



**Submission by the
Financial Rights Legal Centre**

NSW Fair Trading

Regulatory Impact Statement, Pawnbrokers and
Second-hand Dealer Regulation 2020, July 2020

28 July 2020

About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took over to 22000 calls for advice or assistance during the 20182019 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

For Financial Rights Legal Centre submissions and publications go to www.financialrights.org.au/submission/ or www.financialrights.org.au/publication/

Or sign up to our E-flyer at www.financialrights.org.au

National Debt Helpline 1800 007 007

Insurance Law Service 1300 663 464

Mob Strong Debt Help 1800 808 488

Monday – Friday 9.30am-4.30pm

Introduction

Thank you for the opportunity to comment on the draft Pawnbrokers and Second-hand Dealers Regulation 2020 and the accompanying Regulatory Impact Statement.

Missed opportunity to adequately protect consumers

Financial Rights' biggest concern with the proposed draft Regulation is that this review of the legislation is a missed opportunity to adequately protect consumers, especially vulnerable consumers. The primary objective of the proposed regulation appears to relate only to preventing the sale of stolen goods, even though the NSW Department of Customer Service claims it should also be to protect consumers who enter into pawn agreements.¹ There is almost no attention given to preventing other unscrupulous business practices towards consumers that have pawned, and hope to reclaim their own goods. Consumer protection improvements in the 2020 draft Regulation are negligible to non-existent.

During the current unprecedented economic downturn, the most vulnerable people in our community will be turning to non-traditional forms of credit when formal Government support streams are closed. Now is the time to ensure those people are not exploited by unscrupulous pawnbrokers and second-hand dealers.

General information and perspectives about credit provided by pawnbrokers

Pawnbroking is essentially the provision of secured credit, involving charges of interest and various fees. Yet it is under-regulated compared to all other forms of credit.

It is primarily the most vulnerable and disadvantaged members of the community that access loans from pawnbrokers, who are considered an option of last resort when consumers cannot access mainstream credit, borrow from friends or family or obtain food or electricity vouchers.

Consumers facing increasing unemployment and underemployment during this economic crisis are open to exploitation by pawnbrokers. Financial Rights receives calls from consumers who cannot afford to pay immediate living expenses such as food and utility bills and are turning to pawnbrokers for short-term loans. The Australian Bureau of Statistics

¹ The National Tribune, 7 July 2020 "Pawnbrokers and second-hand Dealers regulation undergoes review": <https://www.nationaltribune.com.au/pawnbrokers-and-second-hand-dealers-regulation-undergoes-review/>

uses the incidence of pawnbroking or sale of possessions as one of its nine indicators of financial stress.²

Pawnbroking is often exploitative, and involves extremely high interest rates, fees and other set-up charges. In Financial Rights' experience, pawnbroking contracts often charge interest rates exceeding 20% per month, with some exceeding over 80% per month. This is high compared, for example, to the nationally legislated cap for small amount loans under National Consumer Credit Protection Act (Cth) 2009 (the NCCP Act) of 20% establishment fee and 4% per month³It is significantly higher than the 48% interest rate cap that formerly applied in NSW for other types of consumer credit (and now applied nationally for larger loans).

Callers to our service often report having pawned items which are valued significantly above the value of the loan, and/or have significant sentimental value (such as heirloom jewellery). This puts them in a position of paying the amount of the loan many times over through repeated extensions in an attempt to prevent the sale of these items because they cannot afford to redeem them. When these efforts are nonetheless futile and the goods are sold, they may also be deprived of the difference in value as the case studies below demonstrate. This is, at its heart, an outrageously unfair bargain, made possible by the combined effects of:

- No limits on the cost of credit;
- No requirement to consider capacity to pay back the loan;
- No rights to vary the contract on the grounds of hardship without incurring additional charges;
- Poor regulation of documentation and rights to obtain copies of documentation;
- Ineffective rights in relation to being notified of a surplus; and
- No access to free & impartial dispute resolution.

While there may be risks inherent in lending to low income and disadvantaged groups, pawnbroking is a form of secured credit and the pawnbroker takes possession of the pledged item before handing over any money. Added to this is the consumer's heightened position of financial fragility and vulnerability, since pawning personal items is often an action of last resort. The bargaining power will always rest behind the counter. This appears to place

² *Household Expenditure Survey and Survey of Income and Housing*, ABS 6503.0, 2015-2016; published 13/09/2017. Available at: <https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6530.0Main%20Features72015-16?opendocument&tabname=Summary&prodno=6530.0&issue=2015-16&num=&view=>

³ This is equivalent to an annual interest rate of between 100% and over 400% depending on the term of the loan - The Debt Trap How pay day lending is costing Australians, p6, https://consumeraction.org.au/wp-content/uploads/2019/11/Payday-Lending-Report_FINAL_UPDATED_WEB-1.pdf

pawnbrokers in a more favourable position than that of payday lenders, who have similar customer bases but are subject to all the requirements of the NCCP Act.

Pawnbroking is under-regulated compared to all other forms of credit. There is a risk of downward drift of predatory operators away from other types of credit and into pawnbroking.

This submission will comment on the following questions from the Regulatory Impact Statement:

- Question 10 – Display requirements
- Questions 13 & 14 – Proceeds of sale
- Question 23 – Information in and form of pawn ticket
- Question 24 – Do any of the regulation making powers that are not included in the proposed Regulation need to be used, and if so, why?
- Question 25 – Other issues not raised in this RIS

Specific Responses to Regulatory Impact Statement

Updated display requirements (Question 10)

Do the rules for displaying signs balance the flexibility for licensees and protecting the public? If not, what could be changed?

No, the proposed rules provide almost unlimited flexibility for licensees without adequately considering the needs of the public.

The proposed Regulation removes the current requirements to display signs using specific colours, fonts and sizes and instead says licensees must have signs that are “clearly legible”. While we have no objection to removing the specific requirements for colour and font, we believe the Regulation needs to at least set a minimum size of the font, otherwise what is ‘legible’ will become too subjective, and prone to abuse. We are concerned that if the Regulation just says “legible” then the font size may be decreased until it becomes too easy for vulnerable people to miss and thus becomes meaningless.

In addition we would also support licensees providing licence details and notice requirements in section 32 of the Act directly to customers via email.

Minimum font size requirement should also be set in the Regulation in relation to s28(5) of the Act (“An accurate and legible copy (a "pawn ticket") of any such record must be given to the person who pawned the goods at the time the record is made.”).

Recommendations

1. The Draft Regulation should continue to set a minimum size for notice displays, as well as require this information being provided directly to customers via email; and
 2. Minimum font size requirement should be set in the Regulation in relation to s28(5) of the Act, relating to the pawn ticket.
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Proceeds of Sale (Question 13 & 14)

Is the proposed threshold of \$75 appropriate? If not, what should it be?

Do customers understand that they are entitled to claim any surplus proceeds of sale? What types of fees and charges are typically deducted?

No, raising the threshold when pawnbrokers no longer need to notify customers regarding the proceeds of the sale of their goods to \$75 is not appropriate. This amount is significant for low-income and disadvantaged people, and can often be the difference between whether a person has adequate food or clothing. There is no reason in principle why a pawnbroker should be entitled to retain the surplus, regardless of how “small” it may appear. In the second reading speech for the Bill that introduced s31A, the Minister for Fair Trading said that “A person who has pawned goods for a lesser value than their worth but is unable to redeem those goods is entitled to any surplus proceeds from a sale of those goods” and described that entitlement as a “right”.⁴ There is also no reason in principle why the surplus amount should be adjusted upwards for inflation. This is particularly so given pawnbrokers were relieved of the requirement to use registered post in 2002, decreasing the costs of notification.⁵ At most, the relevant consideration is whether there is a threshold below which the cost of notifying customers exceeds the surplus available, or would impose an unacceptable burden on the pawnbroking business. We believe the threshold should only be \$25; although acknowledge this cannot be done by regulation (given s31A(2)(b) already specifies a \$50 threshold).

Financial Rights also does not believe customers understand that they are entitled to claim any surplus proceeds of sale, and they are extremely disadvantaged by the common practice of being forced to opt-out of the required notice at Section 31A of the Act.

Section 31A(2)(a) of the Act allows pawnbrokers not to have to send a notice to the consumer advising that there is a surplus if the consumer has made a written request that they not be notified if there is a surplus. Financial Rights has seen contracts where there is a fine print clause

⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 October 2002, 6184 (John Aquilina, Minister for Fair Trading).

⁵ *Fair Trading Legislation Amendment (Reform) Act 2018*, Schedule 7, item 7.11.

written into the pawn agreement to say that the consumer doesn't want to be notified in the event of any surplus. This term is inserted as a standard, non-negotiable term of the pawn agreement, designed, in our opinion, to circumvent s31(A) of the Act and the requirement to notify consumers of a surplus (*see Case Study below*). We submit that this is unfair and a misrepresentation of the consumer's rights. Surely a fine print statement at the bottom of the pawn agreement cannot be considered a 'request' within the meaning of 31A(2)(a) of the Act. Further, we submit that being notified of a surplus is such a fundamental right under the contract, and the bargaining power of the borrower so likely to be poor, that there should be no contracting out of this obligation even by something could be fairly construed as a "written request".

Furthermore, where the consumer has signed to contract out of getting back any surplus, section s31A of the current legislation does not appear to require the pawnbroker to notify the consumer of this surplus. This lack of transparency assists to shield the pawnbroker from the consumer making a claim for unfair practices. For this reason (i.e. because most pawnbrokers simply do not notify their customers of any surplus), Financial Rights is not in a position to comment on the types of fees and charges typically deducted – we have encountered no instances where a customer was actually given an account of how any surplus proceeds were applied.

Case study – Janice's story

Janice pawned her wedding ring, engagement ring and eternity ring at a pawnbroker in early 2020 for \$500 and agreed to pay \$1250 to get them back. She had pawned these rings a few times previously when she needed some money for things like school expenses and she always got them back since she wanted to keep them.

Janice said she knew she had 3 months to redeem them and on other occasions if she was short of money near the 3 months she contacted them and they gave her some more time. This time Janice contacted the pawnbroker just after the 3 months and they told her it was ok and she had another 3 weeks to get them. In the past when she got extensions the pawnbroker would text her, but that did not happen this time. Janice was not able to come to the shop in person because she was home-schooling and self-isolating with her kids.

About a month later she called the pawnbroker and was told the rings were going to retail to be sold for \$3000 and the rings were in the safe. Janice said she has a formal valuation of the three rings for \$15,000. Janice made it clear to the pawnbroker that this week she would be able to pay all the money due to reclaim the rings. Unfortunately, when she called the pawnbroker a few days later she was told the rings had been sent to a jeweler to get the diamond removed and melt the gold. It was all already in progress.

Janice complained that she was not informed about this and they said she signed a form that says she doesn't want to be notified of any sale. Janice says she has pawned the rings before and knows the forms and did not agree to this clause. Janice has no written proof about the extension of time the pawnbroker offered her even though she relied on the conversation she had with them.

Source: C207332

Finally we believe the requirement at 31A(1) to send a notice informing a person of the surplus proceeds of a sale “by post to the last known address of the person who pawned the goods” is terribly inadequate in this day and age. Those consumers regularly using pawnbrokers are likely to be a transient population. The Act should require pawnbrokers to take mobile numbers and e-mails and notify the person who pawned the goods by all possible methods. This is not onerous or costly.

Unfortunately we do not believe these broader issues can be properly resolved within the Regulation, but will instead require amendments to Section 31A of the *Pawnbrokers and Second-Hand Dealers Act 1996*. In the interests of attempting to ameliorate these issues pending legislative reform, we have also suggested some regulatory action – but these suggestions should not be taken as indicating we consider anything short of legislative change is required.

Recommendations

3. Section 31A of the *Pawnbrokers and Second-Hand Dealers Act 1996* should be amended to ensure that:
 - a) consumers are advised of a surplus (s31(2) (a) should be repealed),
 - b) notice of surplus is given through multiple means of communication including SMS and email; and
 - c) the notice threshold be lowered to \$25.
4. Pending legislative reform:
 - a) Clause 22(2) of the Draft Regulation (made pursuant to s28(2)(f)) should be amended by inserting an additional paragraph (d) a to the following effect:

If the agreement by which goods are pawned contains a provision purporting to be a request to the pawnbroker not to send a notice under subsection 31A of the Act—a prominent statement that the owner of the goods cannot by law be forced to make that request, and can withdraw it at any time up to and including the date of sale of the goods.

- b) There should be no regulation made pursuant to s31A(2)(b); that is, that the surplus proceeds notification threshold remains \$50.⁶
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Information in and form of pawn ticket (Question 23)

Is the information disclosed to consumers enough for them to make informed decisions? Is it presented in a way that is easy to understand?

Financial Rights has consistently seen pawnbrokers failing to give clients Form 2 in Schedule 1 of the Regulation, as required. This failure could be resolved through better enforcement and access to external dispute resolution (*see Answer to Question 25 below*).

In addition to this requirement to give the Form 2, disclosure in the pawn agreements and extending agreements should be clearer, especially regarding fees and interest.

Financial Rights is concerned that consumers do not understand the true cost of the credit they are obtaining. Pawn agreements brought to Financial Rights by clients most often do not clearly explain the fees and charges payable. Most contain brief, fine print, poorly set out, jumbled together and difficult to understand. There is no clear tabular form to explain the true cost of the credit. This is at odds with research in relation to best practice in conveying cost of credit information. Similarly, disclosures on extending agreements are scant and often incomprehensible.

The regulations relating to disclosures pursuant to ss 28 and 29A of the Act should be augmented to require disclosures, in tabular form in monetary amounts. It is critical that consumers get an indication as to the total amount that needs to be repaid at conclusion of the Redemption Period to recover the goods.

Adding some disclosures in tabular form within each actual pawn agreement and extending agreement would make things a whole lot clearer for consumers.

Form 5 of the *National Consumer Credit Protection Regulations* (the NCCP Regulations) may make a good reference point as a starting point for developing better disclosure requirements in the Regulations. Financial Rights recommends additional disclosure requirements as follows

1. In the first stage of the pawn transaction, to enable consumers to know how much the credit will cost them, and to know what they will need to pay to recover the goods, the pawn agreement should spell out the total amount of the following, in monetary terms (not just in percentage terms):

⁶ It may be possible to achieve a threshold lower than the \$50 designated in the Act through the Regulations. The Act at s31A(2)(b) states “the amount that may be claimed is less than \$50 or such **other amount** as may be prescribed instead” (**emphasis added**). This should be investigated.

- The interest payable in dollar and cents; plus
- the total loan amount; plus
- any fees.

All of these fees and interest charges are ascertainable at the commencement of the pawn. This total sum should be given to the consumer on the pawn ticket in a format that the consumer will understand.

2. In the second stage (renewing stage), the extending agreement(s) should spell out, in monetary terms, the total amount of the following:
 - how much interest will be charged for the new redemption period (in dollars and cents); plus
 - any outstanding amount on the initial loan; plus
 - any fees.

This total sum should make it clear to the consumer how much money they will need to recover their goods at the end of the new redemption dates. There should also be a requirement to give a Statement of Account to the customer at each renewal stage which will advise them in writing as to how much money they've already paid to the pawnbroker.

The disclosure requirements should also include an obligation for pawnbrokers, both by way of prominent signs in-store and in writing on the pawn agreement and extending agreements, to advise the consumer of other options for short-term financial support and to advise the consumer where he or she can go for free financial counselling or legal advice in case of financial hardship. Schedule 7 and 9 of the NCCP Regulations provide examples.

Recommendations

5. Regulations relating to disclosures pursuant to ss 28 and 29A of the Act should be amended to require disclosures in tabular form in monetary amounts, as outlined above;
 6. Further disclosure requirements should include an obligation to advise the consumer of other options for short-term financial assistance and to advise the consumer where he or she can go for assistance in case of financial hardship.
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Use of other regulation making powers (Question 24)

External Dispute Resolution (regulation making power s11/ss43 and 29B)

Financial Rights considers the compulsory membership of pawnbrokers in an external dispute resolution scheme to be the most critical omission in the pawnbroking regulatory regime. We believe this omission can be rectified under the Regulations by changing pawnbroker licensing conditions.

Pursuant to s11(2) of the Pawnbrokers and Second-hand Dealers Act (the Act), the Regulations have the power to, and should, make provision for the imposition of a condition at the grant or renewal of a licence that pawnbroking licensees:

- A. Have an internal dispute resolution procedure; and
- B. Be a member of an approved external dispute resolution scheme (EDR).

This is similar to the requirement in s47 of the *National Consumer Credit Protection Act* (NCCP Act).

The lack of compulsory membership of an External Dispute Resolution (EDR) scheme, such as the Australian Financial Complaints authority is a significant omission in the pawnbroking licensing requirements and should be rectified as a matter of urgency. EDR schemes provide free, independent dispute resolution services to all consumers of other types of credit contracts covered by the National Credit Code (being Schedule 1 of that NCCP Act) (the NCC). All participants in the loan provision and advice process, ranging from the credit provider to brokers and mortgage managers are required to be a member of an ASIC-approved EDR scheme under the NCCP Act. Pawnbrokers' customers are covered by the unjust contract provisions of the NCC but are deprived of the opportunity to pursue their valid complaints under these provisions in an EDR scheme. It is vital that pawnbroking contracts be brought into line with other types of consumer credit contracts and that membership of an EDR scheme become a condition of license under the Regulations.

The efficacy of regulations that protect consumers in their applications for any form of consumer credit depends strongly on the availability and accessibility of dispute resolution avenues. Pawnbrokers' customers are most often the most vulnerable consumers, without resources, capacity or will to commence action in a court or tribunal. The few rights that borrowers do have under the current legislation, such as the obligation on the pawnbroker to sell the goods at the best price reasonably obtainable (s30), are ineffective without an accessible jurisdiction in which to enforce them. EDR schemes are particularly important for the low-income and/or disadvantaged consumers. These consumers do not have the resources, capacity or will to commence action in a court or tribunal and without access to EDR schemes they are deprived of the opportunity to pursue a valid complaint. Further, in our experience solicitors from community legal centre and legal aid who might otherwise be able to assist such borrowers are not guaranteed to be given leave to appear in NCAT.

Case study – Sam’s story

Sam pawned his car for a \$1500 loan. The car is worth about \$8000. The terms of the agreement were confusing and Sam didn’t realise he was being charged 300% interest per annum (\$400 per month). Each time Sam came in to make a payment they also extended the redemption period meaning he is potentially liable for \$3600 interest when the agreement expires. Sam could never afford the pawn contract and he doesn’t have the funds to pay the full amount owed now so it is continuing to accrue interest. Sam reached out to a community lawyer for help getting his car back but the pawnbroker refused to even talk to the lawyer. The community lawyer looked into whether a case for unjustness could be brought in NCAT, but the website seems to say NCAT only deals with pawnbroking matters where there is a claim of right over stolen goods.

After consulting with Financial Rights the community lawyer concluded that pawns probably do fall under the general division of NCAT, but if she wants to run an unjustness argument under the National Credit Code it would need to be through the Federal Court. If she wants to complain about breaches of the pawnbroking legislation it would need to be in the commercial division of NCAT. The confusion and jurisdictional complexity left the community lawyer deciding the best solution is to just try to settle the matter directly with the pawnbroker, even though he is being uncooperative. There is no way Sam could resolve this dispute unassisted.

Source: C141488

Case study – Jolene’s story

Jolene pawned about 15 items of jewellery for \$3000. Jolene paid the pawnbroker about \$500 a month for eight months to prevent her items from being sold. After the three-month redemption period ended, some items were sold but the pawnbroker verbally said they would extend the period for the remaining items, although this was never put in writing. Jolene continued to pay \$500 a month in interest payments, paying more than \$4000 in total. Jolene’s only income is a carer’s benefit form Centrelink and she has recently moved into government housing. Jolene was never able to afford the pawn contracts without substantial difficulty and she had no ability to negotiate the terms of the pawn at the time giving her a good argument for unjustness, but the only way she can raise the issue of unjustness is to take the pawnbroker to the tribunal. Jolene is very vulnerable and not capable to taking her case to the tribunal without assistance.

Source: C87900

Such a cases illustrate the urgent need for EDR membership to be a condition of pawnbroking licensing. Each of these cases could have been more expeditiously dealt with in EDR, without such wasted resources or consumer stress.

We were recently involved in a matter involving a lender who provides both consumer credit and traditional pawn broking services. The lender was a member of an EDR scheme as a result of its obligations as an Australian Credit License holder. We achieved a successful settlement in the matter but the lender has since withdrawn its pawn broking arm from EDR membership.

In addition to membership of EDR providing safeguards and remedies for consumers, an EDR scheme would also prevent credit providers who do not want to be held up to the scrutiny of an independent EDR scheme drifting into the pawn broking industry. It is imperative that all pawnbrokers must be required to be a member of an ASIC-approved EDR scheme in order to ensure uniform and effective regulation of this industry as a whole. If one segment of the industry is under-regulated there is a real risk that other players will find ways to frame their services in ways that 'fit' the gaps where there is a lack of supervision. Anecdotally, we have heard many stories from consumers who were knocked back from a regulated credit contract to be referred to or directed to the pawnbroking entity that was co-located within the premises (See Maxine's Case Study below).

If requiring membership of a free-standing EDR scheme is unpalatable or impracticable for some reason (which as currently advised Financial Rights does not accept), then a binding dispute resolution process within NSW Fair Trading should be established with respect to pawnbrokers, to ensure there is a free and independent forum for consumers to exercise their rights. Such a process could be modelled on the NSW Fair Trading consumer guarantee directions process established under Schedule 3 of the *Fair Trading Act 1987*. Such a process could be established pursuant to the regulation making powers under ss43(1) of the Act and 29B(1)(b) of the Act. Although, we must note that we have concerns about the potential lack of transparency of such a process. We would expect to see published decisions and clear guidance on how NSW Fair Trading would ensure procedural fairness in circumstances of a vulnerable consumer.

As to s43(1), we submit that establishment of such a process is necessary and convenient to carry out and give effect to the Act; in particular ensuring that only fit and proper persons (being persons who, inter alia, do not enter into unjust contracts with customers) hold pawnbroking licences: s8(1)(b). As to s29B(1)(b), Financial Rights submits that the regulations could provide for the variation of a pawn agreement in accordance with a direction made by the Secretary, pursuant to such a dispute resolution process, to remedy any agreement found by the Secretary to have been unjust in the circumstances relating to it at the time it was entered (by reference to the criteria in s76 the NCC).

Recommendations

7. Compulsory membership in an external dispute resolution scheme should be introduced as a matter of urgency. This could be done through:
 - a) Requiring membership of a scheme as a condition of all licences pursuant to s11 of the Act; or
 - b) Establishing a binding dispute resolution process within NSW Fair Trading to independently resolve disputes between consumers and pawnbrokers, pursuant to s43(1) and s29B(1)(b) of the Act.
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Provision of documents (regulation making power s43(1)(a))

Section 43(1)(a) of the Act provides for the making of regulations with respect to the rights and obligations of the parties and the procedure to be followed when pawn tickets are lost, stolen or destroyed. Financial Rights and its clients have encountered significant difficulty in obtaining basic documentation from pawnbrokers. In the absence of that documentation, it is difficult for customers to obtain advice about, much less enforce, their rights.

Regulations should be made obliging a pawnbroker to furnish from their records a copy (clearly marked as a copy) of the pawn ticket and any information or statements provided with that ticket at the time of issue, to any consumer who has lost their ticket, within 7 days of being notified by the consumer that the ticket has been lost. That obligation would be subject to compliance by the customer with the identification and ownership requirements prescribed for redemption without a pawn ticket pursuant to s29 of the Act and clause 24 of the Draft Regulation. Such a requirement would impose minimal burden on pawnbrokers, as they are already obliged to retain such records pursuant to s28 of the Act.

Case study – Luther’s story

Luther pawned two work vehicles for \$5000 and \$10,000 in August. As soon as the redeeming period passed both of the vehicles were sold. Luther called Financial Rights in November because he believes the vehicles were sold for more than the debt but the pawnbroker simply told him “we sell for the amount of the debt.” Luther also says he had \$10,000 of work tools in one vehicle which he had not pawned and he does not believe they were not listed on the pawnticket, but he doesn’t have the paperwork. He saw his vehicle for sale on Gumtree with the 'work tools thrown in'. He wants his tools returned since he only put the vehicles up as a security. Luther says he saw that the two vehicles were advertised for \$10,000 and \$17,000 each respectively. Luther contacted the pawnbroker and asked them to pay him the surplus but they said there was no surplus.

Source: C196630

Recommendations

8. Regulations should be made pursuant to s43(1)(a) obliging pawnbrokers to furnish customers with a copy of a pawn ticket and associated documents within 7 days of being notified that the customer has lost their ticket, subject to appropriate confirmation of identity and title.
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Disqualifying breaches (regulation making power s8A(1)(e))

All of the consumer protection provisions with respect to pawns (that is, all the provisions in, and regulations made under, Part 4 of the Act) should be prescribed as disqualifying breaches.

This will ensure that pawnbrokers are conscious of the seriousness of failing to comply with consumer protection provisions, and assist to restore some of the asymmetry in bargaining power that currently exists between consumers and pawnbrokers. At present, there are no meaningful consequences for breaches of these provisions, meaning they can be disregarded with impunity.

This would also, where a person has their licence revoked or suspended due to non-compliance with the consumer protection provisions, enliven the ability for the Secretary to order possession of pawned goods to be given back to the consumer under s.38A of the Act.

Case study – Maxine’s story

Four months ago Maxine pawned some jewellery and a laptop computer for a total amount of \$500, and she agreed to pay \$1300 to reclaim the goods. Maxine now owes a total of \$1800. Maxine has three babies under the age of 3 and is on Centrelink. She never had capacity to repay the loans and interest. When she approached the pawnbroker she did not have any money to buy nappies and formula. Maxine applied for a payday loan from the pawn shop but was declined. The pawnbroker said he would give her \$100 for her Tiffany ring that was worth \$3,500. Maxine returned to the pawn shop and pawned more jewellery and her laptop for \$200 and some rings for another \$200.

Right after the three months redemption period was over Maxine went to the pawnbroker and offered to pay \$1100 to reclaim her goods, because that was all the money she could come up with. The pawnbroker told Maxine she could not have any of her items until she pays \$1300. Maxine particularly wanted a one of the rings back, but the pawnbroker says they do not have it anymore, even though they promised it would be available for her to reclaim. Maxine was upset and expressed her frustration with the pawnbroker, who simply told her they had the right to sell it. After that Maxine found an

advertisement on eBay with her same Tiffany ring. NSW Fair Trading advised Maxine to confront the pawnbroker about the ring, and when she did the pawnbroker told her to “f*\$k off”. The ad was then quickly taken down from eBay. Maxine’s only option now is to make a complaint to NSW Fair Trading, but she is not comfortable doing that without help.

Source: C194125

Recommendations

9. Regulations should be made pursuant to s8A(1)(e) prescribing all the provisions in, and regulations made under, Part 4 of the Act, as disqualifying breaches.
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Other Issues not raised in the RIS (Question 25)

Maximum Interest Rate cap

Pawnbroking is essentially a form of secured credit but with unfettered interest rates far in excess of reasonable costs of providing the credit. Pawnbrokers are holding the goods as security and their position is protected by their ability to sell the goods once the redemption period expires if the client doesn’t repay the pledge plus interest. The amount loaned is usually far less than the value of the goods pawned, therefore exorbitant interest is not necessary to protect the pawnbroker’s position.

Pawnbrokers have an enormous amount of bargaining power in these transactions, both in terms of how much to offer for an item, and what fees and interest to charge. In Financial Rights’ experience, pawnbroking contracts often charge interest rates exceeding 20% per month, with some exceeding over 80% per month. A study based in Victoria found nominal interest rates ranging between 10%-60% per month, with the majority falling between 10%-30%. Given that pawnbroking contracts are typically 3 months or more, this equates to a typical rate of 30%-90% every three months. As an annualised rate this is extremely high cost credit.

The NCCP Act capped interest rates on loans under \$2,000 for less than 12 months⁷ at a one off 20% establishment fee and 4% per month flat rate. Many consumer groups including Financial Rights were of the view that this interest rate cap is too high and yet it is lower than the price of many pawn contracts. Importantly, the lender may also only recover a maximum of 200% of the

⁷ Loans under 16 days are prohibited.

amount lent under the NCCP Act regime including default fees (the amount borrowed and the same amount again). We have seen pawnbroking customers who have paid back the amount borrowed ten times over as a result of paying interest for many years in order to avoid the sale of goods to which they are emotionally attached.

Case study – Tony’s story

In October Tony pawned six items of jewellery (including some family heirlooms) for \$5000 with a pawnbroker. Tony has continued to get extensions to repay and by November the next year (13 months later) he had paid \$7500 in interest only and still owes the pawnbroker over \$7000 if he wants to reclaim his jewellery. Tony cannot afford to pay an additional \$7000.

Tony has tried to negotiate with his pawnbroker and he was advised by them that he should stop making payments until the loan forfeits. At that point his jewellery will be assessed at retail value and the pawnbroker will put them on layby for him if he will pay a 20% up front deposit. Then he can repay the rest of the retail value over three months interest free. Tony says he cannot afford this option either, and what is to prevent the pawnbroker from selling his jewellery to someone else who has enough cash up front? Tony won’t have any more rights once he forfeits.

Source: C142663

Case study – Nellie’s story

Nellie pawned her jewellery for \$3000. Nellie is solely reliant on the DSP. The money was sent overseas to support a friend, but now that person is out of contact. Nellie has been paying various amounts every month for almost a year and even though she has paid off the original debt she still owes \$13,000. The debt is growing by \$900 in interest every month. Nellie does not want to give up her jewellery, especially now that she has repaid the principal debt. She needs help.

Source: C141404

See also Marlee’s Story below.

Recommendations

10. A maximum interest rate cap must be introduced.
11. A new rule should be introduced which says the pawnbroker may also only recover a maximum of 200% of the amount lent including interest and default fees (the amount borrowed and the same amount again).

30 day warning prior to sale.

Financial Rights submits that consumers should be given a 30-day Warning of Sale. This 30-day Warning of Sale should include advice as to the amount required to redeem the goods and the basis of that calculation. It should also include information about EDR (following our recommendations EDR should be mandatory as a licensing condition).

Recommendations

12. A 30-day Warning of Sale must be introduced.

Assessment of capacity to pay

The existing NSW pawnbroking legislation does not require pawnbrokers to conduct any assessment of a person's capacity to service a pawnbroking pledge. For many consumers, going to pawnbrokers is an option of last resort. They often cannot access mainstream credit, either due to low income or to a poor credit history. Many harbour a hope that they will be able to get their possessions back, which is why a pawnbroker is chosen over other avenues such as a direct sale of their personal items.

The NCCP provides further protections, along with the cap and mandatory EDR membership a provider of a high cost loan must provide a financial health warning, referring consumers to the National Debt Helpline to discuss options that may be an alternative to a high cost loan. There is no such requirement of pawnbrokers.

Case study – Marlee’s story

In December Marlee had pawned her car for \$700 (purchased six months earlier for \$4500). When Marlee contacted Financial Rights, the car was about to be sold as Marlee was unable to pay back the loan within the 3-month pawn period. Marlee is Aboriginal, a single mother and subsists on Abstudy and Family Tax Benefit payments. She and her daughter are domestic abuse survivors, in relation to which her ex-partner is now serving a lengthy jail term.

Marlee attended the pawnbroker with her daughter straight after doing the school pick up. Marlee wanted to borrow \$400 to pay that week’s rent; she was told the minimum she could borrow was \$700, with monthly interest payments of \$220. Marlee said she could not afford that, but was told it was her only option. Marlee agreed, signed the paperwork and handed over her car.

When the pawn expired, Marlee was contacted by the pawnbroker (who also operates a car dealership) and told her car had to be sold. By this stage, Marlee was homeless (on the waiting list for emergency accommodation) and surviving on the charity of a local church organisation. Marlee offered to pay \$50/fortnight, but this was refused.

When Financial Rights got involved and wrote to the pawnbroker raising a dispute on the basis that the pawn contract was unjust and the pawnbroker could have ascertained by reasonable inquiry that Marlee could not afford the pawn without substantial hardship. Immediately the pawnbroker offered to settle and Marlee was able to raise the settlement money with the support of her church and reclaim her car.

Source: C141684

Pawnbrokers do not have a financial incentive to check if consumers are able to repay a debt. Pawnbrokers are protected both by the hefty interest and fees they charge, as well as possession of the secured goods. By lending only a percentage of the resale value of an item (usually a quarter of the value) and keeping custody over the security, they are able to sell off the collateral and recover their money and costs regardless, in the meantime entering extending agreements with customers to collect significant amounts of interest.

In Financial Rights’ experience, pawnbrokers commonly do not assess any ability of consumers to make repayments. Failing to assess capacity to pay exposes low income consumers already in financial hardship to enter into high risk loans that they could never afford to repay (or not without substantial hardship). Some people will lose the pawned items; others may struggle for years against mounting interest and charges with each renewed pledge. The consumers who do manage to repay their debt will normally have paid extremely high rates of interest and charges.

While a significant number of pawnbroking customers pawn only small ticket items such as iPads, watches and jewellery, some consumers will pawn much larger items which they require for day to day living, including tools of trade and even cars.

Provisions relating to unjustness in the NCC apply to pawns, but the responsible lending provisions in Chapter 3 of NCCP Act do not. This is a regulatory gap that needs to be addressed. Unfortunately we do not believe these issues can be resolved with a review of the Regulation alone.

Recommendations

13. A capacity to pay assessment must be introduced.

Financial hardship protection

Finally we want to point out that under the existing pawnbroking legislation, customers have no rights to vary their contracts on the grounds of financial hardship without incurring additional charges.

If a borrower's loan is covered by the NCC, they have certain rights if they are having trouble making loan repayments because of a reasonable financial hardship cause (e.g. illness, family breakdown or unemployment). Borrowers in hardship are able to request a reasonable repayment arrangement or a hardship variation to their loan contract. Hardship variations often include:

- Extending the term of the loan and adding arrears to the end of the loan.
- Reducing or freezing the interest rate for a period of time (under the Code the lender does not need to do this but they may consider doing it for a credit card as a once off).
- Waiving enforcement expenses; or
- Accepting no payments for a period of time.

There is no reason that similar protections could not be incorporated into the NSW Pawnbrokers and Second-hand Dealers legislation. Customers that find themselves in an unexpected period of financial hardship should not have to choose between losing their family heirlooms or paying exorbitant amounts in interest and fees.

Recommendations

14. Financial hardship protections must be introduced.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Julia Davis, our Policy & Communications Officer on (02) 8204 1384 or at Julia.Davis@financialrights.org.au

Kind Regards,



Karen Cox
Chief Executive Officer
Financial Rights Legal Centre
Direct: (02) 8204 1340
E-mail: Karen.Cox@financialrights.org.au