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Hon. Kris Faafoi  
Minister of Commerce and Consumer Affairs

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Dear Minister

**RE: CONSUMER CREDIT LAW - PAWNBROKING**

1. This submission is made on behalf of the New Zealand Licensed Traders' Association Inc ("LTA"), the industry body for pawnbrokers.
2. **Introduction**
  - 2.1 The LTA welcomes the current review of consumer credit law. Pawnbrokers are only too conscious of the issues arising in the consumer credit market, which operates in a different area from that of pawnbroking.
  - 2.2 It is, however, of concern that the review still appears to refer to pawnbroking as if it were in fact consumer credit, albeit one with its own statutory provisions in the Secondhand Dealers and Pawnbrokers Act (SDPA).
  - 2.3 Pawn is **not** "credit". There is no obligation to for a pledger to "repay", because there is no debt. The consumer pledger may choose to redeem his or her pledge but has no obligation to do so. Therefore references to pawnbroking should be removed from the Credit Contracts and Consumer Finance Act.
3. **An area of confusion in the review documents**
  - 3.1 The 2018 desk-based study of lenders is an admirable project. However it clearly confuses pawn with a loan. Paragraph 15.4 states that "pawnbrokers are secondhand dealers who lend money on the security of goods, which they take possession over."
  - 3.2 First, not all secondhand dealers are pawnbrokers. Secondly, a pawnbroker is not necessarily a secondhand dealer per se: he or she must comply with the secondhand dealing provisions of the SDPA and

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also with the pawnbroking provisions when disposing of goods which are the subject of a pledge.

- 3.3 We also note from the study that the pawnbrokers who were included were those who “also provided consumer credit contracts”. With respect, in the provision of consumer credit contracts they are acting as creditors, not pawnbrokers, and should not be referred to as pawnbrokers. The transactions are quite different, as are the statutory requirements. It is incorrect to categorise them as pawnbrokers in the context of their alternative role as creditors.

#### 4. **Why pawn is better than credit**

- 4.1 With pawn, there is no requirement to pay the sum advanced. Pawn gives the consumer two choices:
- (a) Pay off the advance and charges and redeem the pledged goods, or
  - (b) Choose not to pay off the advance, knowing that all he or she will lose is the pledged item, but still retaining the right to recover 90% of any surplus when the item is sold at auction.
- 4.2 With pawn, there is no adverse credit report, and no repossession of other property or other enforcement action. There are no “all present and after-acquired property security interests” – in fact, no security interests of any kind. There are no hidden traps for consumers. The deal is easy for any consumer to understand.
- 4.3 Pawn is clean, available, simple to administer and balanced. Consumers’ rights, choices and obligations when pledging an item are clear and complete. The pawnbroker is the person who has all of the outstanding risks and obligations, not the consumer. Every consumer, even the most uninformed consumer can assess the value of the redemption price against their perceived value of the item pledged. There is no simpler or clearer system for enabling a person to assess the personal consequences of his or her decisions to obtain finance.
- 4.4 The pledger (consumer) passes the goods to the pawnbroker who retains them for a specified period. They are not security for a loan, but a pledge – a conditional security against advance of money. Only if the pledger wishes to retake possession of the goods is the pledger required to repay to the pawnbroker the sum paid to the pledger plus administration and storage fees (wrongly referred to as “interest” in the SDPA);
- 4.5 Although the SDPA requires the pawnbroker to refer to the pawn fees as “interest”, this wording is not correct<sup>1</sup>. The pawn fees are not a rate over time, but a fixed fee, covering administration, storage and

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<sup>1</sup> The LTA has made several submissions to the Ministry requesting that the word “interest” should be changed to “fee”.

over time, but a fixed fee, covering administration, storage and overheads. Pawn fees are set out in full on the pawn contract and are fixed fees. As there is no debt, there is no "late payment" fee to be added. Pawn is a transparent transaction. Because there is no loan there is no obligation to repay, and there is no debt. "Credit" requires a debt to have been incurred (the analysis of this is set out in the attached appendix, which was forwarded to MBIE on 23 December 2014). Pawn is not credit, and pawnbrokers are not creditors.

**5. Pawn as a solution, not a problem**

- 5.1 As pointed out above, a consumer has no obligation to redeem goods which are pledged under a pawn agreement. Also, because the goods must be stored securely by the pawnbroker and returned on payment of the amount advanced plus the fixed fee, pawnbrokers have the ability to efficiently advance small sums which can be repaid easily for redemption at levels which are not cost-effective for payday lenders, because of their high administration costs. A consumer who needs \$50 to take a child to the doctor can use pawn to get the cash promptly.
- 5.2 Under the SDPA, if goods are not redeemed, they can sold by the pawnbroker, with the consumer entitled to claim 90% of any excess on the sale above \$10.00.

**6. Action requested**

- 6.1 The LTA therefore requests that all references to "pawn" and "pawnbrokers" be removed from the Credit Contracts and Consumer Finance Act. The SDPA is and should clearly remain the sole statute for the regulation of pawnbrokers.

Yours sincerely

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## 1. Introduction

- 1.1 This submission is in three parts. The first part of the submission points out why the responsible lending code provisions are not applicable to pawn. The second part sets out commercial realities of the pawn transaction, including the strict statutory requirements, monitoring and enforcement. The third part of the submission addresses the draft Code, and sets out in more detail why pawnbrokers are unable to carry out most of the requirements of the Code in pawn transactions. The LTA notes that it is not possible to answer the question set out in the draft Code document, because few if any of those questions are relevant to pawn.
- 1.2 The LTA thanks the Ministry for already noting that the situation of pawnbrokers is different because of the significant degree of regulation and monitoring already imposed by the Secondhand Dealers and Pawnbrokers Act 2004 (SDPA). It also notes that the intention of Parliament to clearly exclude pawnbrokers from the disclosure provisions of the Credit Contracts and Consumer Finance Act (CCCFA) as now demonstrated by the new section 15A which was inserted by the Credit Contracts and Consumer Finance Act Amendment Act 2014.
- 1.3 However, and with respect, the LTA points out that in any case the Code is not applicable to pawnbrokers. This submission sets out the reason based on statutory interpretation that the code does not apply, and also points out why provisions of the Code are inapplicable to the simple pawn transaction. In short, pawn is not a loan: there is no debt which the consumer must repay. It is the consumer's choice as to whether or not to redeem pawned goods.
- 1.4 The LTA notes that if pawnbrokers were required to perform the detailed actions set out in the Code, not only would their clients become confused or misled (including being made to believe there was an obligation to repay) but pawnbrokers would be vulnerable to significant risks of enforcement action. In addition the significant costs of making unnecessary enquires would have to be recovered. Pawn transactions can be quite small: an LTA member pointed out to the Commerce Select Committee that pawn is the only legitimate way for people to get \$20 when they need it!
- 1.5 Please note that pawnbrokers are required by the SDPA to set out the details of a pawn transaction for clients. The LTA points out that pawnbrokers are already:
  - registered;

- subjected to continuing scrutiny by a regulator, with owners and staff required to undergo Ministry of Justice checking and certification processes.

## 2. The Statutory Interpretation Issue

- 2.1 The definition of “pawnbroker” is set out in section 4 of the SDPA as follows:

*Pawnbroker means a person –*

- (a) *who, in expectation of profit, gain, or reward, lends money on the security of goods of which the person takes possession, but not ownership; and*
- (b) *who is not a secondhand dealer or the employee of a second-hand dealer and pawnbroker.*

- 2.2 Please note that the word “lends” is used in the context of a pawn pledge and has no implication of debt which must be repaid by the consumer. In the context of pawn transactions the consumer is referred to in the SDPA as a “pledger”, not a debtor. In fact, it is the pledger who has the right to redeem the pledged goods, and to receive 90% of any surplus on sale if they choose not to redeem them.

- 2.3 Further, pawnbrokers are not “lenders” in terms of the definition set out in section 9B of the Credit Contracts and Consumer Finance Act which sets out the traders to whom the Code applies. That section reads:

***lender means—***

- (a) *a creditor under a consumer credit contract or a credit contract to which Part 3A applies;*
- (b) *a transferee under a buy-back transaction*

- 2.4 First, true pawn transactions fall outside the consumer credit contracts provisions of the CCCFA (see new section 15A). Further, they cannot fall under part 3A which addresses repossession: the pawnbroker already has possession of the goods.
- 2.5 In addition, a pawn transaction cannot be a buy-back transaction. First, buy-back transactions under the CCCFA are restricted to buy-back transactions involving land, in the absence of a contextual difference (and there is none): see CCCFA section 8. Further, buy-back transactions are specifically prohibited by section 55 of the SDPA.
- 2.6 In any case, as pointed out above, pledgers of goods by way of pawn are placed under no continuing obligations: they may choose to redeem goods or not.

## 3. The realities of the pawn transaction.

- 3.1 Pawnbrokers are required to be registered. They and their employees must follow strict procedures, including verification of the identity of pledgers, the keeping of detailed records including photographs, provision of secure storage for pawned goods, and redemption of goods. This includes in particular the matters to be disclosed on a pawn tickets (SDPA section 51). Pawn can be carried out only as a face-to-face transaction.
- 3.2 The pledger, after suitable verification which includes photo ID and verification of address, hands over the item to be pawned, and receives the agreed amount of money in return. This verification is required by section 52 of the SDPA and requires pawnbrokers to maintain specialised records to document the identity of the pledger. Those records are inspected by the NZ Police at regular (and close) intervals. The ID must be checked and updated where necessary for every transaction.
- 3.3 The pledger may choose to redeem the goods on or before the redemption date on payment of the sum agreed at the time the goods are pawned, but has no obligation to do so. Where the pledger chooses not to redeem the goods, then after the time set out in the statute the pawnbroker may sell the unredeemed goods at auction or Internet auction (section 63). The pawnbroker has the right to retain the redemption price and after deducting 10% of any excess received on sale (if there is any excess) is obliged by law (section 64 of the SDPA) to return the balance to the pledger. During the term of the pawn contract, the pledger may choose to sell the goods to the pawnbroker under similar terms: SDPA section 66. The choice to redeem, sell or walk away is entirely the pledger's.
- 3.4 Through an unfortunate drafting error in the SDPA, the transaction fees for the pawn transaction **must** be referred to as "interest" (section 57(2)). It is, of course, not interest either as defined in the CCCFA or as it is typically understood, because it is not a rate applied to an amount owing that accrues over time: the CCCFA definition states:
- interest charge** means a charge that accrues over time and is determined by applying a rate to an amount owing under a credit contract;*
- However, because of section 57 (2), pawnbrokers are forced to use this misnomer.
- 3.5 Please note that the SDPA prohibits pawnbrokers from adding any other fees (or indeed fees with other names) to the redemption price of the pawned goods: see section 57 (2). The SDPA does provide for pawnbrokers to charge a lesser "interest", or more properly, a reduced administration/storage fee, if a pledger chooses to redeem their pledge early: section 51(2)(h).

3.6 Pawn transactions are usually small. The LTA points out that it is not in the public interest to make transaction costs so high that consumers cannot afford them: consumers and in particularly low-income consumers have no other legitimate source of accessible cash.

3.7 Further, failure to carry out strict procedures can result in penalties including loss of licence. This can also occur if a pawnbroker is convicted of an offence under the Fair Trading Act (SDPA definition of “specified offence”: section 4).

#### 4. **The Code and pawn transactions.**

4.1 This analysis is supplied merely to underline the irrelevance of the Code to a pawn transaction properly carried out under the SDPA. As pointed out above, on a proper interpretation, the Code cannot apply to pawn.

4.2 **Obligations that apply before and throughout the agreement:** little of this section has any application to pawnbrokers:

- (a) The careful procedures required by the SDPA have been referred to at paragraph 3 above;
- (b) The pawnbroker does not have to make any decisions regarding creditworthiness: the only issue is whether or not the consumer has the right to pledge the goods. Again, the procedures in this respect are set by the SDPA;
- (c) Subsequent dealings between the pledger and the pawnbroker are set by the SDPA.
- (d) Please note that all of the above procedures must be followed by pawnbrokers because failure to do so can result in prosecution or cancellation of their licences. This also applies to the actions of staff of pawnbrokers.
- (e) Pawnbrokers cannot carry out transactions with a purported agent of a consumer. They must have face-to-face contact: SDPA section 56 which provides that pawnbroking contracts may enter to into only at the pawnbroking business premises identified in the pawnbrokers’ license.

#### 4.3 **Advertising**

- (a) Pawnbrokers are already required to comply with careful advertising procedures. It is not in their interests to extend the time required to explain to consumers how pawn transactions work, by correcting any advertising misrepresentations. The LTA provides Fair Trading Act compliance seminars from time to time for its members.

- (b) It should be noted that no credit checks are required for pawn transactions. The key enquiry is as to proof of identity and right to pledge.
- (c) There is no risk of “default” with respect to pawn. Persons who might wish to redeem the goods are required to be advised of the circumstances under which they can redeem at the time of entry into the pawn transaction.

#### 4.4 **“Borrower’s” requirements and objectives**

- (a) Because there is no outstanding debt, nothing in this section of the draft Code is relevant to the pawn transaction. Indeed, it would be offensive to consumers and a breach of Principle 1 of the Privacy Act for a pawnbroker to enquire into their objectives and in particular to make note of this enquiry. Again, the only relevant enquiries are as to the consumer’s right to enter into the pawn contract.

#### 4.5 **Enquiries into and assessment of borrowers’ substantial hardship**

- (a) See response above.

#### 4.6 **Guarantors**

- (a) This section has no relevance to pawn. There is no debt so guarantors are not contemplated by the transaction and in any case cannot be involved in it.

#### 4.7 **Informed decisions**

- (a) The nature of the pawn transaction, with the statutory requirement to clearly set out the redemption conditions and the consequences to a pledger if the goods are not redeemed by the redemption date, of its nature enables a consumer to make an informed decision.
- (b) Please note that because of the face-to-face nature of the pawn transaction, also the fact that pawn transactions are frequently very low value, there is a positive incentive upon pawnbrokers to make sure that consumers are in possession of full information. If this did not happen, the operational costs incurred in carrying out these low-value transactions would be significantly increased by dealing with consumers who had entered into a pawn contract under misunderstandings.
- (c) Again, the provisions relating to guarantors have no relevance.

#### 4.8 **Credit related insurance and repayment waivers**

- (a) Neither of these has any relevance to pawn, because there is no obligation to repay.



#### **4.9 Fees**

- (a) The only fee that a pawnbroker may charge is the misnamed “interest” which must be disclosed clearly on the pledge ticket. A copy of the pledge ticket must be given to the pledger when the transaction is entered into: SDPA section 59.

#### **4.10 Subsequent dealings**

- (a) Each pawn transaction is a standalone transaction. The SDPA obliges pawnbrokers to comply with pledgers’ rights to inspect pawned goods, and to redeem the goods prior to sale. Please note that the pawnbroker is required by the SDPA to sell pawned goods after redemption date only as set out in section 63.

### **5. Procedural breaches can cost pawnbrokers their license**

- 5.1 It is important to point out that pawnbrokers can be subject to criminal action and may lose their licences if they do not follow the SDPA procedures strictly. For this reason alone, it is incumbent upon them to follow those procedures in their day-to-day dealings with consumers. The Responsible Lending Code is inapplicable to pawn, and indeed, were they to follow of the requirements set out in the Code, could cause pawnbrokers to breach the Fair Trading Act by misleading consumers as to the nature of their transaction and their rights.
  - 5.2 But in any case, and as pointed out in paragraph 2 of this submission, the Code does not apply to pawnbrokers who as a class fall outside the definition of “Lenders” in section 9B of the CCCFA.
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