adequate.

Other jurisdictions

WA	Compulsory for pawnbrokers operating in Western Australia to maintain computer records, although, second-hand dealers in that State have the option of keeping computer or manual records. However, if second-hand dealers chose to maintain manual records they are required to furnish their paper records to the Police by way of facsimile.
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Review's comments/position

The keeping of records on a computerised database is seen as one of the most significant initiatives of the current regulatory scheme. As noted earlier in this Report, the primary objective of the Act is the regulation of trade in certain categories of second-hand goods (high risk of theft goods) in order to limit the traffic in stolen goods through pawnbrokers and second-hand dealers. The requirement that licensees use computerised records is fundamental in achieving this aim and reflects the Government's recognition that rapid provision to Police of up-to-date information on stolen property will enhance the enforcement capability of the Police to apprehend offenders and recover stolen goods. Computerised records enables the direct transmission of data to Police on a regular and timely basis. This data can then be cross-checked against Police computerised records of stolen goods.

The initiative of a computerised system for recording second-hand dealing and pawnbroking transactions was based on the Western Australian model. An Internal Review, conducted in mid 1997 by the Western Australian Police Service, of the Pawnbrokers and Second-hand

Dealers Act 1996 stated that the computerised system had been extremely successful and, since the legislation was introduced on 1 April 1996, property value in excess of \$700,000 had been seized. This was directly attributed to the fact that all transactions are forwarded to the Police Service and compared against stolen property. Additionally, all persons who conduct large numbers of transactions are identified and investigated by the Police. This capability has already been responsible for identifying and apprehending a large number of professional shoplifters and housebreakers. The Review further stated that all other Police Agencies across Australia have expressed a keen interest in the Act and are attempting to obtain similar legislation, as the traffic in stolen goods does not stop at State or Territory borders.

A National Police Research Unit Report¹⁴ has concluded that the introduction of computer-based records which are both easily transmitted to Police and comparable with Police records appears to be the most efficient option, as they facilitate easy matching and following of transaction (audit) trails with Police data both within and across State/Territory borders.

Pawnbrokers and second-hand dealers in Minneapolis, United States of America, are also required to maintain computer records. The Minneapolis Police Department Licence Investigation Division has advised that, since the implementation of computerised records in 1997:

- the cost of regulation and enforcement of the city's pawnbroker and second-hand dealer ordinances has decreased and stabilised;
- there has been improved police service and effectiveness;
- recovery of stolen property has increased.

The basis for the decision to exempt certain second-hand dealers from the computerisation requirements is that it would be unfair to impose the requirement on small scale dealers who, at the time of first becoming licensed, could not have been aware of this future obligation. Having said this however, it is considered that license holders who have entered the second-hand dealing industry after the legislation came into force should have been aware of this requirement at that time and should therefore be required to comply with it. The computerisation exemption, which was introduced in 1998, substantially alleviated the concerns of many small scale second-hand dealers in relation to the cost associated with the requirement to be computerised.

The Review considers that the current exemption from the requirement to keep computer records is still appropriate. All new second-hand dealers coming into the industry are required to maintain computer records, as are those business with a larger turnover. However, the Review maintains the view that those small scale dealers who operated before the introduction of computerisation should still be eligible for an exemption.

The Review considers that the documentation which must be produced to support an exemption application is necessary in order to substantiate the gross receipts of a business. Flexibility is provided by allowing a tax return or audited financial statement to be submitted, however, in all cases a statutory declaration must be furnished. However, the preparation of a declaration is not considered to be an onerous requirement.

Competition impact

¹⁴ National Police Research Unit (1997) *Approaches to Pawnbroker and Secondhand Dealer Legislation* Report Series No: 131.1 Australia p3, 9, 31

The licence condition requiring licensees to keep computerised records creates a barrier to entry and imposes administrative costs on pawnbrokers and those second-hand dealers who are not exempt from the requirement. However, in this regard, it is noted that with advances in computer technology the costs of computers have decreased markedly. In the longer term, the use of a computer may well reduce business operating costs. It is also the case that a large number of retail traders now use a computer to operate their business. Despite the cost impost on licensees, it is considered that the requirement is of net public benefit to the community as a whole as it will ensure that licensee transaction records are transmitted rapidly to the Police which can then be automatically cross checked with Police records on stolen goods. This requirement is considered fundamental in achieving the Act's objectives of recovering stolen goods and combating property crime.

Recommendation: Computerised records

Maintain the current requirements for keeping computerised records

Furnishing of records to the Police

The Act contains a regulation making power for the purpose of enabling the regulations to prescribe the time period licensees must furnish records to the Police. For this purpose, the regulations currently require licensees to electronically transmit computer records to the Police within 3 working days of the records being made or in accordance with other arrangements made by the Police with the licensee.

Second-hand dealers who are allowed to keep manual records must furnish records to the Police, if so directed by the Police.

Submissions

Police have strongly recommended that the legislation be amended to require immediate transmission of data, once the computerised system is fully operational.

The submissions generally supported the current time frame of 3 working days, with some qualifications. One submission from a dealer put the view that the time frame may be problematic if the dealer does a lot of travelling and suggested that a lap top computer may overcome the problem.

Review's comments/position

The provision of licensee records to the Police in a timely fashion is fundamental to the capacity of the Police to identify stolen items and return them to their rightful owner prior to them being onsold.

The NSW Police Service is currently in the process of completing the final phase of the computerisation system which will allow computer records of licensees to be transferred on-line to the Police. Currently, licensees who are required to keep computer records must download data onto a floppy disk for collection by the Police. This computer data is then cross matched with Police computer records on stolen goods.

The National Police Research Unit has stated that it is imperative that Police have timely access to detailed records of all the items received, whether or not licensees suspect that they are stolen goods. Accordingly, the Unit says an appropriate goal would appear to be a requirement that all such data is transmitted to Police on a daily basis¹⁵.

The Review considers that the current timeframe for furnishing records is reasonable and appropriate in light of the fundamental objectives of the legislation. However, as it is anticipated that the computerised system will soon be fully operational with records being sent to the Police on-line, the Review recommends that these timeframes be reviewed once the on-line computer system is fully operational.

Competition impact

Although the requirement imposes costs on licensees, it is considered to be of net public benefit to the community as a whole as it will ensure that licensee records are furnished to the Police in a timely fashion, thus helping to achieve the objectives of the Act.

Recommendation: Furnishing records to the Police

Review the timeframes for the furnishing of records to the police once the on-line computerised system is fully operational.

Records (Market promoters)

Market promoters are required to keep the following records in relation to all unlicensed vendors selling second hand goods in a market:

- the date on which the market is held;
- the location of the market;
- the name, address and vehicle registration number of any unlicensed stallholder offering second hand goods for sale (high risk of theft goods);
- a general description of the goods offered for sale by any such stallholder; and
- details of any identification documents produced by any such stallholder.

Submissions

Submissions generally supported the current requirements.

Police have indicated that while market promoters are required to keep records of any identification which may be produced by unlicensed stallholders, there is presently no requirement in the legislation as to what types of identification is acceptable. The Police have suggested that stallholders should be required to produce the same kind of evidence of identity that is required under the Act by persons wanting to sell or pawn goods.

Other jurisdictions

¹⁵ National Police Research Unit (1997) *Approaches to Pawnbroker and Second-hand Dealer Legislation* Report Series No: 131.1 Australia p3.

Both South Australia and Tasmania require persons who operate a second-hand dealers market to keep records of the name and address of persons selling second-hand goods at the market, the particulars of the document used to verify the identity of that person and the date on which the person sold goods at the market.

Review's comments/position

To deter the sale of stolen goods at fairs and markets, promoters of regular events of this type are required to keep records of those selling goods in nominated categories. The requirements are not considered onerous as they do not require promoters to keep many more additional records than they would in order to operate an event efficiently. However, the provisions give the Police a further source of information on potential illegal traders.

According to the National Police Research Unit¹⁶ report there is a major problem regarding distribution channels for stolen goods with traders who only deal on an intermittent or occasional basis and who are not licensed with regard to any other premises. Comparative data on the use of markets as a channel for the traffic in stolen goods is not available, however, according to a study by the NSW Bureau of Crime Statistics and Research¹⁷ about 6 percent of imprisoned burglars said they used markets to dispose of the goods they had stolen.

The Review considers that the Police proposal is reasonable, as it will assist in maintaining the audit trail for potentially stolen goods and will ensure that consistency is maintained with the remainder of the legislation in terms of these requirements.

The proposal is not considered onerous for unlicensed stallholders. It would usually be the case that stallholders use a car or truck to transport their goods to the market, hence they would be able to produce a driver's licence to satisfy the evidence of identity requirement.

Competition impact

This proposal places an administrative cost on market promoters and stallholders. However, it is anticipated that the impact on competition will be minimal, given that it is not difficult to satisfy the evidence of identity requirement. It is considered that the proposal will be of net public benefit to the community as it will ensure that an adequate audit trail is maintained in relation to persons selling second-hand goods at markets.

Recommendation: Market promoters

Market promoters to require unlicensed stallholders to produce the same kinds of evidence of identity that persons offering to sell or pawn goods are required to produce.

¹⁶ National Police Research Unit (1997) *Approaches to Pawnbroker and Secondhand Dealer Legislation* Report Series No: 131.1 Australia p7

¹⁷ R J Stevenson and L M V Forsythe *The Stolen Goods Market in New South Wales: An Interview Study with Imprisoned Burglars*. 1998 Bureau of Crime Statistics and Research (<http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/stolengoodsummary>)

6.6 Retention of goods

14 day retention period and exclusions

Section 21 of the Act requires second-hand dealers to hold goods for 14 days after receipt, except to goods or circumstances as the regulations may prescribe. For this purpose, the regulations currently prescribe:

- a) goods consigned for sale by the licensee; and
- b) goods purchased by the licensee at auction.

For the 14 day period the licensee must not alter the form of the goods or dispose of them in any way, or part possession with them.

A minimum 3 month retention period applies to pawned goods, unless extended by mutual consent between the pledgor and the pawnbroker.

Submissions

No strong arguments were put forward in the submissions for the 14 day period to be altered. Some submissions expressed the view that whilst they were costly and sometimes difficult to comply with in terms of storage, the retention periods were necessary for tracking stolen goods.

One licensee stated that the 14 day retention period can impact heavily on some businesses that contain stock lines that can depreciate rapidly within the retention period. The licensee was also of the view that it was unfair for second-hand dealers to have to hold goods given that no other retailing businesses were required to.

A number of submissions argued that the retention period was excessive, particularly in light of the requirement to keep computer records and furnish them to the Police. Another submission stated that the 14 day period was too long and that victims of property crime were better served by allowing the goods to be displayed.

Most submissions expressed the view that neither the area of consignment nor purchases from auctions was a potential avenue for the disposal of stolen goods, hence the retention period exemption for these goods was appropriate. Similarly, submissions which addressed the issue were of the view that goods purchased from government agencies should be exempted from the retention period, because such goods fall within the low risk of theft category and ownership has been established.

One submission expressed the view that in relation to pawns where the amount loaned exceeded \$500 the minimum retention period should be reduced from 3 to 2 months and for pawns where the amount loaned exceeded \$1500 the minimum retention period should be reduced from 3 months to 6 weeks. The rationale provided for this view was:

- accrued interest on the loan would be lower and the return from the sale higher;
- pawns in relation to cars and boats can lose up to 50% of their value in cases where registration has expired or due to seasonal changes. Earlier disposal would improve the sale bid and the return to customers; and
- the pawnbroker would not have to “carry” the value of the loan and then hope the sale bid would be sufficient to cover all costs.

Another submission suggested that the 3 month redemption period for pawned goods could be reduced to 36 days for small pawns.

Other jurisdictions: Retention periods

VIC	<ul style="list-style-type: none"> ▪ Second-hand goods must be retained for 7 days ▪ Loan period must be fixed
SA	<ul style="list-style-type: none"> ▪ In general, prescribed goods must be retained for 10 days. Exemptions include second-hand goods valued less than a prescribed amount. ▪ 1 month redemption period
TAS	<ul style="list-style-type: none"> ▪ In general, goods must be retained for 7 days. Exemptions include: <ul style="list-style-type: none"> - goods purchased at a public auction - goods purchased from another second-hand dealer - vessels or vehicles ▪ 6 month redemption period
QLD	<ul style="list-style-type: none"> ▪ In general, goods must be retained for 7 days ▪ 3 month redemption period
NT	<ul style="list-style-type: none"> ▪ Goods must be retained for 14 days ▪ 1 month redemption period
WA	<ul style="list-style-type: none"> ▪ In general, goods must be held for 14 days, exemptions include goods obtained: <ul style="list-style-type: none"> - from outside WA - at an auction - a public utility - from a licensee ▪ 3 month redemption period
ACT	<ul style="list-style-type: none"> ▪ Certain goods must be held for 5 days ▪ 3 month redemption period

Review’s comments/position

The purpose for the retention period is to stop the movement of goods which may have been stolen for a sufficient period to allow them to be identified and reclaimed. This is particularly important where the stolen goods fall into the domestic theft category, that is, they have been sold to dealers by family members who are drug addicted or where there has been a relationship breakdown and one partner has sold jointly owned property.

The Review considers that the current period in which licensees are required to hold goods is adequate and reasonable for the purpose of temporarily stopping the movement in stolen goods.

The National Police Research Unit Report on Approaches to Pawnbroker and Second Hand Dealer legislation argues the case for having “requirements that goods be retained unchanged for a suitable period of time to allow for appropriate checks to be undertaken. It is important to note that this option not only prevents goods from being disguised or dismantled, but also prevents goods from being moved interstate. This is necessary for both pawnbrokers and second hand dealers.”¹⁸

The rationale for consignments being exempted from the retention period is based on the fact that consigned goods are not the property of the licensee and the outcome of the sale requires further contact with the vendor¹⁹. Accordingly, consignment selling is not seen as a high-risk area for stolen goods. Similarly, goods purchased by a dealer at auction are considered to be a

¹⁸ National Police Research Unit (1997) *Approaches to Pawnbroker and Second Hand Dealer Legislation*, p 10

¹⁹ Pawnbrokers and Second-Hand Dealers Bill; Second Reading, the Hon Mrs F Lo Po’, Minister for Fair Trading and Minister for Women, 24 April 1996, Legislative Assembly, p 439

low risk area. There was no evidence provided in the submissions that either auctions or consignment selling were high risk areas in terms of stolen goods and hence should not continue to be exempt from the 14 day holding period.

There was general agreement in the submissions that goods purchased from government agencies should also be exempted from the 14 retention period. The Review agrees with this exemption as such purchases fall within the low risk of theft area and ownership has been established. It is noted that such an exemption is consistent with a recent amendment WA has made to their regulations.

Legislating the minimum redemption period is considered to be an important consumer protection mechanism to ensure that persons pawning goods have an adequate period to repay the money they borrowed, which cannot be reduced through an agreement. The existing redemption period contained in the Act is considered appropriate to allow this to occur.

One of the recommendations contained in this report is to require second-hand dealers to make records of their transactions by the close of business of the day that the goods come into their possession. There is also a provision proposed that if a second-hand dealer receives goods at any premises other than those notified to the Department of Fair Trading, they are to record the transaction as soon as possible. To ensure that there is a full 14 days between the record of the transaction and when the goods can be on-sold, it is proposed that the retention period should start from when the transaction is recorded.

However, when the computerised records system is fully operational, with records being transmitted online to the Police, it is recommended that the retention period for second-hand dealers who keep computer records be reviewed.

Competition impact

It is anticipated that the proposal will have the effect of reducing the administrative costs currently imposed on second-hand dealers who purchase prescribed second-hand goods from government agencies, as they will not have to retain such goods for a 14 day period.

<p><i>Recommendation: Retention periods</i></p> <ol style="list-style-type: none"><i>1. Provide that the 14 day retention period for second-hand goods commences once the transaction has been recorded.</i><i>2. That the regulations be amended so as to provide that goods purchased from government agencies by way of tender/auction are exempt from the 14 day retention period.</i>
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6.7 Mechanism for Recovering Stolen Goods

A number of mechanisms are available to persons who have identified their stolen goods in the possession of a licensee. These mechanisms are outlined below:

- 1) *Civil Proceedings*
Section 22 of the Act establishes a procedure for the recovery of goods which have been identified as stolen and are in the possession of a pawnbroker or second-hand

dealer. Specifically, section 22 provides that if a person identifies their stolen property in the possession of a licensee, they can lodge a claim over those goods on the spot. The licensee is required to complete a statement which details the name and address of the person claiming the goods (“the claimant”) and a description of the goods. The statement must be given to the claimant immediately upon completion and the licensee must give a copy of the statement to the police officer in charge of the nearest police station within 24 hours.

Except with the consent of the claimant or a court order, the goods concerned must not be altered, sold, redeemed or removed from the premises of the licensee for 28 days. This 28 day period gives the claimant sufficient time to initiate civil proceedings for the recovery of the alleged stolen goods. Once court action is commenced, the pawnbroker or second-hand dealer must not sell or dispose of the goods until the court determines ownership of the goods. The court will then determine who is lawfully entitled to the property. If the court believes that the claimant is the rightful owner, it has the power to order that the goods be returned to the claimant.

2) *Criminal Proceedings*

It may be the case that the Police commence criminal proceedings in relation to the theft of the goods. In such circumstances, the Act provides, pursuant to section 23, that if a court, in any criminal proceedings, finds that goods have been stolen, or that possession of the goods has been taken unlawfully and the goods are believed to be in the possession of a licensee, the court must, unless satisfied that there is good reason not to, direct the Police to take the goods into custody. The goods are then disposed of under the provisions of Part 6 of the Criminal Procedure Act 1986. Under this Part a person may apply to the court to make an order that the property in Police custody be delivered to the person who appears to it to be lawfully entitled to the property. If no application is made within a month of the determination of the criminal proceedings, the goods are sold at public auction.

3) *Informal arrangements*

If the value of the goods are low and the claimant prefers not to institute civil proceedings to recover the alleged stolen goods, the parties may determine to resolve the matter themselves. Accordingly, depending on the circumstances of the case, the claimant may offer to buy the goods back from the licensee.

Apart from seeking general comments in relation to the Act’s recovery of goods provisions, the Issues Paper also sought comments in relation to the mechanism used in the Northern Territory for the recovery of stolen goods. In that State confirmed stolen goods are returned to their rightful owner if title can be substantiated and the onus is placed on the pawnbroker or second-hand dealer to institute legal proceedings to recover the goods.

Submissions

Mechanism generally

Eleven stakeholders responded to the issues relating to the mechanism for the recovery of alleged stolen goods. A number of submissions indicated that the current system was unfair as it placed the onus on the victim of property crime to institute recovery proceedings and encouraged them to buy back the goods rather than follow the procedure set out in the legislation.

Other submissions indicated that the current system was working effectively and was more efficient than the mechanism in the previous legislation. One submission considered that the current system allows for the victim of property crime to pursue their rights through the court, but also supports the pawnbroker or second-hand dealer who potentially purchased the goods in good faith and followed the requirements for proof of identity in the Act.

One submission expressed the view that persons should be able to recover goods without having to resort to the courts, as this is costly in terms of both time and money.

Northern Territory model

Several submissions were unclear as to how such a system would work. One submission suggested that if an amendment was made which lessened the likelihood of a licensee being paid for the disputed goods then they would be more likely to show greater diligence when checking the ownership of the goods. Other submissions felt that this system would place the licensee in an untenable situation when they complied with the requirements of the legislation and purchased the goods in good faith. There was concern that this system did not recognise that the licensee is a victim in this situation as well.

The submission from the Police Service supports a system whereby the onus of instituting recovery proceedings is reversed. It is stated in the submission that "...the onus should be placed on the dealer to establish that the goods are not in fact stolen, provided the person asserting ownership has provided a statutory declaration that the goods are their property ...The dealer should be required to hand the property back to the owner, unless the dealer commences action in a court to dispute the claim". Any new procedure should clearly define the procedural issues to be involved and they should be kept simple and with little or no cost to the owner. Unless this situation is clarified the current general practice of victims of crime buying back their own property from dealers will continue."

The Police also noted in their submission that Police assisting owners to recover stolen property in civil court proceedings is not a policing function. Accordingly, the Service opposes any move to place an obligation on it or its officers to provide assistance in court proceedings."

Other jurisdictions

WA	<ul style="list-style-type: none"> ▪ A person may make an application to a justice in relation to stolen or unlawfully obtained goods which are in the possession of a licensee. ▪ The justice may issue a warrant or summons for the production of the goods and the appearance of the licensee before the Court. ▪ A Court of Petty Sessions may then make an order for the delivery of the goods to the owner and the payment by or to the licensee of an amount as determined by the Court.
NT	<ul style="list-style-type: none"> ▪ Allows the claimant to reclaim the goods if they can prove to the Commissioner of Police that they are the rightful owners. ▪ If the licensee disputes this claim it is then the licensee who must initiate court proceedings to recover the goods from the claimant. ▪ If the claimant can prove to the satisfaction of the Police that they have title to the goods then the Police will issue the licensee or employee of the licensee with a certificate which gives them 7 days, to either make an application to the Court disputing the return of the goods or return the goods to the claimant. ▪ If the licensee makes an application to the court then the court would then determine the rightful owner of the goods.
QLD	Provides for authorised officers under the Acts to seize and detain goods suspected of being stolen.
ACT	A dispute as to ownership is determined by a court who can rule that the goods are returned to the claimant without any compensation being offered to the licensee
SA	<ul style="list-style-type: none"> ▪ Provides for the production of a notice in the prescribed form to both the claimant and the Police.

	<ul style="list-style-type: none"> ▪ The Magistrates court can make an order for the return of the goods to the complainant or for compensation.
VIC	<ul style="list-style-type: none"> ▪ Provides that a complainant can apply to the Magistrates court for an order without notifying the licensee. ▪ The Magistrates court can then order the licensee to hand over the goods to the complainant within 21 days. Within that time the licensee must not alter or dispose of the goods and the licensee can lodge an objection to the ruling.
TAS	Provides for a Police officer to issue a prescribed notice that prohibits the licensee from altering, selling or disposing of the goods in any way.

Review's comments/position

As noted earlier in this Report, one of the main objectives of the Act is to assist the rightful owners of goods to recover their stolen property. However, despite the current mechanism contained in the Act for the recovery of stolen goods, it appears to be the usual practice that victims of property crime buy back their stolen goods from the licensee. The main reason for this practice is that it is generally cheaper and quicker to buy back the stolen goods from the licensee rather than to institute legal proceedings for the recovery of the goods (even though most recovery proceedings would be dealt with in the Small Claims Division of the Local Court).

The most significant feature of the Northern Territory model is that, in general, the victim of property crime would not incur any costs in recovering their stolen goods as they are not required to institute court proceedings for the recovery of the goods. The licensee, however, has the right to take the matter to court if he or she disputes the goods being returned to the owner. Reversing the onus would assist in ensuring that one of the fundamental aims of the Act is being achieved. Modifying the current mechanism for recovery of the stolen goods in this way would provide victims of property crime with a more fair and equitable manner to recover their goods. However, to ensure that such a recovery process is not abused and operates fairly for both parties the Review considers that the following procedures should be put in place:

- clear guidelines as to the procedural processes involved in substantiating an owner's title to the stolen goods. For example, unless a claimant can provide Police with a statutory declaration the claimant would be required to take legal proceedings to recover the goods (as per the current procedure);
- the theft of the item must have been reported to the Police. This will assist in ensuring that spurious claims for the recovery of goods are not made;
- the Act should be amended so as to create an offence for a person to knowingly make a false claim to the title of stolen goods; and
- the Fair Trading Tribunal or its successor the Consumer Trader and Tenancy Tribunal should be given the jurisdiction to hear disputes regarding the recovery of stolen goods under the Act. This will ensure that licensees who proceed to dispute the return of the stolen goods to the claimant incur as little costs as possible.

It is noted that the Fair Trading Tribunal or its successor the Consumer Trader and Tenancy Tribunal was specifically established to adjudicate consumer and commercial disputes. The objects of the Fair Trading Tribunal Act and its successor the Consumer Trader and Tenancy Tribunal Act is to establish an accessible Tribunal which has efficient and effective proceedings which are determined in an informal, expeditious and inexpensive manner. The Tribunal is not bound by the rules of evidence and can inform itself as it thinks fit, subject to the rules of natural justice. The fee to have a matter dealt with before the Tribunal depends on the amount claimed or disputed, for example, if the amount claimed or disputed is less than \$2,000, the filing fee is currently set at \$11. Importantly, parties to proceedings have carriage

of their own case and representation is not allowed except where the Tribunal decides a party would be disadvantaged if representation was not allowed or where representation is necessary due to the complex issues of law or fact likely to arise in the proceedings. Generally, parties are to bear their own costs.

However, it is important to note that it is often the case that the issue of the recovery of stolen goods is dealt with as part of criminal proceedings where a person has been charged for an offence relating to the stolen property.

Competition impact

This proposal may result in imposing costs on licensees who have in their possession stolen or unlawfully obtained second-hand goods. However it will ensure that victims of property crime, who can substantiate title to the stolen goods, do not incur costs as a result of having to buy back their stolen goods from the licensee. It is considered that the proposal will be of net public benefit to the community as a whole as it will ensure that the Act's objective of providing a mechanism to facilitate the return of stolen property to rightful owners quickly and equitably is achieved. Licensees who dispute the return of the goods will have the capacity to have the matter heard in the Fair Trading Tribunal or its successor the Consumer Trader and Tenancy Tribunal which is a quick and inexpensive way to have a dispute resolved.

Recommendation: Recovery of alleged stolen goods

- (1) Transfer the jurisdiction for the hearing of disputes regarding the ownership of goods to the Fair Trading Tribunal or its successor the Consumer Trader and Tenancy Tribunal.*
- (2) As is the case in Victoria, impose an obligation on dealers to display prominently a sign advising persons of the mechanism that enables disputes regarding the ownership of goods to be resolved.*
- (3) Modify the mechanism for the recovery of stolen goods to provide for the following:*
 - i If the claimant can substantiate title to the goods to the Police, the licensee will be notified by the Police that they have 28 days, from being advised, to make an application to the Tribunal disputing the return of the goods to the claimant. (The claimant must be able to provide Police with written documentary evidence or a statutory declaration. In addition, the claimant must have also reported the theft of the item to the Police).*
 - ii The goods are to remain in the possession of the licensee for 28 days, or if the licensee applies to the Tribunal within that 28 day period, until such time that the matter is determined by the Tribunal. The goods cannot be sold or altered in any way during this period of time.*
 - iii If the licensee does not apply to the Tribunal in that 28 day period, title to the goods is immediately vested in the claimant and must be surrendered to the claimant.*
 - iv Failure to comply with the Police notification would be an offence under the Act and grounds for possible revocation of licence.*
 - v If an application is made, the Tribunal would then determine the rightful owner of the goods.*
 - vi Create an offence for a person to knowingly make a false claim to the title of stolen goods.*

6.8 Special Restrictions on Pawnbrokers

Information disclosed on the pawn agreement

The Act provides, pursuant to section 28, that at the time possession of the goods is taken under a pawn agreement, a record of the agreement must be made that includes the following information:

- a) a fair and reasonable description of the goods;
- b) the total amount lent on the goods, together with the rate of interest charged by week, month, or other period, as the case may be, and any other charges,
- c) an equivalent annual interest rate;
- d) the name and residential address of the owner of the goods and of any agent through whom they are pawned;
- e) the date of the pawn; and
- f) any other particulars required by the regulations to be included.

The regulations require particulars of the pawners date of birth to be recorded.

Submissions

Only 3 stakeholders responded to the issue of disclosure provisions in relation to pawn agreements.

A consumer representative group was of the view that the disclosure provisions were inadequate and additional information should be disclosed, such as the length of the loan, the price at which the goods can be redeemed, the consumer's rights and obligations under the agreement and a breakdown of the fees charged by the pawnbroker.

The two other industry based responses were of the view that the disclosure provisions were adequate, however, one commented that a concise definition of what is a fair and reasonable description of the goods is required.

Other jurisdictions

Listed below is a summary of the information that other jurisdictions require to be disclosed in relation to pawn transactions, ***which is additional to what the NSW legislation currently requires.***

WA & NT	<ol style="list-style-type: none"> 1. A statement informing the consumer of the pawnbroker's obligation to keep the pawned goods for at least 3 months or such longer period as the parties may agree. (1 month for NT) 2. A statement that the goods can be redeemed at any time before the sale of the goods. 3. A statement of the party's right to any surplus after deduction of interest and charges. 4. The interest to be paid on the amount lent expressed as an amount in dollar terms to be paid for each week or month, as the case may be, of the loan. 5. The types of charges that are, or may become, payable, including those that may become payable in the event of the sale of the goods, and the amount (if known) of the charges. 6. The redemption period if it is longer than 3 months. (1 month for NT) 7. The name of the person accepting the goods in pawn as, or on behalf of, the pawnbroker. 8. The premises where the goods will be located during the redemption period, and if the goods are moved, the name and address of the location of the goods. 9. If the redemption period is extended, the new redemption period and the date of the agreement to extend the period.
SA	<ol style="list-style-type: none"> 1. Itemised statement of all fees and charges that are or may become payable and, if any of the

	<p>fees/charges are not ascertainable at the time of the contract, a statement of how those fees and charges will be determined.</p> <ol style="list-style-type: none"> 2. End date of the redemption period. 3. A statement advising that the redemption period may be extended and the procedure for so doing this. 4. A statement advising that the pawnbroker is required to sell the goods if they are not redeemed at the end of the redemption period. 5. The address where the goods will be kept during the redemption period. 6. If the pawn ticket covers more than one item – a statement of whether or not the items may be separately redeemed. 7. A statement of any fees and charges that were not treated as interest
VIC	<ol style="list-style-type: none"> 1. The period of the loan. 2. A pawnbroker must prominently display a notice so that it is clearly visible to the public which shows the maximum amount charged on pawn transactions. The pawnbroker must serve on the pawner written notice of the charge that will be imposed on the transaction. (In general, the pawnbroker must not charge more than the amount displayed on a notice) 3. A pawn ticket must be accompanied by a prescribed notice that sets out comprehensively the rights and obligations of the consumer.
TAS	<ol style="list-style-type: none"> 1. The date before which the goods pawned may be redeemed. 2. That the goods will be forfeited on failure to redeem them before the date. 3. That the owner of the goods will be entitled on demand to the balance of the proceeds of sale.

Review's comments/position

A primary economic rationale for consumer protection regulation in the credit area is that of market failure as a result of an imbalance of information between consumers and traders. Hence, a traditional aim of the regulation of pawnbrokers is to ensure that the relationship between pledgor and pawnbroker is conducted in a fair and open manner and that there is proper disclosure of price and terms. Although the Fair Trading Act 1987 gives some protection to consumers in their dealings with pawnbrokers, it is considered necessary to have special legislation which regulates this area. Community education can also play a role in informing consumers of the costs and other terms and conditions associated with the transaction, however, disclosure requirements on pawnbrokers are seen as a far more efficient mechanism.

Full disclosure of the terms of a pawn agreement is necessary to facilitate competition as consumers are then able to compare terms amongst pawnbrokers and other credit avenues available to them to raise funds. It may also alert consumers to the fact that they may be paying a high price compared with alternative options that they may qualify to use.

In contrast with a number of other jurisdictions, the NSW legislation does not require the specific disclosure of certain information which may be of significant consumer benefit, such as interest rates expressed as a dollar term, fees and charges which may arise in the future under the agreement and the date before which the goods pawned may be redeemed.

The legislation of Western Australia and the Northern Territory provide that the redemption period can be extended as long as the new redemption period and the date of the agreement to extend the period is included on the pawn agreement. South Australia also allows for the extension of the redemption period and requires that a statement must be included on the pawn setting out the procedure for doing so. No jurisdiction allows for any other variation of the pawn agreement. The review considered that the ability to extend the redemption period was of consumer benefit as long as the licensee was required to include on the pawn agreement the new redemption period, any new fees and charges that are or may be payable and the date that the agreement to extend the redemption period was made. The review also considered that it was of consumer benefit for the Act to stipulate that no other variation could

be made to the pawn agreement. If both parties wished to vary the agreement then the agreement would need to be paid out and a new agreement entered into.

The Review considers that full disclosure of the terms and conditions of the pawn agreement should be coupled with a consumer education campaign that focuses on increasing consumer awareness about the rights and responsibilities in regard to pawning. As is the case in Victoria, it is recommended that the legislation include a requirement that a prescribed notice that sets out comprehensively the rights and obligations of the consumer must accompany the pawn agreement (Victoria's prescribed notice is attached at Appendix E). The NSW consumer notice could also be modelled on the pawnbroking fact sheet developed by the United Kingdom's Office of Fair Trading, attached at Appendix F.

Competition impact

This proposal is likely to have the effect of imposing administrative costs on pawnbrokers, which could result in decreased competition. However, it is considered that the proposal will have a net public benefit on the community as a whole as it will ensure that persons who use pawnbroking services are aware of their rights and obligations in relation to the pawn agreement, thus helping to achieve one of the Act's objectives.

Recommendation: The pawn agreement

(1) As is the case in Western Australia, the Northern Territory and South Australia, require the following information to be included in the pawn agreement:

i an itemised statement of all fees and charges that are or may become payable and, if any of the fees/charges are not ascertainable at the time of the agreement, a statement of how those fees and charges will be determined;

ii the premises where the goods will be located during the redemption period, and if the goods are moved, the name and address of the location of the goods;

iii if the pawn ticket covers more than one item – a statement of whether or not the items may be separately redeemed; and

iv the date before which the goods pawned may be redeemed.

(2) As is the case in Western Australia, the Northern Territory and Victoria require the interest to be paid on the amount lent to be expressed as an amount in dollar terms to be paid for each week or month, as the case may be, of the loan.

(3) As is the case in Victoria, include a requirement that a prescribed notice that sets out comprehensively the rights and obligations of the consumer must accompany the pawn agreement.

(4) Require that a pawn agreement cannot be varied other than by extending the original redemption period by mutual agreement. If either party wishes to make any other variation to the pawn agreement then by mutual agreement the original pawn agreement must be paid out and a new agreement entered into. If the redemption period is extended by mutual agreement, then the pawn agreement must contain the new redemption period,

any new fees and charges that are or may be payable and the date of the agreement to extend the redemption period.

Interest rates

The legislation only requires that the pawn pawn discloses the interest rate charged by the relevant period and equivalent annual interest rate.

In relation to the issue of interest rates, the Issues Paper raised whether the Act should:

- prescribe the maximum interest rate which may be charged on a pawn agreement;
- specifically provide that interest ceases to run at the expiry of the loan agreement; and
- specifically provide that interest owing on the pawn agreement is payable in instalments.

Submissions

Two submissions were in favour of the interest ceasing to run at the expiry of the loan term (one of these submissions was from an industry based organisation). One submission thought interest should continue to run on the basis that, in regional areas, it may be some months before pawnbrokers send forfeited goods to auction.

One consumer protection organisation expressed the view that there was a strong need to cap interest rates.

Other jurisdictions

No other jurisdictions in Australia provide for interest rate capping in relation to pawn transactions or specifically provide that interest ceases to run at the expiry of the loan agreement.

Review's position/comments

Following the review of the Victorian Second-hand Dealers and Pawnbrokers Act 1989, which was conducted within the context of the Victorian Government's agreement with the Commonwealth to implement National Competition Policy, the maximum interest rate ceiling of 48% was abolished in 1998. The rationale for removing the 48% interest cap was based on the fact that pawnbroking is different to mainstream forms of credit provision, in that the loan amounts are usually small in nature, rarely in excess of \$500 (normally in the \$100 range) and are for a short period of time. It was argued that limiting a pawnbroker to a \$4 gross profit for holding a \$100 item for a month is clearly unreasonable, despite the apparent excessiveness of an interest rate greater than 48%. Furthermore, it was considered that systemic constraints existed on pawnbrokers in setting terms for borrowers who approach them, such as the general second-hand price of the type of item being pawned (a borrower would not agree to pay more to retrieve the item than it would cost to buy a replacement elsewhere). Victorian legislators could not find any real evidence of general market failure to support the continued regulation of capping interest rates. Indicators such as borrowers preferring to sell an item outright to meet immediate cash needs due to the amount of the loan offered being too low or their being a high incidence of unredeemed pawns was not evident.

It is important to note that while the Consumer Credit Code is generally inapplicable to pawnbrokers (hence the interest rate cap of 48% contained in the Code does not apply) they are specifically brought within the coverage of the Code, so as to enable pawn agreements to be re-opened if they are determined to be unconscionable.

The issue of an interest rate cap for pawnbrokers was examined in the Victorian research paper entitled “Money Lenders or Loan Sharks”²⁰, which was co-authored by the Financial and Consumer Rights Council and Good Shepherd Youth and Family Service, with assistance from the Consumer Law Centre and the Consumer Credit Legal Service. This paper detailed the consumer’s perspective on the impacts of the deregulation of the pawnbroking industry and other legislative amendments to the Victorian Second-hand Dealers and Pawnbrokers Act 1989, which took effect in January 1998. In regard to the issue of interest rate caps, the Paper recommended that the decision in Victoria to lift the 48% cap required further examination and stated that, “in light of the research findings, it can be concluded that market forces, including the dynamics of competition, have not contained the breadth of fees and charges being incurred within the pawnbroking industry in Victoria or ensured the ‘best possible deal for consumers.’

Concerns have been raised that consumers who use alternate consumer credit, such as pawnbrokers, pay much higher prices for goods and services compared to mainstream credit providers. Interest rates charged by alternate credit providers are often substantially higher than the maximum interest rate cap in NSW of 48% provided by the Consumer Credit Code. On this basis it is argued that lower income consumers (who, in general, are the major users of alternate credit providers) should receive the same level of protection as that provided to more affluent consumers of credit and financial services.

In a paper prepared last year for the Office of Consumer Affairs, Industry Canada and the Ministry of the Attorney General, British Columbia entitled ‘Access to Credit in the Alternative Consumer Credit Market’²¹, it is argued that there is a good case for price or interest rate controls as a mechanism to prevent against excessive charges in relation to pawnbroking, but not as a means for second guessing normal market rates. The paper suggested that these rates could be fixed or have graduated ceilings.

However, in light of the fact that no other Australian jurisdiction stipulates the maximum interest rate which can be charged in relation to pawn transactions and that only one submission was received recommending that a maximum interest rate cap be imposed, it is proposed that the status quo be maintained in relation to this issue. Having said this, the Department of Fair Trading will continue to monitor pawnbroking interest rates. If in the future there is evidence of general market failure to support a proposal for the introduction of maximum interest rates, this matter will be reconsidered.

However, to ensure consumer interests are protected in relation to pawn transactions, it is proposed that the following measures be introduced:

- make clear that interest ceases to run at the expiry of the loan agreement;
- make clear that interest owing on the pawn agreement is payable in instalments, that is, pawnbrokers can not require customers to pay the total interest component at the expiry of the 3 month period. Customers must have the option of paying the interest on a monthly basis;

²⁰ Ayres-Wearne, Valerie. April 2000.

²¹ Ian Ramsay, Professor of Law, Osgoode Hall Law School, Toronto, 1 February 2000.

- require pawnbrokers to detail on the pawn agreement any changes to the interest due or the interest period if there are any agreed variations to the original pawn agreement.
- require pawnbrokers to display prominently the rate of interest and the fees and charges they charge at their business premises. (It is noted that this requirement was introduced in Victoria in 1998 when the maximum interest rate of 48% was abolished); and
- as recommended earlier in this Paper, include a requirement that a prescribed notice that sets out comprehensively the rights and obligations of the consumer must accompany the pawn agreement. This notice could also include information regarding pawnbroker interest rates.²²

Competition impact

The proposal requiring pawnbrokers to display a sign will place an administrative cost on pawnbrokers, however, it is considered that this cost will be minimal. The requirement will make it significantly easier for customers to be able to compare interest rates and fees charged between pawnbrokers. The vast majority of pawnbrokers already ensure that interest ceases to run at the expiry of the loan and allow customers to pay interest monthly, hence the anticipated cost impost of these proposals are also anticipated to be minimal and will have a negligible impact on competition.

Recommendation: Interest rates

- (1) *Interest to cease to run at the expiry of the loan agreement.*
- (2) *Ensure that customers can pay interest instalments on a monthly basis.*
- (3) *Require pawnbrokers to display prominently the rate of interest and the fees and charges they charge at their business premises.*

Sale of forfeited goods

The current legislation requires unredeemed goods to be sold at public auction as soon as practicable if the principal lent on the goods was greater than \$50. 'Public auction' is defined as an auction to which members of the public are invited by advertisement in a newspaper of general circulation in New South Wales or circulating in the district where the goods were pawned.

Submissions

The following options for selling unredeemed goods were raised in the submissions:

- retain the present arrangements;
- abolish the requirement for public auctions; and
- and provide for a dual system of disposal either by public auction or sale from the pawnbroker's shop.

In general, submissions indicated a range of problems associated with the current requirement of having to sell unredeemed goods at public auction, including:

²² As is the case with the United Kingdom, Office of Fair Trading Fact Sheet entitled 'Using a pawnbroker'.

- The pawner is often not aware of the particular auction at which his/her unredeemed item will be offered for sale. Several submissions commented that pawners did not make use of the buy back opportunity provided by the public auction.
- Costs associated with the auction process (such as, commission, transport charges especially from smaller regional towns, insurance) are higher than costs for selling the item in the pawnbroker's shop.
- Loss of control over presentation of items for sale that can result in lower prices being paid for the items.
- Excess supply of some types of goods at auction which in turn lowers the prices paid.
- Incentive for pawnbroker to accept a lower price rather than pay for unsold goods to be stored until the next auction or transported back to the shop.
- Risk of damage to goods during transit and at auction.
- Disadvantage to country dealers as they have to incur greater costs in sending their unredeemed goods to auctions, which are usually held in larger regional or metropolitan areas.
- The \$50 prescribed limit is inadequate and does not reflect today's market.

Some pawnbrokers explained that a larger loan could be provided to the pawner if the pawnbroker did not have to factor in the additional costs and greater uncertainty with the public auction method compared with the sale of the item on the business premises.

Two submissions addressed the issue of whether the Act should make provision for Internet auction sales. Both submissions were in support of Internet auctions.

However, a number of submissions supported the continuation of the current auction system and were of the view that the \$50 prescribed limit was appropriate on the basis that the system helps to ensure that the unredeemed item is sold for market value.

Other jurisdictions

ACT TAS	Require unredeemed goods to be sold at public auction
QLD	<ul style="list-style-type: none"> ▪ Require unredeemed goods to be sold at public auction ▪ However, if the amount lent on the forfeited goods is less than \$40, the goods become the property of the pawnbroker.
SA WA NT VIC	<ul style="list-style-type: none"> ▪ Pawnbrokers required to sell the forfeited goods in a manner conducive to securing the best price reasonably obtainable. ▪ If requirement is not complied with it is an offence against the Act. If in any proceedings a question arises as to whether a pawnbroker has complied with the requirement, the onus of proving compliance is on the pawnbroker.
ACT QLD	Require pawnbrokers, within a specified period of time prior to the sale of unredeemed goods (where more than a prescribed amount of money has been lent on the goods) to have placed a notice in some public newspaper advising of the sale.
VIC	If principal lent on the goods is \$100 or more, pawnbroker must send prescribed notice to pawner, unless pawner has requested in writing, using the prescribed form, not to send the notice. The notice is advise that the pawned goods will be offered for sale after the expiration of one month from the date of the notice.
TAS	At least 14 days before the proposed sale of forfeited goods, pawnbrokers are required to advise pawners in writing of the sale by certified mail.

Review's position/comments

The previous licensing regime which regulated pawnbrokers since the turn of the century required the sale of unredeemed goods at public auction. When the current Act was

introduced consideration was given to removing the auction requirement. However, at that time, it was determined that the system appeared to be well accepted by both pawnbrokers and clients as promoting a fair and independent marketplace and gave the pawner an opportunity to buy back his or her forfeited goods.

The current requirement of having to sell unredeemed goods at public auction appears to underpin a large auction system of unredeemed pawns dominated by a small number of auction houses.

Following an examination of the submissions, the Review considers that consumers would not suffer a disadvantage if pawnbrokers had the option of selling unredeemed goods at either their business premises or at auction, provided that the safeguards detailed below are put in place:

- (i) Pawners must be advised at the time of entering into the pawn transaction which disposal method would apply to the item if the item was unredeemed;
- (ii) As is the case in South Australia, Victoria, the Northern Territory and Western Australia, require the pawnbroker to sell the forfeited goods in a manner conducive to securing the best price reasonably obtainable. However, if the pawnbroker does not comply with this requirement, it is an offence against the Act. If in any proceedings a question arises as to whether a pawnbroker has complied with the requirement, the onus of proving compliance is on the pawnbroker;
- (iii) The pawn agreement must set out the cost associated with the proposed method of sale;
- (iv) Where an unredeemed item is sold on the pawnbroker's premises, the pawnbroker must record the transaction details including the price paid for the goods, the date the goods are sold and the name and address of the person who purchased the goods, if the value of the goods exceed \$50; and
- (v) If the surplus is over a prescribed amount, the pawner must be notified of the surplus (This proposal is discussed in the following section).

These steps will bring New South Wales in line with South Australia, Victoria, the Northern Territory and Western Australia.

At present the audit trail stops when unredeemed goods are sold at public auction. The audit trail would, however, be maintained if unredeemed goods were to be sold by the pawnbroker. This would assist victims of theft and Police in tracking the stolen goods.

There is a potential for consumers to receive a larger loan than would otherwise be the case if only the public auction disposal method was available for the disposal of unredeemed goods. As the costs of a shop sale are lower than sale by public auction there is some scope for consumers to benefit from a lower interest charge or a greater surplus after costs and the outstanding debt has been met. By allowing forfeited goods to also be sold at the pawnshop it would assist those pawnbrokers who reported difficulties in using public auctions by providing an alternative.

Competition impact

It is considered that the proposal will have the effect of decreasing administrative costs imposed on pawnbrokers and hence promoting competition. .

Recommendation: Sale of forfeited goods

That pawnbrokers have the option of selling unredeemed goods at either their premises or at auction, provided the following safeguards are put in place:

- i Require the pawnbroker to sell the forfeited goods in a manner conducive to securing the best price reasonably obtainable. However, if the pawnbroker does not comply with this requirement, it is an offence against the Act. If in any proceedings a question arises as to whether a pawnbroker has complied with the requirement, the onus of proving compliance is on the pawnbroker.*
- ii Pawners must be advised at the time of entering into the pawn transaction which disposal method would apply to the item if the item was unredeemed.*
- iii The pawn agreement must set out the cost associated with the proposed method of sale.*
- iv Where an unredeemed item is sold on the pawnbrokers premises, the pawnbroker must record the transaction details including the price paid for the goods, the date the goods are sold and the name and address of the person who purchased the goods, if the value of the goods exceed \$50.*

Surplus proceeds

Currently under section 31 of the Act pledgors may claim the surplus sale proceeds where unredeemed goods have been sold for more than the amount of the loan, less interest and charges reasonably incidental to the sale, within a 12 month period after the sale.

The Issues Paper raised the issue as to whether pawnbrokers should be required to advise customers of any surplus proceeds following the sale of forfeited goods.

Submissions

One submission stated that pawnbrokers should be required to account for surplus funds and send a cheque for any surplus following the sale of the unredeemed goods.

Others indicated that any requirement on pawnbrokers to advise customers of surplus proceeds would be costly, time consuming, onerous, difficult to regulate or enforce and of little benefit. Similarly, one submission was of the view that such a requirement would provide an unfair advantage to the pawner and it would not be commercially viable.

Some Reference Group members remarked that from their experiences there was rarely any surplus to return to the pawner. It was suggested that a pawnbroker should within seven days of a pawner's inquiry provide a written account of the sale of the unredeemed item which itemises the sale price, outstanding principal and interest charges, other reasonable costs and any surplus amount.

Other jurisdictions

WA	<ul style="list-style-type: none"> ▪ Surplus proceeds is recoverable from the pawnbroker as a debt in a court of competent jurisdiction. However, pawnbroker must pay surplus to pawner on demand. ▪ Within 14 days of the sale of unredeemed goods, pawnbrokers must send by pre-paid post to the last known address of the pawner a notice advising the amount of the surplus and that they are entitled to receive that amount. Exceptions to this requirement are: <ul style="list-style-type: none"> (i) where the pawner requests in writing that the pawnbroker not send a notice; or (ii) where the surplus is less than a prescribed amount, currently \$50.
ACT	The pawner has 12 months to recover any surplus which may have resulted from the sale.
QLD	In cases where more than \$40 is lent on forfeited items, surplus proceeds must be paid into a trust account maintained by the pawnbroker. If the surplus is not claimed by the pawner within a 12 month period, the surplus is to be paid to the Public Trustee.
SA	Surplus proceeds is recoverable from the pawnbroker as a debt in a court of competent jurisdiction
TAS	Surplus proceeds is recoverable from the pawnbroker as a debt in a court of competent jurisdiction. However, within prescribed period, pawnbroker must pay surplus to pawner on demand.
NT	<ul style="list-style-type: none"> ▪ Surplus proceeds is recoverable from the pawnbroker as a debt in a court of competent jurisdiction. However, if the surplus is less than \$50, the pawner has only 60 days to demand the surplus. ▪ Within 14 days of the sale of unredeemed goods, pawnbrokers must send by certified mail to the last known address of the pawner a notice advising the amount of the surplus and that they are entitled to receive that amount, within 60 days after the notice is issued. Exceptions to this requirement are: <ul style="list-style-type: none"> (i) where the pawner requests in writing that the pawnbroker not send a notice; or (ii) where the surplus is less than a prescribed amount, currently \$50.

Review's position/comments

The intent of the current arrangement is to protect both the interests of the pawner from unscrupulous profiteering from the sale of unredeemed goods and the interests of the pawnbroker in recovering money still owed in the event of a default on repayments by the pawner.

The Review recommends that pawnbrokers should be required to notify pawners in writing of the surplus proceeds of the sale of the forfeited goods, if the surplus exceeds \$50. The notice should also advise pawners how the proceeds may be collected. This proposal follows the approach taken by Western Australia and the Northern Territory and ensures that the pawners interests are protected. However, as is the case in Western Australia and the Northern Territory, it is proposed that the pawnbroker be exempted from this requirement if the pawner has elected in writing that they not be notified of any surplus. Such an exemption overcomes concerns some customers may have about pawnbrokers contacting them at their home address.

Given that the Act already provides the pawner with the right to claim surplus proceeds, pawnbrokers would already have in place a system which accounts for this surplus. Existing computerised record keeping systems should assist with any written notification to customers concerning the results of the sale of unredeemed goods.

If the recommendation to allow pawnbrokers to sell forfeited goods in any manner which is conducive to securing the best price reasonably obtainable is endorsed, it then adds additional weight to the proposal that notification of surplus proceeds over a prescribed amount should be provided so as to ensure consumers are better informed and protected from unscrupulous dealers.

It is anticipated that this requirement will have a minimum impact of pawnbrokers given that a number of industry Reference Group members have advised that there is rarely any surplus proceeds resulting from the sale of forfeited goods. However, the proposal will provide

pawner's with a substantial benefit, especially in light of the fact that the majority of persons who use pawnbroking services are lower income earners.

Competition impact

The proposal will have the effect of imposing administrative costs on pawnbrokers, however, it is anticipated that the cost will be minimal given that it is not often that a surplus of more than \$50 results from the sale of unredeemed goods. It is considered that the proposal is of net public benefit to the community as a whole as it will ensure that customers who use pawnbroking services are made aware of any surplus monies (over \$50) they are entitled to as a result of the pawnbroker selling their goods.

Recommendation: Surplus proceeds

- (1) That within 14 days of the sale of the unredeemed goods, where a surplus of more than \$50 has resulted, the pawnbroker be required to notify the pawner of the surplus, by way of registered post.*
- (2) Pawnbrokers will be exempted from this requirement if the pawner has elected in writing that they not be notified of any surplus.*

Other issues of concern

Disposal of pawned goods when licensee surrenders or does not renew licence etc

The Act currently provides, pursuant to section 33, that if a court revokes or suspends a pawnbroker's licence, the court may make such orders as it sees fit in relation to the redemption of the pawned goods. Similarly, section 36 provides that where the Director-General of the Department of Fair Trading revokes or suspends a pawnbrokers licence (by way of a show cause notice), the Director-General may make such orders as he/she sees fit in relation to the redemption of the pawned goods.

However, the Act does not make provision as to what happens to pawned goods in cases where pawnbrokers do not renew or surrender their licences. Accordingly, the rights of pawners attempting to redeem their goods in such circumstance is unclear.

Some other Australian States deal with these issues in the following ways:

QLD	Where licence has been refused or cancelled, a person can make an application to the court, for the court to make such orders with respect to the disposal of pawned goods as the court thinks fit
WA	If person is unable to redeem goods because pawnbrokers licence has been revoked, suspended or not renewed, a court may, on the application of any person, make such orders as the court thinks fit for the purposes of redeeming the goods.
NT	Where a pawnbroker sells or transfers the business to another person, the rights and obligations of the pawnbroker in relation to each pawn ticket issued are transferred to that person. The pawnbroker must notify each pawn ticket holder of the transfer. If person is unable to redeem goods because pawnbrokers licence has been revoked, suspended or not renewed, a court may, on the application of any person, make such orders as the court thinks fit for the purposes of redeeming the goods.

Competition impact

It is anticipated that this proposal will not have an impact on competition.

Recommendation: Disposal of pawned goods

- (1) Where a pawnbroker sells or transfers the business to another person, the rights and obligations of the pawnbroker in relation to each pawn ticket issued are transferred to that person. The pawnbroker must notify each pawn ticket holder of the transfer (or the pawnbroker who has assumed the rights).*
- (2) That the Act make provision for the disposal of unredeemed goods in cases where the licence has been surrendered or not renewed.*

Pawnbrokers to physically retain pawned goods

Departmental legal advice indicates that the current wording of the Act does not expressly or impliedly require pawnbrokers to retain physical possession of pawned goods during the redemption period. Accordingly, at present, pawnbrokers are not in breach of the Act if they allow the pawner to maintain possession of the pawned item through the redemption period, as they are still considered to be in legal possession of the item.

The Review considers that by allowing the pawner to maintain possession of the pawned item the effectiveness of the legislation is undermined as it makes it very difficult for the goods to be traced.

It is noted that the Western Australian legislation requires pawned goods to be kept at the business or storage premises to which the licence applies until the redemption period expires.

Competition impact

It is anticipated that this proposal will not have an impact on competition given that nearly all pawnbrokers retain physical possession of pawned goods

Recommendation: Other issues of concern

To amend the Act to clarify that pawned goods are to be kept at the business or storage premises to which the licence applies until the redemption period expires.

6.9 Disciplinary Procedures and Compliance

Under section 33 of the Act the Director-General of the Department of Fair Trading may serve a notice on a licensee requiring the licensee to show cause, within a time not less than 14 days, why the licensee's licence should not be revoked if the licensee, among other things:

- has been convicted of an offence involving dishonesty in relation to the licensed business;
- has been convicted of an offence against the Act;
- becomes bankrupt; or
- fails to comply with a condition of their licence.

Section 36(1) provides that if, after undertaking such inquiry and investigation as the Director-General sees fit, the Director-General is satisfied, on the balance of probabilities, that the ground of a notice has been substantiated, the Director-General may:

- (a) revoke or suspend the licence for a period of time;
- (b) attach one or more conditions to it;
- (c) determine that the licence is not to be renewed or granted unless one or more conditions are attached to it on grant or renewal.

Where such action has been taken against a licence, the licensee may apply to the Administrative Decisions Tribunal for a review of the action.

Review's comments/position

The Act sets out a disciplinary system which aims at effectively protecting the public whilst providing essential protections, including appeal rights to the licensee whose livelihood may be at risk. The show cause provisions of the Act provide a mechanism whereby licensees who engage in unscrupulous activities may be prevented from operating their business. This promotes standards of conduct in the industries to ensure consumer confidence and minimise illegal activity.

To enhance the Act's objectives, the Review considers that it is appropriate to amend the Act for the purpose of providing that the Director-General may serve a show cause notice:

- (a) on a licensee, who has (or whose employee has) contravened a provision of the Act or the regulations (whether or not the person has been prosecuted or convicted of an offence in respect of the contravention). This proposal makes the Act more consistent with other licensing regimes administered by the Department of Fair Trading, such as the Motor Dealers Act, the Travel Agents Act and the Home Building Act.
- (b) on a licensee, who is (or whose employee is) convicted of an offence involving dishonesty since the licence was issued or last renewed. The Act currently only provides that a notice may be served if the licensee has been convicted of an offence involving dishonesty *in relation to the licensed business*. However, the Review considers that it is appropriate to extend this to cases where the licensee commits an offence involving dishonesty which is

unrelated to the licensed business, as such conduct demonstrates that the licensee is unsuitable to continue to hold a licence. This proposal is consistent with the current provisions contained in the Act which provide that a person is disqualified from holding a licence if they have convicted of an offence involving dishonesty within the last 10 years.

In addition to the above recommendation, the opportunity is taken to clarify a notice to show cause provision based on Departmental legal advice. As currently drafted, it is unclear as to whether the Director-General has the discretion, upon being satisfied that a ground of a notice has been substantiated, to determine to take no further action in relation to a matter. Presently, it is arguable that the Director-General must take one of the actions against the licence set out in section 36(1) (a), (b) and (c). It is considered appropriate that the Director-General be given a wide discretion in relation to disciplinary action which may be taken against a licence.

The operation of the Act has highlighted an inconsistency in the legislation whereby current and former licence holders are not subject to the same disciplinary provisions. Consequently the Review recommends that the legislation be amended to ensure that show cause notices can be served to “former licensees” as well as to current licence holders. A “former licensee” is a person who, in the last 12 months, has held a licence under the Pawnbrokers and Second-Hand Dealers Act 1996 or has been a director or secretary of a corporation that, within the period, has held a licence under the Pawnbrokers and Second-Hand Dealers Act 1996. This will ensure that both current and former licence holders are subject to the same disciplinary procedures

Finally, the Review considers that there is currently a gap in the Act which needs to be addressed in relation to offences by a corporate licensee. As is the case in other acts administered by the Department of Fair Trading, such as the Motor Dealers Act, the Travel Agents Act and the Property, Stock and Business Agents Act, the Act should provide, in effect, that if a corporation contravenes any provision of the Act or regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention. This proposal will ensure that directors and persons who are concerned in managing the corporation are also made liable for breaches of the legislation by the corporation.

Competition impact

It is considered that the proposals to widen the grounds for the serving of show cause notices and to provide for prosecution action against directors/persons concerned in the management of the corporation will provide a net public benefit to the community as a whole as it will help to ensure that only suitable persons are involved in the industries. The proposal making clear that the Director-General has discretion to determine to take no further action in relation to a matter will not have an impact on competition.

Recommendation: Disciplinary provisions

- (1) Provide that the Director-General may serve a show cause notice:*
- (a) on a licensee who has (or whose employee has) contravened a provision of the Act or the regulations (whether or not the person has been prosecuted or convicted of an offence in respect of the contravention).*
 - (b) on a licensee, who is (or whose employee is) convicted of an offence involving dishonesty since the licence was issued or last renewed.*

- (c) on a former licensee (a person who in the last 12 months has held a licence under the Act or has been a director or secretary of a corporation that, within the period, has held a licence under the Act).*
- (2) Amend the Act to provide, in effect, that if a corporation contravenes any provision of the Act or regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.*
- (3) Make clear that the Director-General has the discretion to determine to take no further action in relation to a matter (even when satisfied that the grounds contained in a notice to show cause have been substantiated).*

7. Appendices

A List of parties who made submissions

1 Ms K Bozinovska Solicitor Consumer Credit Legal Centre (NSW) Inc	23 Mr & Mrs Barbara & Bill Newman Pastimes Antiques
2 Mrs Robyn Connell	24 Mr Chris Jones 'Juke in the Box'
3 Mr Bryce Gaudry MP Member for Newcastle	25 Mr Robert Herron – Crows Nest Pawn Shop Mr Tim Martin – Chester Hill Loan Office
4 Mr Mark Delahunt The Golden Opportunity Store	26 Mr/s C Wares Coastal Cash and Trade Lake Haven
5 Mr Charles Aronson, Vice-President (Australia) The Australian Antique Dealers' Association	27 Mr Bruce Williams ANZ Computers
6 Ms Diane Tattis, Chairperson Singleton Interagency	28 Mr Colin Furnari
7 Aussie Junk	29 Mr & Mrs Les & Babs Gilbert
8 Mr Wayne Jahnsen Cash Traders Near New Furniture	30 Ms Julie Williams & Mr Malcolm MacKenzie
9 H & M Wholesalers	31 Mr Alec Spiller – Evenpen Pty Ltd Mr Mark Scott – Kale Securities
10 Ms Pamela Grinter Pamela Grinter Antiques	32 Pawnbrokers Association of NSW
11 Mr/s Shadrach Creek	33 Mr R White, Secretary Auctioneers and Valuers Association
12 Mr Andrew Cash Andrew Cash & Co Investments Pty Ltd	34 Mr I Rosen
13 Mr Steve Chalmers Inspector NSW Police Service	35 Mr Martin Tye, Managing Director Revolution CD Pty Ltd
14 Mr Ian Kilpatrick Secretary Cash Converters Franchisees Association NSW (Inc)	36 Mr Rodney Tyson Rod's Collectable Records & CD's
15 Mr Noel Kenny Inverell Books & Bric-a-Brac	37 Mr & Mrs Joe & Houda Daher
16 Ms Narelle Brown Vice President Financial Counsellors' Association of NSW Inc	38 Mr Ian G Drummond, Director/Manager Buckley's Furniture
17 Mr John Damen & Ms Joy O'Farrell Circle Secondhand	39 Coffs Harbour Pawnbrokers P O Box 2013
18 Ms Valda Barton Manager Lake Macquarie Neighbourhood Information Centre Inc	40 Mr Brian J Stokes
19 Mr John Thompson Lismore Book Traders	41 Mr David Foster Munro's Mill Loans Office
20 Mr Michael D Standen	42 Mr Aaron Senes Happy Hockers
21 Mr & Mrs Neil & Patricia Emerton Trish's Trash and Treasures	43 Mr Gordon Carlsen G Holdings Pty Ltd
22 Mr Rodney Atkinson Mudgee Trading Post	44 Mr Brett Howe Managing Director Autoloan
	45 Mr John S Moss The Curiosity Shop
	46 Issues raised at the public meeting

B List of parties consulted

Relevant Industry Organisations

Cash Converters
Boating Industry Association of Australia
Jewellers Association of Australia (NSW State Branch)
The Australian Antique Dealers Association
Auctioneers & Valuers Association of Australia
Australian Finance Conference
Pawnbrokers Association of NSW

Legal Centres and Societies

The Law Society of New South Wales
Law Consumers Association
New South Wales Law Reform Commission
Legal Aid Commission of NSW
Bar Association of NSW
Public Interest Advocacy Centre

Consumer Groups and Societies

Australian Consumers Association
Australian Council of Social Service
NSW Council of Social Services
Australian Council of Social Service
Lifeline (Gamblers Counselling Service)
Salvation Army Moneycare Counselling Service
Society of St Vincent de Paul NSW
Smith Family

Relevant NSW and Interstate Government Agencies

Attorney General's Department, NSW
Director General, Department of Justice, VIC
Office of Fair Trading and Business Affairs, VIC
NSW Small Business Development Corporation
Commercial Agents Squad, Police Department, WA
Office of Consumer Affairs and Fair Trading, NT
SA Police Department
Registrar, Magistrates Court, Civil Law Section, ACT
Office of Fair Trading, QLD

C Terms of reference for the review

The review of the *Pawnbrokers and Second-hand Dealers Act 1996* shall be conducted in accordance with the principles for legislation reviews set out in the Competition Principles Agreement. The guiding principle of the review is that legislation should not restrict competition unless it can be demonstrated that:

- (a) the benefits of the restriction to the community as a whole outweigh the costs, and
- (b) the objectives of the legislation can only be achieved by restricting competition.

Without limiting the scope of the review, the review is to:

- (a) clarify the objectives of the legislation, and their continuing appropriateness
- (b) identify the nature of the restrictive effects on competition
- (c) analyse the likely effect of any identified restriction on competition on the economy generally
- (d) assess and balance the costs and benefits of the restrictions identified, and
- (e) consider alternative means for achieving the same result, including non-legislative approaches.

When considering the matters in 1.3.2. the review should also:

- (a) identify any issues of market failure which need to be, or are being addressed by the legislation, and
- (b) consider whether the effects of the legislation contravene the competitive conduct rules in Part IV of the *Trade Practices Act 1974* (Cth) and the NSW Competition Code.

The review shall consider and take account of relevant regulatory schemes in other Australian jurisdictions, and any recent reforms or reform proposals, including those relating to competition policy in those jurisdictions.

The review will consider the general effectiveness of the legislation and examine issues of concern to consumers and industry.

The review shall consult with and take submissions from consumers, relevant industry associations and other interested parties.

D Key Features of Legislation in other jurisdictions

VICTORIA

Legislation	Industry Coverage	Barriers to entry	Exempted from Act's Operation	Conduct of business
<p><i>Second-hand Dealers and Pawnbrokers Act 1989</i></p> <p><i>Second-hand Dealers and Pawnbrokers Regulations 1997</i></p>	<p><u>PAWNBROKERS</u></p> <ul style="list-style-type: none"> All pawnbrokers <p><u>SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> All persons who deal in second-hand goods which are not exempted under the Act Exempted goods include, clothing, low value cutlery and factory seconds 	<ul style="list-style-type: none"> Need to be registered Registration fees: <ul style="list-style-type: none"> -initial \$110 -renewal \$30 Not convicted of a disqualifying offence within last 5 years Is not a represented person within meaning of the Guardianship and Administration Act Is not an insolvent 	<ul style="list-style-type: none"> Licensed auctioneers Licensed firearms dealer Persons conducting a fundraising appeal Goods subject to a hire-purchase agreement or a bailment Licensed motor car trader (in part) 	<p><u>PAWNBROKERS</u></p> <ul style="list-style-type: none"> Must keep prescribed records Unredeemed goods over \$40 must be sold at public auction <p><u>SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> Must keep prescribed records In general, must hold goods for 7 days after receipt

SOUTH AUSTRALIA

Legislation	Industry Coverage	Barriers to entry	Exempted from Act's Operation	Conduct of business
<p><i>Second-hand Dealers and Pawnbrokers Act 1996</i></p> <p><i>Second-hand Dealers and pawnbrokers Regulations 1998</i></p>	<p><u>PAWNBROKERS</u></p> <ul style="list-style-type: none"> All pawnbrokers <p><u>SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> All persons who deal in second-hand goods 	<ul style="list-style-type: none"> Persons who propose to commence to carry on business as second-hand dealers or pawnbrokers must notify the police at least 1 month prior to so commencing. They must also notify the police of certain particulars Not convicted of offence against the Act or any offence involving dishonesty Not an undischarged bankrupt/insolvent etc Must not have been in possession of stolen goods on at least 3 separate occasions during the previous 12 months 	<p><u>SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> Second-hand market conducted for charitable purposes Licensed dealers in second-hand vehicles are exempted from certain provisions of the Act 	<p><u>PAWNBROKERS</u></p> <ul style="list-style-type: none"> Must keep prescribed records Unredeemed goods must be sold as soon as practicable <p><u>SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> Must keep records for prescribed goods Records not required for goods temporarily returned for repair/maintenance. Reduced recording requirements apply if goods imported into Australia The required records must be made as soon as possible after the goods are bought/received In general, prescribed goods must be held for 10 days after receipt Auctioneers must keep certain records If transaction is by way of phone/fax etc, seller not required to produce prescribed ID

AUSTRALIAN CAPITAL TERRITORY

Legislation	Industry Coverage	Barriers to entry	Exempted from Act's Operation	Conduct of business
<i>Pawnbrokers Act 1984</i> <i>Pawnbrokers Regulation 1994</i>	<ul style="list-style-type: none"> All pawnbrokers 	<ul style="list-style-type: none"> Licence fees: <ul style="list-style-type: none"> -initial \$92 -renewal \$92 Over 18 years Fit and proper person 	<ul style="list-style-type: none"> Advances or loans made by bankers, brokers etc or licensed auctioneers in the ordinary course of mercantile or banking transactions if the interest on any such loans or advances does not exceed the rate of 14% pa. 	<ul style="list-style-type: none"> Must keep prescribed records Unredeemed goods on which \$10 or more was lent, must be sold at public auction
<i>Second-hand Dealers and Collectors Act 1906</i> <i>Second-hand Dealers and Collectors Regulation</i>	<ul style="list-style-type: none"> Persons who deal in certain second-hand goods, including metal, clothes, boots, furniture, tools, jewellery, drapery goods. 	As per above		<ul style="list-style-type: none"> Must keep prescribed records Must hold certain goods for 5 days after receipt

WESTERN AUSTRALIA

Legislation	Industry Coverage	Barriers to entry	Exempted from Act's Operation	Conduct of business
<i>Pawnbrokers and Second-hand Dealers Act 1994</i> <i>Pawnbrokers and Second-hand Dealers Regulations 1996</i>	<p><u>PAWNBROKERS</u></p> <ul style="list-style-type: none"> All pawnbrokers Financial bodies receiving goods under “buy back” contracts are not pawnbrokers <p><u>SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> Dealers in all second-hand goods, except such things as, books, scrap metal, clothes, furniture, household soft furnishings, household decorative goods, kitchenware and collectables 	<ul style="list-style-type: none"> Licence fees (for 1 year) <ul style="list-style-type: none"> - Pawnbrokers licence, \$217 - Second-hand dealers licence <ul style="list-style-type: none"> a) who keep computer records, \$217 b) who don't keep computer records, \$278 - Combined pawnbrokers/ second-hand dealer licence, \$250 Good character/fit and proper person Must place add in newspaper re intention to be licensee No offence involving dishonesty, fraud, stealing, within 5 years 	<ul style="list-style-type: none"> Licensed auctioneers Licensed firearms dealer Licensed motor vehicle dealer 	<p><u>PAWNBROKERS</u></p> <ul style="list-style-type: none"> Must keep prescribed records Is required to keep computer records Unredeemed goods must be sold as soon as practicable Must notify pawner of surplus of the proceeds of the sale <p><u>SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> Must keep prescribed records Not mandatory to keep computer records In general, must hold certain goods for 14 days after receipt Certain requirements to obtain ID are not required if goods are purchased outside WA or at an auction

NORTHERN TERRITORY

Legislation	Industry Coverage	Barriers to entry	Exempted from Act's Operation	Conduct of business
<p><i>Consumer Affairs and Fair Trading Act</i></p> <p><i>Consumer Affairs and Fair Trading (Pawnbrokers and Second-hand Dealers) Regulations</i></p>	<p><u>PAWNBROKERS</u></p> <ul style="list-style-type: none"> • All pawnbrokers • Financial bodies receiving goods under “buy back” contracts are not pawnbrokers <p><u>SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> • All persons who deal in second-hand goods which are not exempt • Exempt goods includes such items as books, scrape metal, clothing and furniture. 	<ul style="list-style-type: none"> • Must satisfy a character test: <ul style="list-style-type: none"> - good character - not have a criminal history of such things as fraud, dishonest or physical violence offences. - of reputable character • Members of the public have opportunity to object to the granting of a licence on specific criteria • Licensee must ensure that during the licence period there is adequate management, supervision and control of the business operations • Second-hand dealer or pawnbrokers licence fees: <ol style="list-style-type: none"> a) Fee on application: <ul style="list-style-type: none"> - Individual \$50, Corporation \$100 b) Fee on grant of licence: <ul style="list-style-type: none"> - 1 year \$150, 2 years \$250, 3 years \$350 • Combined second-hand dealers and pawnbrokers licence fees <ol style="list-style-type: none"> a) Fee on application: <ul style="list-style-type: none"> - Individual \$75, Corporation \$150 b) Fee on grant of licence <ul style="list-style-type: none"> - 1 year \$200, 2 years \$350, 3 years \$450 	<p><u>PAWNBROKERS & SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> • An auctioneer within meaning of Auctioneer Act • A dealer within meaning of Firearms Act • A motor vehicle dealer • A registered corporation, a bank and a financial institution <p><u>SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> • Trade-ins/disposal of goods pursuant to the Uncollected Goods Act • Selling of second-hand parts for motor vehicles 	<p><u>PAWNBROKERS</u></p> <ul style="list-style-type: none"> • Must keep prescribed records • Unredeemed goods must be sold as soon as practicable • Must keep certified photograph of employees • Employees must wear a name badge • Minimum redemption period of 1 month • Unredeemed goods must be sold as soon as practicable so as to receive the best market price reasonably obtainable • Must notify pawner of surplus of the proceeds of the sale <p><u>SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> • Must keep records for prescribed goods • Must keep certified photograph of employees • Employees must wear a name badge • Records not required for goods temporarily returned for repair/maintenance. • Must retain goods for 14 days

TASMANIA

Legislation	Industry Coverage	Barriers to entry	Exempted from Act's Operation	Conduct of business
<p><i>Second-hand Dealers and Pawnbrokers Act 1994</i></p>	<p><u>PAWNBROKERS</u></p> <ul style="list-style-type: none"> • All pawnbrokers <p><u>SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> • Second-hand dealer, is a person who deals in second-hand goods 	<ul style="list-style-type: none"> • Persons who propose to commence to carry on business as second-hand dealers pr pawnbrokers must notify the police at least 1 month prior to so commencing. They must also notify the police of certain particulars • Must be a fit and proper person • Not convicted of offence against the Act or an offence involving dishonesty 	<ul style="list-style-type: none"> • Licensed auctioneers or real estate agents 	<p><u>PAWNBROKERS</u></p> <ul style="list-style-type: none"> • Must keep prescribed records • Redemption period is 6 months • Forfeited goods to be sold at auction unless under prescribed value <p><u>SECOND-HAND DEALERS</u></p> <ul style="list-style-type: none"> • Must keep prescribed records • In general, goods must be retained for 7 days after receipt

QUEENSLAND

Legislation	Industry Coverage	Barriers to entry	Exempted from Act's Operation	Conduct of business
<p><i>Pawnbrokers Act 1984</i></p> <p><i>Pawnbrokers Regulation 1994</i></p>	<ul style="list-style-type: none"> • All pawnbrokers 	<ul style="list-style-type: none"> • Licence fees: -initial \$362 -renewal \$362 • Over 18 years • Not mentally incapacitated • Fit and proper person • Is not a licensed collector • Not convicted of offence involving dealing or selling goods fraudulently or dishonestly, within 5 years 	<ul style="list-style-type: none"> • Advances made by bankers, brokers etc, in the ordinary course of business, on the security of anything taken as a pawn 	<ul style="list-style-type: none"> • Must keep prescribed records • Unredeemed goods over \$40 must be sold at public auction
<p><i>Second-hand Dealers and Collector Act 1984</i></p> <p><i>Second-hand Dealers and Collectors Regulation 1994</i></p>	<ul style="list-style-type: none"> • Dealers or collectors in all second-hand goods, except such things as, books, stamps, goods refunded or exchanged, used video cassettes and tyres. 	<ul style="list-style-type: none"> • Licence fees: -initial \$217 -renewal \$217 • Over 18 years • Not mentally incapacitated • Fit and proper person • Is not a licensed collector • Not convicted of offence involving dealing or selling goods fraudulently or dishonestly, within 5 years 	<ul style="list-style-type: none"> • Charities • licensed auctioneers • licensed motor dealers /motor salespersons • licensed weapons dealers • local governments • person who acquires ownership of new goods and then lets or hires them • registered banking or life insurance co, trustee company, friendly society or building society 	<ul style="list-style-type: none"> • Must keep prescribed records • Must hold certain goods for 7 days after receipt

E Notice to person pawning goods

Redemption of goods

1. You may reclaim goods you have pawned by paying the outstanding amount of the loan and producing to the pawnbroker the pawn ticket and the prescribed identification.
2. You may reclaim the goods at any time before the pawnbroker sells or disposes of them, even if the period of the loan has passed.

Charges

3. The pawnbroker must give you written notice of the charge that will be imposed on the transaction. This charge may not be more than an amount calculated in accordance with the amount displayed in a notice at the business premises, unless-
 - (a) it is reasonable to charge a higher amount because the pawnbroker is likely to incur additional storage costs in relation to the goods being pawned; or
 - (b) it is reasonable to charge a higher amount because the agreement provides for amounts to be paid less frequently than is specified in the displayed notice; or
 - (c) the regulations allow higher amounts to be charged; and
 - (d) the written notice given to you by the pawnbroker states the reason why the higher charge is made; and
 - (e) you agree in writing to the higher charge; and
 - (f) the pawnbroker gives you a copy of the agreement referred to in paragraph (e).

Period of loan and payments

4. The period of a loan commences on the day the goods are pawned.
5. You may pay money to the pawnbroker at any time and the pawnbroker must note your payment on the pawn ticket.

Lost or stolen pawn ticket

6. If your pawn ticket is lost or stolen, and you produce to the pawnbroker a statutory declaration stating that your ticket is lost or stolen and you also produce proof of your identity, the pawnbroker must issue a duplicate pawn ticket.

Sale of unredeemed goods

7. If the period of the loan expires and you have not reclaimed the pawned goods-
 - (a) if the loan is less than \$100, the pawnbroker must offer the goods for sale as soon as possible; or
 - (b) if the loan is \$100 or more, the pawnbroker must send you a notice (unless you have requested the pawnbroker not to send you a notice) stating that the goods will be offered for sale one month after the date appearing on the notice. The pawnbroker will send this notice to your last known address or to an alternative address, if you have given one to the pawnbroker. The pawnbroker must offer the goods for sale as soon as possible after the expiry of one month after the date appearing on the notice.
8. The pawnbroker must offer the goods for sale at the best price reasonably obtainable.
9. The pawnbroker must not buy the goods for himself or herself.

F UK Factsheet – Using a pawnbroker

USING A PAWNBROKER

What are your rights?

What is the procedure to follow?

What can you do if something goes wrong?

Pawnbroking is a simple way of raising money, but it has some disadvantages:

- 1 You may have to pay more interest than you would to a bank or building society
- 2 A pawn-receipt is more significant than a receipt for goods from a shop – and so is losing it
- 3 The price your pawn is sold for may be much less than what it was insured for, or what you thought it was worth
- 4 If the sale of a pawn produces a surplus, this will not automatically come to you – you have to chase it

What does pawning involve?

Making the agreement

When you pawn an item, you leave something valuable (the pawn) as security with the pawnbroker. The pawnbroker will give you a loan and ask you to sign a credit agreement. Do not sign unless you understand all the terms and conditions. The pawnbroker will also give you a pawn-receipt. In most cases the credit agreement and the pawn-receipt are on the same document. Keep it – it proves that you own the item.

Getting the item back

You get your item back (redeem it) by handing over your pawn-receipt and paying what you owe under the agreement. A pawnbroker can refuse to redeem a pawn only if there is good reason, for example if you do not present your pawn-receipt. You normally have six months to redeem an item, but the pawnbroker may agree to a longer period when you make the agreement.

Renewing your loan

If you cannot redeem your item and you do not want it to be sold, the pawnbroker may agree to renew your loan. (You will usually be asked to pay the interest that has built up when you renew.) The pawnbroker must give you another agreement (a modifying agreement), when you renew a loan.

What can go wrong when you pawn something?

You lose your pawn-receipt

If you lose your pawn-receipt, tell the pawnbroker so that no one else will be able to use it. You can get your goods back by paying what you owe and signing a statement that you have lost your pawn-receipt. If you borrowed more than £75, you will have to sign the statement before a Commissioner for Oaths, Justice of the Peace or Notary Public. You can do this before a local solicitor, but you may have to pay a fee.

You cannot redeem the pawn

If you cannot pay what you owe by the deadline and you borrowed £75 or less, the pawnbroker will keep your pawn. If you borrowed more than £75, the pawnbroker can sell the pawn to recover the debt you owe. The pawn is yours until it is sold – and you can still redeem it – but you will have to pay off the loan and you will continue to be charged interest on it until you do.

The pawn is sold

If the item is sold for more than you owe under your agreement, the surplus belongs to you, once the sale costs have been deducted. If, on the other hand, the pawn is sold for less than you owe, you will be liable to pay the difference.

What happens when the pawn is sold?

If you borrowed more than £100, the pawnbroker must write to you 14 days before the sale, and tell you:

- the asking price for the item;
- when, how and where it will be sold.

If you borrowed more than £75, the pawnbroker must tell you, within 20 working days, the price for which an item was sold, and the sale costs. The pawnbroker must pay you any surplus from a sale promptly. You can claim interest otherwise. The surplus will not automatically come to you – you will have to chase it.

What if you have a complaint?

If you are unhappy with the price

If you think that the price the pawn fetched was too low or the sale costs too high, speak to the pawnbroker. You should remember, though, that the second-hand value of goods, even jewellery, is generally much less than the price of new items and less than what they may be insured for. If the pawn was sold at public auction, the courts are likely to consider the price it fetched fair, however low this may be.

If you want to go to court

If you are still not satisfied, you can challenge the pawnbroker in court using the small claims procedure, which is designed for claims of up to £5,000 (£750 in Scotland). It is informal and easy to use: you do not have to go to a solicitor. The pawnbroker will have to prove that the price was fair and the sale costs reasonable. Even if you lose, only very limited costs can be awarded against you in a small claims court.

Are there rules to protect you when you pawn an item?

Pawnbrokers must have consumer credit licences from the Office of Fair Trading. They must use standard documents and follow strict procedures. The rules differ slightly if you borrow more than £75.

What the courts can decide

If the pawnbroker keeps your pawn without good reason, the courts may grant you compensation (in England, Wales and Northern Ireland) or order it to be returned (in Scotland). The courts can also decide what they think is a suitable price for an item. The courts can instruct a pawnbroker to pay any interest on the surplus from a sale – if the pawnbroker has not handed this over promptly.

Where can you find advice and help?

If you are uncertain about anything to do with your pawn agreement, you can get advice from your local Citizens Advice Bureau or the Trading Standards department of your local council. Your local Citizens Advice Bureau or consumer advice centre will give you leaflets explaining court procedure and help in filling in the forms. Leaflets are also available from any County Court (Sheriff Court in Scotland).

Where you can find these organisations

Citizens Advice Bureaux and consumer advice centres are listed in the telephone book, as are County Courts and Sheriff Courts. Trading Standards departments (or consumer protection departments) are listed in the telephone book under your local council.

What else do pawnbrokers do?

Sale and buy-back

Some lenders (including some pawnbrokers) offer sale and buy-back schemes. With pawnbroking, the goods remain your property until you redeem them or they are sold by the lender. Under a sale and buy-back agreement, you actually sell the goods to the lender. You have the option of buying them back (at a higher price

agreed with the lender) within a short period of time, eg. six weeks. However, you do not have the same rights and protection under sale and buy-back as you do under pawnbroking. Instead of buying the goods back in one go, you may be able to arrange with the lender to buy them back in instalments. This is often called a 'set aside' or 'lay by' scheme. Under this agreement the goods belong to the lender until all the repayments have been made. With both these schemes it is up to the customer to agree terms with the lender. There are fewer regulations covering these schemes and you have more rights and protection under a pawnbroking agreement.

Unfamiliar terms

The pawn

An item of value which you leave as security with the pawnbroker in return for a loan.
When you pay off the loan and the charges you get the item back.

Redeeming

You can get your item back at any time by giving back your pawn-receipt and paying what you owe under the agreement.

Renewal

When the pawnbroker gives you more time to pay off your loan.

Realisation

When the pawnbroker sells your pawn to recover a debt you cannot pay.

Redemption period

The period during which you can redeem your pawn.