

# LENDING ON THE EDGE: PAWNBROKING IN AUSTRALIA

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*In Australia, pawnbrokers are largely exempt from national consumer credit legislation. They are instead governed by state legislation, which affords very limited protection to consumers. This study outlines the current regulation of pawn lending and presents a qualitative profile of consumers who use pawn loans. In the absence of reliable industry data, it draws on case law, media reports, law reform submissions, previous qualitative studies and an online survey of consumers, conducted by the authors. The study argues that the light regulation of pawn lending creates a high risk of consumer harm and regulatory arbitrage by unscrupulous providers. It proposes law reforms and policy measures to address these risks and to provide more effective protection to consumers.*

## I INTRODUCTION

Pawn loans are a form of credit secured by a borrower's personal belongings.<sup>1</sup> Throughout the nineteenth century, pawnbroking enjoyed immense popularity, particularly among the poor in urban areas. It entered a period of sustained decline in the twentieth century, as the expansion of the welfare state reduced demand for short-term credit, and other products, such as credit cards, became more readily accessible. In the last two decades, pawnbroking has returned to prominence due to the international success of television programmes such as

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<sup>1</sup> An essential feature of the transaction is that the item pawned remains in the possession of the lender until the loan is repaid. The lender has no legal right to pursue the debtor for repayment of the debt, interest or other fees, but may sell the pawned item to recoup these amounts if the loan is not repaid within the specified time: *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, 257–8 [17] (McHugh, Gummow, Hayne and Heydon JJ), 274–6 [77]–[81] (Kirby J) ('*Palgo*').

‘Posh Pawn’<sup>2</sup> and ‘Pawn Stars’.<sup>3</sup> These programmes often focus on the pawning of ‘high-end assets such as jewellery, watches, art, handbags, cars [and] fine wine.’<sup>4</sup> In reality, however, the majority of pawnbroking customers remain low income earners, seeking small loans and using common, low-value items as security.<sup>5</sup> Consumer advocates have long expressed concern that pawn lending<sup>6</sup> leaves vulnerable consumers at risk of exploitation and significant harm.<sup>7</sup> They warn that the recent sharp increase in the cost of living has led to ‘record levels’ of pawn lending<sup>8</sup> as more consumers turn to pawnbrokers ‘in desperation’.<sup>9</sup> Yet, despite this, Australian pawnbrokers are much less strictly regulated than most other providers of consumer credit. They are largely exempt from the requirements of the *National Consumer Credit Protection Act 2009* (Cth) (‘NCCPA’).<sup>10</sup> They are primarily governed by state legislation, which affords very limited rights to consumers.<sup>11</sup>

<sup>2</sup> ‘Posh Pawn: the Reality’, *Business Age* (online, 26 July 2022) <<https://www.businessage.com/post/posh-pawn>>.

<sup>3</sup> Emily Nelson, ‘Local Pawn Shops See More DVDs Than Diamonds’, *The News Star* (online, 31 January 2010) <<http://www.thenewsstar.com/article/20100131/LIFESTYLE/1310324>>.

<sup>4</sup> ‘Posh Pawn: the reality’ (n 2).

<sup>5</sup> See generally Nelson (n 3), and below Part IV.

<sup>6</sup> Throughout this article, the terms ‘pawn lending’ and ‘pawnbroking’ are used interchangeably. The *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 3A(1) defines a ‘pawnbroker’ as ‘a person who carries on a business of lending money on the security of pawned goods’. Section 3A(2) provides that ‘goods are pawned if the goods are taken into the possession of a lender of money for the purpose of the lender relying on possession of the goods as security for the repayment of the loan’. The *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 3(1) defines a ‘pawnbroker’ as ‘a person who carries on the business of advancing money on the security of pledged goods’. The *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld) sch 3 defines a ‘pawnbroker’ as a person who holds a pawnbroking licence and ‘carries on the business of advancing, on interest or in expectation of profit or reward, an amount on the principal or collateral security of property taken by the person as a pawn’.

<sup>7</sup> Taskforce on Industry Self-Regulation, Treasury, *Industry Self-Regulation in Consumer Markets* (Report, August 2000) (‘*Industry Self-Regulation in Consumer Markets*’) 37; Consumer Action Law Centre et al, Submission to Treasury, *Design and Distribution Obligations and Product Intervention Power* (15 March 2017) 21–3 (‘CALC 2017 Submission’); Consumer Action Law Centre et al, Submission to Treasury, *Exposure Draft Consultation: Corporations Amendment (Design and Distribution Obligations) Regulations 2019* (10 October 2019) 4–5 (‘CALC 2019 Submission’).

<sup>8</sup> Leke Oso Alabi and Siddharth Venkataramakrishnan, ‘Pawnbroking Demand Hits “Record Levels” in UK’, *Financial Times* (online, 13 August 2023) <<https://www.ft.com/content/d4062163-04cf-43d3-84ea-22b50db9765f>>. See also Sarah Marsh, “‘We Had No Money’: Desperate UK Public Increasingly Turning to Pawnbrokers to Make Ends Meet”, *The Guardian* (online, 22 October 2023) <<https://www.theguardian.com/money/2023/oct/21/we-had-no-money-desperate-uk-public-increasingly-turning-to-pawnbrokers-to-make-ends-meet>>.

<sup>9</sup> ‘Injunction Against Pawnbroker’, *Star Weekly* (online, 17 November 2023) <<https://brimbanknorthwest.starweekly.com.au/news/injunction-against-pawnbroker/>>.

<sup>10</sup> Pawn lenders are subject to ss 76 to 81 of the *National Credit Code* (‘NCC’) (a schedule to the NCCPA), prohibiting unjust transactions: NCC s 6(9). However, consumer advocates have stated that ‘this protection is largely illusory for the vulnerable consumers targeted by these businesses because there is no accessible forum where a consumer can make a complaint’: CALC 2017 Submission (n 7) 22.

<sup>11</sup> See below Part III(C).

This article is the first scholarly study of pawn lending to be conducted in Australia.<sup>12</sup> It provides an overview of the history of pawnbroking and outlines the current regulation of the industry under Australian Commonwealth and state laws. In lieu of quantitative data regarding the size and characteristics of the industry as a whole, it draws on case law, media reports, previous qualitative research and law reform submissions by consumer advocates to present a qualitative profile of consumers who use pawn loans. It describes recent and ongoing regulatory action by the Australian Securities and Investments Commission ('ASIC'), in response to pawnbrokers' alleged breaches of the *NCCPA*. It also reports the results of an online survey of pawn loan users, conducted by the authors. Drawing on these sources, the article identifies potential risks to consumers arising from pawn loans. It argues that the light regulation of pawn lending creates a high risk of consumer harm, in the light of the extreme vulnerability of some consumers of pawn loans. It also contends that the anomalous treatment of pawn lending creates a risk of regulatory arbitrage, since it offers unscrupulous lenders a means of evading the scope of the *NCCPA*. The article outlines several law and policy reforms that would address these risks and provide more effective protection to consumers of pawn loans.

## II THE HISTORY OF PAWN LENDING

Pawn lending is one of the oldest forms of consumer finance. It has been suggested that the practice of taking temporary possession of another person's goods, as security for money lent, originated in ancient Greece and Rome, or still earlier, in China up to 3,000 years ago.<sup>13</sup> Arrangements more closely resembling the modern, formal pawnbroking industry emerged in medieval Europe. Initially, the practice was unique to members of the aristocracy. In the thirteenth and fourteenth centuries, it was not uncommon for medieval monarchs to pawn their crowns, jewellery and even members of their entourage to raise funds for wars

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<sup>12</sup> In 2000, researchers in the Department of Accounting and Finance at the University of Melbourne produced a study of pawn lending based on original empirical research. This paper is available online: Nick Bienkowski and Kevin Davis, *The Pawnbroking Industry: Evidence From Victoria* (Report, June 1997). In 2010, researchers at the University of Queensland's School of Social Work and Human Services published a paper outlining the results of their empirical study of the 'alternative finance sector' in Queensland. While this study focussed on payday loans, it also collected some data regarding consumers' use of pawn loans: Gregory Marston and Lynda Shevellar, *The Experience of Using Fringe Lenders in Queensland: A Pilot Study* (Report, July 2010) 5, 49, 61. A subsequent peer-reviewed article, based on this research, referred only to payday loans: Lynda Shevellar and Gregory Marston, 'Exploring the Role of Fringe Lenders in the Lives of Queenslanders' (2011) 46(2) *Australian Journal of Social Issues* 205, 207.

<sup>13</sup> John P Caskey, *Fringe Banking: Check-Cashing Outlets, Pawnshops, and the Poor* (Russell Sage Foundation, 1994) ('Fringe Banking') 13; Kenneth Hudson, *Pawnbroking: An Aspect of British Social History* (Bodley Head, 1982) 21; Howard Karger, *Shortchanged: Life and Debt in the Fringe Economy* (Berrett-Koehler, 2005) 66.

and other affairs of state.<sup>14</sup> The first pawnbroking establishments serving ‘the poorer classes’ appeared in the fifteenth century, in central and Northern Italy.<sup>15</sup> These *monti di pieta* (‘banks of pity’) were run by a religious order on a non-profit basis.<sup>16</sup> They were intended to provide low-cost finance to the very poor and to counter the spread of ‘usury’ — that is, money-lending for profit, then regarded by the Catholic Church as a very grave sin.<sup>17</sup> Over time, municipal governments began to provide similar services.<sup>18</sup> Private pawnbroking businesses also sprang up around this time, wherever local laws permitted them to operate.<sup>19</sup> The advent of private pawnbroking led to the enactment of specific laws designed to regulate the industry, particularly through caps on interest.<sup>20</sup> Hudson writes that ‘[a]s early as the thirteenth century, charters specifying maximum interest rates were common’ in continental Europe.<sup>21</sup> The first English laws relating to pawnbroking were enacted in 1603.<sup>22</sup> In 1757, 1784 and 1800, successive English Acts were introduced to subject pawnbrokers to licensing requirements and to impose limits on their interest rates.<sup>23</sup> Due to these restrictions, and the small profit margins on most pawn loans, it was necessary for pawnbrokers to operate on a large scale in order to be viable.<sup>24</sup> For this reason, pawnbroking became more common during the Industrial Revolution, as populations became more concentrated in urban areas.<sup>25</sup>

While there has been no history of pawnbroking published in Australia to date, the subject has been studied extensively in the United Kingdom,<sup>26</sup> and, to a

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<sup>14</sup> Hudson writes that ‘Edward III did this in 1340–1, when he sent the Earls of Derby and Northampton out of England, to spend several months confined in Malines and Louvain respectively, as pledges for his debts’: Hudson (n 13) 27.

<sup>15</sup> Ibid 28.

<sup>16</sup> Ibid 28; Caskey, *Fringe Banking* (n 13) 13.

<sup>17</sup> Wayne A M Visser and Alastair Macintosh, ‘A Short Review of the Historical Critique of Usury’ (1998) 8(2) *Accounting, Business & Financial History* 175, 178–9.

<sup>18</sup> Caskey, *Fringe Banking* (n 13) 14; Edward Veitch, ‘The Law o’ the Brass Balls or the Regulation of the Pawn’ (1992) 21 *Canadian Business Law Journal* 49, 53.

<sup>19</sup> Caskey, *Fringe Banking* (n 13) 14.

<sup>20</sup> Veitch (n 18) 53.

<sup>21</sup> Hudson (n 13) 28.

<sup>22</sup> Caskey, *Fringe Banking* (n 13) 14; Warren Swain and Karen Fairweather, ‘The Legal Regulation of Pawnbroking in England, a Brief History’, in James Devenney and Mel Kenny (eds), *Consumer Credit, Debt and Investment in Europe* (Cambridge University Press, 2012) 148.

<sup>23</sup> Swain and Fairweather (n 22) 149–51.

<sup>24</sup> Caskey, *Fringe Banking* (n 13) 16–17.

<sup>25</sup> Hudson (n 13) 31–2.

<sup>26</sup> See generally Beverly Lemire, ‘Petty Pawns and Informal Lending: Gender and the Transformation of Small-Scale Credit in England, circa 1600–1800’ in Kristine Bruland and Patrick O’Brien (eds), *From Family Firms to Corporate Capitalism: Essays in Business and Industrial History in Honour of Peter Mathias* (Clarendon Press, 1998) 112; Melanie Tebbutt, *Making Ends Meet: Pawnbroking and Working-Class Credit* (Leicester University Press, 1983); Hudson (n 13); Swain and Fairweather (n 22).

lesser extent, in the United States.<sup>27</sup> Throughout the nineteenth century, pawnbroking enjoyed immense popularity in the United Kingdom and became a crucial financial resource for many low-income households. As Melanie Tebbutt writes, many pawnbrokers' typical clients were working-class women with large families. Such women relied on pawn lending to supplement and smooth out the irregular incomes earned by their male partners.<sup>28</sup> Pawning jewellery, furniture or clothes was a common solution to unexpected costs, such as a medical bill or a funeral, or a sudden decline in income due to the wage-earner's illness.<sup>29</sup> Items such as baby clothes or winter blankets were often pawned when they were not needed and redeemed when they were. For some households on extremely low incomes, pawning became a 'weekly ... cycle'.<sup>30</sup> Tebbutt writes that, in some areas, workers would regularly pawn their best 'Sunday' clothes on Monday morning and redeem them on Saturday afternoon, when they received their wages.<sup>31</sup> In the poorest areas, loans were even smaller and of shorter duration, with some customers pledging their blankets in the morning and returning to redeem them at night, in exchange for a waistcoat.<sup>32</sup> Despite the extremely high interest rates attaching to such loans,<sup>33</sup> and the protests of 'civic-spirited citizens',<sup>34</sup> many working class people viewed pawn lending as a valuable service. Tebbutt explains that, in this period, pawning became a working class 'tradition', driven by practical necessity, as well as a profound distrust of financial institutions.<sup>35</sup> Rather than accumulate savings that would 'stand idle' in a bank account, habitual pawners often used surplus funds to buy expensive items such as watches, jewellery and furniture, with a view to their future pledge value. Such purchases afforded immediate utility and pleasure, while also serving as a form of insurance against future hardship.<sup>36</sup>

The second half of the nineteenth century has been described as 'the golden age of pawnbroking'.<sup>37</sup> During this period, the pawning of clothing declined, as the advent of mass production and more rapid changes in fashion reduced the value of such items.<sup>38</sup> However, the pawning of jewellery and other small, high-value items remained widespread, not only in the United Kingdom but in the

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<sup>27</sup> See generally John Caskey, 'Pawnbroking in America: The Economics of a Forgotten Credit Market' (1991) 23(1) *Journal of Money, Credit and Banking* 85 ('*Pawnbroking in America*'); Caskey, *Fringe Banking* (n 13).

<sup>28</sup> Tebbutt (n 26) 12.

<sup>29</sup> *Ibid* 12.

<sup>30</sup> *Ibid* 6.

<sup>31</sup> *Ibid* 7.

<sup>32</sup> *Ibid* 13.

<sup>33</sup> *Ibid* 9.

<sup>34</sup> Caskey, *Fringe Banking* (n 13) 19.

<sup>35</sup> Tebbutt (n 26) 18.

<sup>36</sup> *Ibid* 16–17.

<sup>37</sup> Hudson (n 13) 53.

<sup>38</sup> Caskey, *Fringe Banking* (n 13) 17.

rapidly expanding cities of the United States.<sup>39</sup> The popularity of pawn lending fluctuated during the twentieth and early twenty-first centuries. In the United Kingdom, pawning remained a common form of short-term credit until the conclusion of the Second World War and the election of Clement Attlee's Labour Government in 1945. From 1945 onwards, the creation the National Health Service and the significant expansion of the welfare state afforded greater economic security to low-income households,<sup>40</sup> reducing their reliance on pawn loans.<sup>41</sup> In the United States, the expansion of social security entitlements and public services contributed to a similar postwar decline in pawnbroking.<sup>42</sup> Over the course of the twentieth century, consumers also gained access to other forms of credit such as instalment purchases, cheque-cashing services,<sup>43</sup> credit cards and payday loans, further reducing reliance on pawn loans.<sup>44</sup> The decline in pawn lending was accelerated by the decreasing cost of many consumer goods, such as radios, televisions and stereos. Such items lost value quickly, due to rapid advances in technology, and were often large and difficult to store, making them undesirable pledges.<sup>45</sup> In the latter decades of the twentieth century, the industry continued to operate in the United Kingdom, but on a much reduced scale, prompting John Caskey to claim, in 1991, that it had effectively 'die[d] out'.<sup>46</sup> Yet, in 2012, Warren Swain and Karen Fairweather wrote that 'the cycle of decline ha[d] been reversed' and pawn lending had become 'a major industry once more'.<sup>47</sup>

In the United States, pawn lending experienced a dramatic revival much earlier, from the 1970s onwards.<sup>48</sup> According to some estimates, it doubled in size between 1985 and 2004.<sup>49</sup> Writing in 1991, Caskey observed that many United States pawn shops served as 'one-stop financial centers' for consumers, selling money orders, cashing cheques and 'handl[ing] customers' utility bill payments and income tax forms', as well as providing short term credit.<sup>50</sup> In contrast to the

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<sup>39</sup> Ibid 16.

<sup>40</sup> Kevin Jefferys, *The Attlee Governments 1945–1951* (Routledge, 1992) 20–4.

<sup>41</sup> Hudson (n 13) 101.

<sup>42</sup> Caskey, *Fringe Banking* (n 13) 30.

<sup>43</sup> These businesses allow customers to exchange their paycheques or government benefit cheques for immediate cash, for a fee: *ibid.* Caskey describes these services as 'a uniquely American phenomenon': at 34. He notes that, in the United States after the Second World War, 'increasingly comprehensive social security and welfare systems led to large increases... in the number of people receiving government support checks', and that by the 1950s, it was also very common for United States employers to pay their employees' salaries by cheque: at 32.

<sup>44</sup> Ibid 27–9, 31; Veitch (n 18) 50, 54; Swain and Fairweather (n 22) 143–4.

<sup>45</sup> Caskey, *Fringe Banking* (n 13) 29.

<sup>46</sup> Caskey, *Pawnbroking in America* (n 27) 86.

<sup>47</sup> Swain and Fairweather (n 22) 144, 158.

<sup>48</sup> Karger (n 13) 66; J Brandon Bolen, Gregory Elliehausen and Thomas W Miller, 'Do Consumers Need More Protection From Small-Dollar Lenders? Historical Evidence and a Roadmap for Future Research' (2020) 58(4) *Economic Inquiry* 1577, 1583.

<sup>49</sup> Karger (n 13) 66.

<sup>50</sup> Caskey, *Pawnbroking in America* (n 27) 88.

industry's decline in the United Kingdom, Caskey attributed the enduring popularity of pawn lending in the United States to the 'less comprehensive social support system' available to low-income Americans.<sup>51</sup> He speculated that demand for pawn loans grew in response to the deregulation of the United States banking industry and the use of increasingly sophisticated screening processes by mainstream institutions. Both contributed to an increase in the population of 'unbanked' Americans — those who cannot qualify for mainstream loans, or even access basic savings accounts.<sup>52</sup> Such consumers now account for approximately 5.9 million United States households, or 4.5 per cent of all United States households.<sup>53</sup> Caskey suggested that higher immigration from the 1980s onwards might also account for some of the renewed demand for pawn lending. He pointed out that, compared with other consumers, recent immigrants were more likely to have difficulty opening a bank account. He suggested that pawn lending might be particularly attractive to undocumented immigrants, who generally could not open bank accounts and might be reluctant to do so, since this would 'reveal their presence to immigration authorities'.<sup>54</sup>

### III PAWN LENDING IN CONTEMPORARY AUSTRALIA

#### A *The Current Market*

Unlike the United States and the United Kingdom,<sup>55</sup> Australia possesses almost no reliable public data regarding the size of its pawn lending industry, changes in the

<sup>51</sup> Caskey noted, however, that 'England abolished its pawnshop usury ceiling in the mid-1980s, and the industry has grown strongly in recent years': *ibid* 96–7.

<sup>52</sup> *Ibid* 85–7. Howard Karger also wrote, in 2005, that the 'consolidation of the [United States] banking industry over the past 20 years ha[d] reduced the number of banks in low-income neighbourhoods, increased the focus of banks on corporate and high-income customers, and limited banks' interest in serving consumers with small accounts or less-than-perfect credit': Karger (n 13) 12.

<sup>53</sup> Federal Deposit Insurance Corporation, *2021 FDIC National Survey of Unbanked and Underbanked Households* (Report, October 2022) 13 ('2021 FDIC Survey') <<https://www.fdic.gov/analysis/household-survey/2021report.pdf>>.

<sup>54</sup> Caskey, *Fringe Banking* (n 13) 108–9.

<sup>55</sup> For United States data see, eg, Consumer Financial Protection Bureau, *Consumer Use of Payday, Auto Title, and Pawn Loans: Insights from the Making Ends Meet Survey* (Report, 2019) <<https://www.consumerfinance.gov/data-research/research-reports/consumer-use-of-payday-auto-title-and-pawn-loans-insights-making-ends-meet-survey/>>; Federal Deposit Insurance Corporation, *How America Banks: Household Use of Banking and Financial Services* (Report, October 2020) <<https://www.fdic.gov/analysis/household-survey/2019/2019report.pdf>>; 2021 FDIC Survey (n 53). For United Kingdom data, see Financial Conduct Authority, *Pawnbroking Sector Review* (Web Page, 10 July 2018) <<https://www.fca.org.uk/publications/multi-firm-reviews/pawnbroking-sector-review>>; Sara Davies and Andrea Finney, *Pawnbroking Customers in 2020: A Survey of Pawnbroking Customers* (Report, Personal Finance Research Centre, University of Bristol, July 2020) <<https://www.bristol.ac.uk/media-library/sites/geography/pfrc/Pawnbroking%20Customers%20in%202020.pdf>>.

industry over time, or the typical characteristics of pawn loan users. While there are prominent and active industry bodies in both the United States and the United Kingdom, there appears to be no national industry body in Australia.<sup>56</sup> State-based groups have occasionally engaged in media commentary,<sup>57</sup> and contributed to state law reform processes,<sup>58</sup> however they do not maintain websites and their details are not publicly advertised. The most authoritative data regarding the size of the industry appears in the law reform materials and Parliamentary documents published by state governments. However, such data only appears at infrequent intervals.<sup>59</sup> There are presently 158 licensed pawnbrokers operating in Victoria.<sup>60</sup> In 2020, there were 183 pawnbrokers licensed in New South Wales, a number that

<sup>56</sup> In 2001, Victorian Parliamentary debates featured a reference to the Australian Pawnbrokers Association, which at that time 'represent[ed] about 30 stores': Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1720 (Carlo Furletti). The authors have been unable to find any more recent references to this organisation.

<sup>57</sup> 'Pawnbrokers Thriving as Poorest Hurt in Slowdown', *Sydney Morning Herald* (online, 1 July 2013) <<https://www.smh.com.au/business/pawnbrokers-thriving-as-poorest-hurt-in-slowdown-2013-0701-2p5uh.html>> (quoting the head of the Victorian Independent Pawnbrokers Association); Andrew Colley, 'NSW Pawnbrokers Baulk at New MAC Address Laws', *ITNews.com.au* (online, 8 March 2016) <<https://www.itnews.com.au/news/nsw-pawnbrokers-baulk-at-new-mac-address-laws-416340>> (quoting a spokesman from the New South Wales Pawnbrokers Association).

<sup>58</sup> See, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 23 June 2005, 17380–1 (Melinda Pavey) (referring to the Pawnbrokers Association of NSW); Explanatory Notes, Second-Hand Dealers and Pawnbrokers Bill 2003 (Qld) 5 (referring to the Queensland Pawnbrokers Association and the Pawnbrokers Industry Federation); New South Wales Department of Fair Trading, *Pawnbrokers and Second-hand Dealers Act 1996* (Final Report, 1996) 91 (referring to the Pawnbrokers Association of NSW). The NSW report noted 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': at 33.

<sup>59</sup> The Victorian Government's *Second-Hand Dealers and Pawnbrokers Regulations 2008: Regulatory Impact Statement* is no longer published on the Government's website, though it can be obtained from Better Regulation Victoria on request: Victorian Government, *Regulatory Impact Statements* (Web Page, 16 May 2022) <<https://www.vic.gov.au/regulatory-impact-statements>>.) When the Victorian regulations were remade in 2018, no Regulatory Impact Statement was published, on the basis that the proposed regulations 'would not impose economic or social burden and were of a fundamentally declaratory or machinery nature': Parliament of Victoria, *Annual Review: 2018 Regulations and Legislative Instruments* (Report, August 2019) 33; *Subordinate Legislation Act 1994* (Vic) s 8(1)(a), (c).

<sup>60</sup> Email from Business Licensing and Registrations Team, Consumer Affairs Victoria to Lucinda O'Brien, 10 August 2023. In 2008, there were 120 licensed pawnbrokers in Victoria: Victorian Government, *Second-Hand Dealers and Pawnbrokers Regulations 2008: Regulatory Impact Statement*, 1. In 2001, it was suggested that of the 6,900 registered second-hand dealers in Victoria at that time, approximately 150 were operating as pawnbrokers. This was described as a 'guesstimate', as pawnbrokers were not required to obtain a specific form of licence distinguishing them from other second-hand dealers prior to 2001: Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1719 (Carlo Furletti). See also Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1727 (Gerald Ashman).



had ‘consistently declined’ over the preceding decade.<sup>61</sup> In 2004, there were 214 operating in Queensland.<sup>62</sup> In the absence of a prominent industry body, or current public data from state licensing authorities,<sup>63</sup> the most reliable insight into the present scale of the Australian pawnbroking industry comes from the annual reports of a single large chain, Cash Converters. This multi-national corporation earned an annual revenue of \$245.9 million in Australia in the financial year ending in 2022. While the majority of this revenue was generated from the issuing of short-term loans, including payday loans, \$27.7 million was generated from ‘pawnbroking fees’.<sup>64</sup> In June 2022, Cash Converters owned 79 Australian stores and a significant network of franchises across the country.<sup>65</sup> Its most recent annual report revealed an eight per cent increase in its pawn lending business in the financial year ending in 2022.<sup>66</sup>

## B Commonwealth Regulation

In Australia, pawn lenders are largely excluded from national consumer credit laws. Pawnbrokers are exempt from most sections of the NCCPA, provided that, in the event of a debtor’s default, their ‘only recourse is against the goods provided as security for the provision of the credit.’<sup>67</sup> This means that users of pawn loans enjoy far fewer consumer protections than users of consumer leases, payday loans or mainstream credit products such as credit cards or personal loans. Due to their exemption from the NCCPA, pawn lenders are not required to conduct

<sup>61</sup> At that time, according to a NSW Government Regulatory Impact Statement, pawnbrokers were ‘widely distributed throughout the state’ and were ‘well established in regional areas’, as well as in metropolitan Sydney. The Regulatory Impact Statement noted that ‘[h]istorically most businesses were local in their sphere of operation, but the internet and technological advancements have significantly widened the scope of many businesses’: New South Wales Government, *Regulatory Impact Statement: Proposed Pawnbrokers and Second-hand Dealers Regulation 2020* (Report, July 2020) 22 (‘RIS’) <<https://www.productivity.nsw.gov.au/sites/default/files/2020-09/Pawnbrokers%20and%20Second-hand%20Dealers%20Draft%20Regulation%202020.pdf>>.

<sup>62</sup> Queensland Government, *Regulatory Impact Statement: Second-Hand Dealers and Pawnbrokers Regulation 2004* (Report, 2004) 2. See also Explanatory Notes, *Second-Hand Dealers and Pawnbrokers Bill 2003* (Qld) 5.

<sup>63</sup> In August 2023, the authors contacted NSW Fair Trading to ask how many pawnbrokers were licensed to operate in New South Wales at that time. In January 2024, NSW Fair Trading advised that there were 633 licences issued to pawnbrokers and second-hand dealers in New South Wales (without specifying how many were pawnbrokers): email from Property, Transport and Business Licensing, NSW Fair Trading to Lucinda O’Brien, 10 January 2024. In August 2023, the authors sought equivalent data from Queensland Fair Trading but were advised that this could not be provided.

<sup>64</sup> Cash Converters International Limited, *Appendix 4E & Annual Report* (Report, 31 August 2022) 58 <<https://www.cashconverters.com/wp-content/uploads/2022/09/02562443.pdf>>.

<sup>65</sup> *Ibid* 9.

<sup>66</sup> Cash Converters International Limited, *FY 2022 Investor Presentation* (Presentation, August 2022) 13, 17 <<https://www.cashconverters.com/wp-content/uploads/2022/09/02562447.pdf>>.

<sup>67</sup> See (n 10).

assessments of consumers' creditworthiness before providing loans, in accordance with the responsible lending obligations. They are not required to be members of an external dispute resolution scheme, such as the Australian Financial Complaints Authority ('AFCA'). This means that users of pawn loans have no recourse to a free and simple dispute-resolution forum in the event of a dispute with a lender. Pawn lenders were also excluded from the scope of the Design and Distribution Obligations introduced by the Commonwealth Government in 2019.<sup>68</sup> Under the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'),<sup>69</sup> pawn lenders are subject to general consumer protection provisions broadly replicating those contained in the Australian Consumer Law.<sup>70</sup> These provisions prohibit misleading, deceptive<sup>71</sup> or 'unconscionable' conduct,<sup>72</sup> or the making of 'false or misleading representations'.<sup>73</sup> They also require providers to act 'with due care and skill'.<sup>74</sup> Consumer advocates have argued that 'it may amount to unconscionable conduct for pawn loans to be continually extended resulting in long-term high-cost

<sup>68</sup> *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019* (Cth); *Corporations Act 2001* (Cth) s 994B(3)(f); *Corporations Regulations 2001* (Cth) r 7.8A.20(9)(e). The Design and Distribution Obligations require all issuers and distributors of financial products (other than those exempted by the *Regulations*) to test their products, prior to releasing them to market, to ensure that they do not cause consumer harm. Issuers and distributors must also 'monitor consumer outcomes' and review their products regularly 'to ensure that consumers are receiving products that are likely to be consistent with their ... objectives, financial situation and needs': Australian Securities and Investment Commission, *Regulatory Guide 274: Product Design and Distribution Obligations* (Regulatory Guide, December 2020) 4. In the Explanatory Statement accompanying the *Corporations Amendment (Design and Distribution Obligations) Regulations 2019*, the Treasury stated that '[t]he regulations exclude pawnbroking from the scope of the [Design and Distribution Obligations] on the basis that the regulation of pawnbroking is the responsibility of States and Territories': Explanatory Statement, *Corporations Amendment (Design and Distribution Obligations) Regulations 2019* (Cth) 13.

<sup>69</sup> The issuing of a pawn loan constitutes a 'financial service' for the purposes of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act'). This is because pawnbroking constitutes a 'credit facility' and is therefore a 'financial product' for the purposes of the ASIC Act. This broad category also includes credit cards, mortgages, guarantees, consumer leases, hire purchase arrangements and BNPL services: ASIC Act s 12BAA(7)(k); *Australian Securities and Investments Commission Regulations 2001* (Cth) r 2B(1)(c). Provision of a 'financial product' constitutes a 'financial service' under s 12BAB of the ASIC Act: see Hal Bolitho, Nicola Howell and Jeannie Paterson, *Duggan and Lanyon's Consumer Credit Law* (LexisNexis Butterworths, 2<sup>nd</sup> edition, 2020) 24.

<sup>70</sup> *Competition and Consumer Act 2010* (Cth) sch 2, s 18. The *Australian Consumer Law* does not apply to financial products and services: *Competition and Consumer Act 2010* (Cth) s 131A; Bolitho et al (n 69) 24.

<sup>71</sup> ASIC Act (n 69) s 12DA.

<sup>72</sup> Ibid ss 12CA–12CC.

<sup>73</sup> Ibid s 12DB. The ASIC Act also prohibits harassment and coercion (s 12DJ), bait advertising (s 12DG), referral selling (s 12DH), pyramid selling (s 12DK) and the unsolicited issuing of credit or debit cards (s 12DL), among other things.

<sup>74</sup> Ibid s 12ED(1).

debt.<sup>75</sup> To date, however, it appears that no pawnbrokers have been sanctioned for breaching their obligations under the ASIC Act.<sup>76</sup>

### C State and Territory Regulation

Pawnbrokers are regulated in every state and territory.<sup>77</sup> Some jurisdictions require pawnbrokers to hold a licence, while others merely require them to register with a relevant authority.<sup>78</sup> The original purpose of these state regimes was to prevent crime and disrupt the illegal trade in stolen goods.<sup>79</sup> When the *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) ('the NSW Act') was introduced, consumer protection was described as 'secondary' to its law-enforcement function.<sup>80</sup> In recent decades, however, the protective function of state pawnbroking legislation has assumed greater significance. In Parliamentary debates, there has been a shift in emphasis towards the needs of borrowers, who have been described as 'vulnerable',<sup>81</sup> 'unfortunate'<sup>82</sup> and in 'very desperate need'.<sup>83</sup> In 2005, the NSW legislature acknowledged that affording protection to pawn loan users was 'critical', since 'consumers who use the services of pawnbrokers are often amongst the most disadvantaged members of our

<sup>75</sup> Claire Rawlinson, 'Cash Converters Pays Customer \$4,000 to Drop Legal Challenge to Pawnbroking', *ABC News* (online, 17 May 2016) <<https://www.abc.net.au/news/2016-05-17/cash-converters-pays-customer-to-drop-legal-challenge/7421462>> ('Cash Converters').

<sup>76</sup> A search of the ASIC website in August 2023, using the search term 'pawn', yielded no information about enforcement of the ASIC Act obligations in relation to pawn lenders. ASIC's website publishes the details of recent enforcement action against pawn lenders for alleged breaches of the NCCPA. These are discussed in Part III(E).

<sup>77</sup> See *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic); *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW); *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld); *Second-Hand Dealers and Pawnbrokers Act 1996* (SA); *Pawnbrokers and Second-Hand Dealers Act 1994* (WA); *Second-Hand Dealers and Pawnbrokers Act 1994* (Tas); *Pawnbrokers Act 1902* (ACT); *Consumer Affairs and Fair Trading Act* (NT).

<sup>78</sup> The chief requirements of current laws in Australia's three most populous states are summarised in the Annexure.

<sup>79</sup> A Law Reform Commission of Victoria ('LRCV') report notes that the 'primary objective' of the *Pawnbrokers Act 1958* (Vic) was 'crime prevention and control'. According to the LRCV, the *Pawnbrokers Act 1958* (Vic) sought to achieve this '(a) by establishing a system for vetting the character of licence holders; (b) by imposing obligations on licence holders about how they go about their work, for example, in relation to keeping record books and not selling or changing the nature of goods for specified periods after acquiring them; (c) by giving police special powers to inspect goods and records.' The LRCV noted that '[t]here is a widespread view that businesses dealing in used goods are a major outlet for stolen goods – or certainly would be if they were not carefully supervised': Victorian Law Reform Commission, *Second Hand Dealers, Marine Stores Dealers & Pawn Brokers* (Report, May 1988) 7.

<sup>80</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 April 1996, 438, quoted in *Palgo* (n 1) 280 [92] (Kirby J).

<sup>81</sup> Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1725 (Elaine Carbines).

<sup>82</sup> Ibid 1729 (Peter Katsambatis).

<sup>83</sup> Ibid 1723 (Ronald Best).

community'.<sup>84</sup> In 2001, the purposes of the *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) were amended, to include 'enhance[d] protection of consumers dealing with second-hand dealers and pawnbrokers' as an explicit purpose of the Act.<sup>85</sup> State and territory laws require pawnbrokers to confirm the identities of their customers, to keep detailed records and to produce these records on request. They also require pawnbrokers to provide their customers with a 'pawn ticket', setting out the fees and charges payable on pawn loans.<sup>86</sup> Most states impose limited additional rules with a view to protecting consumers. These include rules as to the minimum period that must elapse before a pawnbroker can sell pawned goods,<sup>87</sup> and a requirement that, when unredeemed goods are sold, any residual value must be repaid to the borrower.<sup>88</sup>

Since their enactment, most state laws have been subject to review and amendment.<sup>89</sup> In Victoria, for example, the State Government initiated reviews of its pawnbroking legislation in 1995 and again in 2000.<sup>90</sup> The first review led to the removal of a 48 per cent annual interest-rate 'cap'. The review found that the interest rate cap was causing 'unscrupulous pawnbrokers' to engage in various strategies designed to avoid the application of the *Second-Hand Dealers and*

<sup>84</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 23 June 2005, 17379 (Tom Kelly).

<sup>85</sup> *Second-Hand Dealers and Pawnbrokers (Amendment) Act 2001* (Vic) s 4; Victorian Government, *Second-Hand Dealers and Pawnbrokers Regulations 2008: Regulatory Impact Statement*, 2. By contrast, crime prevention remains the focus of the *Second-hand Dealers and Pawnbrokers Act 2003* (Qld). Section 3 states that its 'main objectives ... are to — (a) regulate the activities of second-hand dealers and pawnbrokers; and (b) deter crime in the second-hand property market; and (c) help protect consumers from purchasing stolen property'. The *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) does not set out explicit purposes or objects. According to the 2020 Regulatory Impact Statement issued by the NSW Government, '[t]he implied objectives of the Act are to: limit the traffic in stolen goods through pawnbroker and second-hand dealer businesses; regulate the dealing in certain categories of second-hand goods at high risk of theft; require licensees to be more vigilant about clients who offer goods for sale or pawn, particularly for the documentation they produce to substantiate their identity and title; enhance the enforcement capability of NSW Police to combat property theft through the rapid provision of up-to-date information on the sale/pawn of second-hand goods; constrain the exercise of market power in respect of the provision of pawnbroking services; [and] facilitate the return of stolen property to rightful owners quickly and equitably.'; see New South Wales Government, *RIS* (n 61) 4.

<sup>86</sup> See, eg, *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 23(3)(a); *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld) s 58; *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 28(5).

<sup>87</sup> This is usually described as a 'redemption period': see, eg, *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 29; *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld) s 60.

<sup>88</sup> See, eg, *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld) s 64.

<sup>89</sup> See, eg, New South Wales Department of Fair Trading (n 58).

<sup>90</sup> See, eg, Consumer Affairs Victoria, *Small Amount Lending Inquiry 2008* (Report, 2009) 9–10 ('CAV Report') <<https://www.consumer.vic.gov.au/library/publications/resources-and-education/research/small-amount-lending-inquiry-2008.pdf>>. According to the CAV Report, the Victorian Government also 'invited views on the regulation of pawnbrokers, including whether any future regulation should extend the Consumer Credit Code to pawn broking businesses' in its 2005 review of consumer credit, but received no submissions on these matters: at 10. See also Consumer Affairs Victoria, *Regulating the cost of credit* (Research Paper, March 2006) i <<https://www.consumer.vic.gov.au/library/publications/resources-and-education/research/regulating-the-cost-of-credit-2006.pdf>>.

*Pawnbrokers Act 1989* (Vic). This meant that some pawnbrokers' customers did not enjoy even the very limited consumer protections afforded them under the Act.<sup>91</sup> The second review led to the reinstatement of the rule, which had been abolished in 1997 by the previous Government, that any surplus value must be returned to the borrower, following the sale of unredeemed goods.<sup>92</sup> These amendments also banned the pawning of motor vehicles and empowered the Victorian Civil and Administrative Tribunal to hear disciplinary matters relating to pawnbrokers, impose fines and suspend or cancel a pawnbroker's registration.<sup>93</sup> The penalties for breaching state pawnbroking laws vary widely between jurisdictions. In Queensland, pawnbrokers may be fined up to \$30,960 for operating without a licence.<sup>94</sup> In New South Wales the equivalent fine is \$11,000.<sup>95</sup> In Victoria, acting as a pawnbroker without being registered carries a maximum penalty of \$19,231.<sup>96</sup>

### D Palgo Holdings Pty Ltd v Gowans

Pawnbroking seldom features in the case law of Australia's appellate courts. In 2005, however, the High Court decision of *Palgo Holdings Pty Ltd v Gowans* ('*Palgo*')<sup>97</sup> offered a rare insight into the industry and the methods employed by some businesses to evade regulation. In *Palgo*, the High Court considered the application of the NSW Act to an enterprise trading as 'Cash Counters Byron' in Byron Bay, New South Wales. Cash Counters offered short-term loans secured by borrowers' personal items. In 'all but exceptional cases', these items were left on the lender's premises until the loans were repaid.<sup>98</sup> If borrowers defaulted on their loans, the items were sold.<sup>99</sup> The NSW Department of Fair Trading commenced legal action against Cash Counters, alleging that it had operated a pawnbroking business without a licence. Yet Cash Counters argued that its loans were in fact 'chattel mortgages' and therefore exempt from the application of the NSW Act. It pointed to the terms of its written agreement with customers, which referred to the goods as 'mortgaged property', and stated that the goods were left

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<sup>91</sup> CAV Report (n 90) 9.

<sup>92</sup> *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 23A; Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1720 (Carlo Furletti), 1726 (Elaine Carbines).

<sup>93</sup> Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1726 (Elaine Carbines).

<sup>94</sup> *Second-Hand Dealers and Pawnbrokers Act 2003* (Qld) s 6; Queensland Government, *Second-Hand Dealing and Pawnbroking Industry Breaches and Penalties* (Web Page, 24 October 2023) <<https://www.qld.gov.au>>.

<sup>95</sup> *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) s 6; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

<sup>96</sup> *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 5; Consumer Affairs Victoria, *Penalties — Second-Hand Dealers and Pawnbrokers* (Web Page, 30 June 2023) <<https://www.consumer.vic.gov.au/licensing-and-registration/second-hand-dealers-and-pawnbrokers/penalties>>.

<sup>97</sup> *Palgo* (n 1).

<sup>98</sup> *Ibid* 254 [8].

<sup>99</sup> *Ibid*.

with Cash Counters ‘in storage at [the] mortgagors [sic] request’.<sup>100</sup> The NSW Act did not define the terms ‘pawned’ or ‘pawned goods’.<sup>101</sup> On appeal from the Local Court, Justice Sperling of the Supreme Court held that Cash Counters’ agreements could be both pawn loans *and* chattel mortgages simultaneously.<sup>102</sup> Accordingly, Sperling J upheld the Local Court’s finding that Cash Counters had provided pawn loans without a licence.<sup>103</sup> The Court of Appeal also upheld the Local Court’s decision, stating that the mere production of ‘a document which gave [Cash Counters] rights as a mortgagee’ was ‘not sufficient to prevent these transactions being fairly described as pledges or pawns’.<sup>104</sup>

In overturning these decisions, the High Court majority adopted a strict interpretation of the NSW Act, concluding that it did not apply to Cash Counters’ loans. The majority concluded that the scope of the Act must be interpreted with reference to the clear and ‘long-established’ legal distinction between pawn loans and chattel mortgages.<sup>105</sup> It noted that, at common law, ‘the right to detain the goods for the pledgee’s security’ was an essential component of a pawn loan, but that in the case of chattel mortgages, ‘possession’ of the goods by the lender ‘is not essential’.<sup>106</sup> It rejected the lower courts’ findings that the NSW Act applied to chattel mortgages, observing that this construction would require the term ‘pawn’ to include ‘transactions which centuries of legal writing has distinguished as being different from a transaction of pawn or pledge’.<sup>107</sup> The majority observed that the NSW Act was ‘only one of several Acts of New South Wales regulating the provision of credit to borrowers’.<sup>108</sup> Chattel mortgages were regulated under the *Bills of Sale Act 1898* (NSW) while other loans were governed by ‘general legislation regulating the provision of consumer credit’.<sup>109</sup> It noted that some other statutes regulating pawnbroking, including the *Pawnbrokers Act 1902* (NSW), expressly extended their scope to include chattel mortgages.<sup>110</sup> In the absence of such

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<sup>100</sup> Ibid 253–4 [5].

<sup>101</sup> Cash Counters was alleged to have breached *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) s 6, which provided that ‘[a] person must not carry on a business of lending money on the security of pawned goods except in accordance with a licence held by the person.’

<sup>102</sup> Justice Sperling stated: ‘It would be extraordinary if the legislature had intended that a transaction having all of the features of a pawnbroking transaction would not be covered by the legislation if the transaction contained the additional element that title in the goods passed to the lender. That would mean that ordinary pawnbroking transactions could be removed from the purview of the Act at the stroke of the pen, which cannot have been intended.’ See *Palgo Holdings Pty Ltd v Gowans* [2002] NSWSC 894, [38].

<sup>103</sup> Ibid [44].

<sup>104</sup> Ibid [34] (Hodgson JA, Handley JA agreeing at [8], Heazley JA agreeing at [9]).

<sup>105</sup> *Palgo* (n 1) 257 [16] (McHugh, Gummow, Hayne and Heydon JJ).

<sup>106</sup> Ibid 258 [17].

<sup>107</sup> Ibid 261 [24].

<sup>108</sup> Ibid 262 [29].

<sup>109</sup> Ibid 263 [31].

<sup>110</sup> Ibid 259 [20].

provisions, it held, there was ‘no evident reason to read the 1996 Pawnbrokers Act as designed to cover a field wider than its words mark out.’<sup>111</sup>

In dissent, Kirby J argued for a more expansive interpretation of the NSW Act, asserting that the Court ‘should be on guard against any temptation to return to the dark days of literalism’.<sup>112</sup> Justice Kirby pointed out that many consumers who borrowed from Cash Counters believed they were engaging with a pawnbroker. One consumer stated that he left his goods at the store ‘because he believed that was part of a normal hock transaction’.<sup>113</sup> Another ‘stated that he assumed he had to leave the goods with [Cash Counters] “because that is the way a pawnbroker normally works”’.<sup>114</sup> His Honour argued that a technical and narrow definition of ‘pawned goods’ ‘should not be used to assist those who use devices to circumvent the operation of the 1996 Act in frustration of the important social purposes it reveals’.<sup>115</sup> Within a month of the High Court’s decision in *Palgo*,<sup>116</sup> the New South Wales Parliament amended the NSW Act.<sup>117</sup> The NSW Act now clearly states that its application depends upon ‘the substance of the loan transaction rather than its form or other legal technicalities’.<sup>118</sup> The 2005 amendments stipulate that ‘particular regard is to be had to the ordinary understanding of the borrower as to the nature of the loan transaction and the reason or basis on which possession of goods is given to the lender’.<sup>119</sup> Specifically, the amendments state that ‘it does not matter that the terms of the loan transaction provide that the lender has taken possession of the goods at the request of or on behalf of the borrower or otherwise so as to give the appearance that the lender does not rely on possession of the goods as security for the repayment of the loan’.<sup>120</sup> The amendments also created a new regulation-making power to facilitate broader application of the NSW Act

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<sup>111</sup> Ibid 263 [31].

<sup>112</sup> Ibid 265 [40].

<sup>113</sup> Ibid 270 [57].

<sup>114</sup> Ibid.

<sup>115</sup> Ibid 281 [99]. In a subsequent 2005 decision, Kirby J noted that the Court had been ‘persuaded’ in *Palgo* ‘to adopt a literal interpretation of the word “pawn” that prevented the attainment of the fairly obvious purpose of the New South Wales Parliament.’ See *R v Lavender* (2005) 222 CLR 67, 102.

<sup>116</sup> The High Court delivered its judgment in *Palgo* on 25 May 2005.

<sup>117</sup> The *Pawnbrokers and Second-Hand Dealers Amendment Bill 2005* (NSW) was introduced into the NSW Legislative Assembly on 10 June 2005. The *Pawnbrokers and Second-Hand Dealers Amendment Act 2005* (NSW) passed both Houses on 23 June 2005 and received Royal Assent on 1 July 2005.

<sup>118</sup> *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 3A(3)(a).

<sup>119</sup> Ibid s 3A(3)(b).

<sup>120</sup> Ibid s 3A(3)(c). In the Explanatory Note accompanying these amendments, the NSW Government stated that the purpose of the changes was ‘to reverse the effect of the decision of the High Court in *Palgo Holdings Pty Ltd v Gowans*’ and to ‘affir[m]’ the interpretation adopted by the NSW Supreme Court, the NSW Court of Appeal and the dissenting judgment of Kirby J’: Explanatory Note, *Pawnbrokers and Second-hand Dealers Amendment Bill 2005* (NSW) 1–2. Identical provisions were inserted into the *Pawnbrokers and Second-Hand Dealers Act 1994* (WA) s 3A in 2006.

‘in the event that the credit market develops new products ... not anticipated by the legislation’.<sup>121</sup>

## E ASIC Enforcement

ASIC’s website publishes relatively little information about its enforcement activity in relation to pawnbroking.<sup>122</sup> However in a media release dated 19 April 2023, ASIC stated that a Queensland lender and its employee had been ‘charged in relation to engaging in credit activity without a licence’ and that the employee ‘ha[d] also been charged with engaging in conduct that contravened an order banning him from engaging in any credit activities.’<sup>123</sup> In April 2017, the Federal Court had issued fines totalling \$776,000 to two companies based in Cairns, in northern Queensland, and to the director of both companies, for breaches of the NCCPA.<sup>124</sup> The companies had been operating in conjunction with a used car dealership to offer car loans to vulnerable consumers, with interest rates of 48 per cent and additional brokerage fees of up to \$990.<sup>125</sup> The Federal Court found that the companies had breached the responsible lending provisions of the NCCPA and that one had engaged in unconscionable conduct and entered into unjust transactions. After the Federal Court handed down its decision, the media reported that the director of both companies continued to operate a pawnbroking business in Cairns.<sup>126</sup> The business purported to offer pawn loans, yet the terms of those loans allowed it to take ‘debt recovery action’ against borrowers in the event of default.<sup>127</sup> As noted above, pawnbrokers are exempt from the NCCPA on the condition that their ‘only recourse’ is to sell the goods offered as security, in the

<sup>121</sup> *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 3A(4); New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 June 2005, 16965 (Alison Megaritty).

<sup>122</sup> A search of the ‘Newsroom’ page on ASIC’s website, conducted in August 2023, revealed only one media release relating to pawnbroking: Australian Securities and Investment Commission, ‘Cairns Pawnbroker and Banned Employee Charged with Unlicensed Credit’ (Media Release 23-100MR, 19 April 2023) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2023-releases/23-100mr-cairns-pawnbroker-and-banned-employee-charged-with-unlicensed-credit/>> (‘Cairns Pawnbroker Charged’). A search of the entire ASIC website, using the search term ‘pawn’, yielded only nine results. Of these, only the 19 April 2023 media release related to an enforcement action.

<sup>123</sup> *Ibid.*

<sup>124</sup> The Court also ordered the three defendants to pay costs totalling \$420,000: *ASIC v Channic Pty Ltd* (No 5) [2017] FCA 363, [102].

<sup>125</sup> Australian Securities and Investment Commission, ‘Queensland Car Yard Lender Ordered to Pay over \$1.2 Million After Breaching Consumer Credit Laws’ (Media Release 17-108MR, 7 April 2017) <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-108mr-queensland-car-yard-lender-ordered-to-pay-over-1-2-million-after-breaching-consumer-credit-laws/>>.

<sup>126</sup> Sharnie Kim, ‘Cairns Salesman Fined for Misleading Vulnerable Consumers Continues to Work as Pawn Broker’, *ABC News* (online, 21 June 2018) <<https://www.abc.net.au/news/2018-06-21/cairns-lender-colin-hulbert-indigenous-loans-fines-qld/9893290>>.

<sup>127</sup> ‘Cairns Pawnbroker Charged’ (n 122).



event of default.<sup>128</sup> A lender reserving the right to pursue borrowers by means of ‘debt recovery action’ may fall outside the scope of the exemption, making it subject to the NCCPA. ASIC’s 2023 media release stated that ‘the matter [wa]s being prosecuted by the Commonwealth Director of Public Prosecutions following an investigation by ASIC’.<sup>129</sup>

#### IV PAWN LENDING IN PRACTICE: QUALITATIVE DATA

This section provides qualitative evidence regarding the operation of the Australian pawn loan industry and the characteristics of pawn loan users. It draws on case law, consumer advocates’ research and policy submissions, media reports and an online survey conducted by the authors.

##### A Case Law

The case law offers some insights into the operation of some parts of the pawnbroking industry and the characteristics of its customers. In the 2005 *Palgo* decision, the Court heard that Cash Counters had provided loans ranging from \$40 to \$100,<sup>130</sup> typically for seven days.<sup>131</sup> Under the terms of one contract tendered in evidence, Cash Counters lent \$70 for one week. The borrower agreed to repay \$77 the following week.<sup>132</sup> With the exception of one loan secured by a customer’s car, the loans described in *Palgo* did not exceed \$100. One customer obtained a loan of \$80, secured by a portable radio and a mobile phone. Another borrowed \$60 on the security of a microwave and a set of speakers. One borrowed \$40 using a ring as security and another borrowed \$60 using a guitar.<sup>133</sup> Another case, heard in the NSW Supreme Court in the following year, involved a Wollongong pawnbroker accused of breaching its obligation to attach a label to each pawned item, under the NSW Act. The inventory of that pawn shop included ‘a Sony Compact disc player, a Canon printer, a Panasonic cordless phone and a Squire Strat guitar.’<sup>134</sup>

The 2022 case of *Sam Pambris Super Fund Pty Limited v Kallidis*<sup>135</sup> afforded an insight into a very different segment of the industry. It involved a pawn lender

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<sup>128</sup> NCC s 6(9).

<sup>129</sup> In August 2023, ASIC’s website stated that the matter was listed for mention on 20 September 2023: ‘Cairns Pawnbroker Charged’ (n 122).

<sup>130</sup> *Palgo* (n 1) 270 [57].

<sup>131</sup> *Ibid* 253 [4].

<sup>132</sup> *Ibid*.

<sup>133</sup> *Ibid* 270 [57].

<sup>134</sup> *Director of Public Prosecutions (NSW) v Illawarra Cashmart Pty Ltd* (2006) 67 NSWLR 402, 406 [10].

<sup>135</sup> [2022] NSWDC 678.

whose business, Hock-A-Car Pty Ltd,<sup>136</sup> operated in Sydney from 2013 to approximately 2022. Hock-A-Car Pty Ltd provided pawn loans secured by motor vehicles,<sup>137</sup> at 20 per cent interest per month, equating to an annual interest rate of 240 per cent.<sup>138</sup> One pawn ticket, tendered in evidence, recorded a loan of \$2,000 secured by a Toyota Corolla. The customer agreed to pay interest of \$400 per month.<sup>139</sup>

## B Previous Qualitative Research and Case Studies

In 1997 and 2000, a national non-profit organisation conducted two qualitative studies of the Victorian pawnbroking industry.<sup>140</sup> The 1997 study was based on a survey of 73 pawn loan users and 50 consumer advocates, as well as 27 case studies gathered with the assistance of these advocates.<sup>141</sup> The study found that pawn loan users ‘were typically in receipt of a pension or other government allowance’ and used pawn loans to fund essential expenses, such as food, utilities and rent.<sup>142</sup> Some of the consumers surveyed said that they had used pawn loans to fund drugs, alcohol and gambling. The study found that, for many of these individuals, pawning goods was a “‘last resort” measure’, pursued after all other sources of funds had been exhausted. Nearly half of those surveyed said that they did not redeem the goods they pawned, while ‘those who did often experienced considerable difficulties.’<sup>143</sup> On average, the consumers in this study estimated that they received a quarter of the value of the items they pawned, with average

<sup>136</sup> The business operated under several different names including A1 Hock-A-Car Sydney Pty Ltd, A1 Hock-A-Car Sydney No. 1 Pty Ltd and A1 Hock-A-Car Sydney No. 2 Pty Ltd: *ibid* [12]–[14].

<sup>137</sup> Since 2001, the pawning of motor vehicles has been prohibited in Victoria: *Second-Hand Dealers and Pawnbrokers Act 1989* (Vic) s 23(1A). It is permitted under the *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) and the *Second-hand Dealers and Pawnbrokers Act 2003* (Qld).

<sup>138</sup> *Pambris Super Fund Pty Limited v Kallidis* [2022] NSWDC 678, [12]–[15].

<sup>139</sup> *Ibid* [18]. The plaintiff gave evidence that ‘a pawn ticket is a standard ticket, all pawnbrokers have the same ticket. Pawnbroking contracts are no longer than three months, they don’t go into 12 month contracts, so therefore that’s only there as a basis to give them a guide, so we don’t charge 240% per annum because the contract expires in three months [sic] time unless the client wants to recontract their car which is very unlikely. And it’s a standard pawn ticket, all pawnbrokers New South Wales wide have this amount of interest and that’s how it works ... I accept that it’s high interest but it’s governed by the Department of Fair Trading and pawnbroking has been around for a long time and it’s short term lending and it’s licensed’: *ibid* [19].

<sup>140</sup> Kristen Densley and Valerie Ayres-Wearne, *Fair Dealing? The Consumers’ Experience of Pawnbroking in Victoria* (Report, Good Shepherd Youth and Family Service and Financial & Consumer Rights Council, March 1997) 1; Valerie Ayres-Wearne, *Money Lenders or Loan Sharks: The Consumers’ Perspective on the Impacts of Deregulation of the Pawnbroking Industry and Other Legislative Amendments to the Second-Hand Dealers and Pawnbrokers Act (1989) Which Took Effect in January 1998* (Report, Good Shepherd Youth and Family Service, April 2000) 9.

<sup>141</sup> These included financial counsellors, ‘consumer support workers’, emergency relief providers, No Interest Loans Network members, gambling counsellors and employees of supported accommodation services and community legal centres: Densley and Ayres-Wearne (n 140) 2.

<sup>142</sup> *Ibid*.

<sup>143</sup> *Ibid*.

loans ranging from \$50 to \$80.<sup>144</sup> While most were unaware of the interest rates attaching to their pawn loans, the authors estimated that their loans attracted rates ranging from 150 to 1,300 per cent per annum.<sup>145</sup> The study noted that many consumers ‘expressed a high level of dissatisfaction with pawnbroking deals’, expressing the view that they were ‘ripped off’ by pawnbrokers.<sup>146</sup> At the same time, they acknowledged their reliance on pawn loans “to help them out in difficult circumstances” given their lack of alternative credit options.<sup>147</sup>

In 2000, the same organisation published a further report evaluating the impact of reforms introduced in 1997 in Victoria.<sup>148</sup> These reforms ‘had the effect of deregulating the pawnbroking industry’ in Victoria by removing the requirement for pawnbrokers to obtain licences from local councils and abolishing the previous interest rate ‘ceiling’ of 48 per cent.<sup>149</sup> The reforms imposed new disclosure requirements on pawnbrokers, on the basis that access to more ‘up-front’ information about fees and charges would allow consumers to ‘shop around to get the best possible deal.’<sup>150</sup> Based on a formal survey of 105 Victorian pawnbrokers operating at the time,<sup>151</sup> the study found evidence of widespread non-compliance with the new regulations.<sup>152</sup> It also found that, in the new regulatory environment of uncapped interest rates, ‘market forces’ had failed to protect consumers from paying very high rates. The study attributed this to the extreme vulnerability of many pawn loan users and the enduring status of pawnbrokers as lenders of ‘last resort’, when all other avenues have been exhausted.<sup>153</sup> To illustrate this, the report presented several case studies of pawn loan users.<sup>154</sup> A typical case study featured a 35-year-old man who pawned a chess set for \$60. Over the ensuing six months, he paid a total of \$100 in order to redeem

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<sup>144</sup> Ibid.

<sup>145</sup> Ibid 3.

<sup>146</sup> Ibid 3, 25, 48, 50.

<sup>147</sup> Ibid 3.

<sup>148</sup> Ayres-Wearne (n 140) 42.

<sup>149</sup> Ibid i, 6. See also *Law and Justice Legislation Amendment Act 1997* (Vic); Explanatory Memorandum, *Law and Justice Legislation Amendment Bill 1997* (Vic) 7; *CAV Report* (n 90) 9–10.

<sup>150</sup> Victorian Government, Office of Fair Trading and Business Affairs, ‘New Legislation to Clean up Pawnbroking Industry: Wade’ (Media Release, 24 December 1997), quoted in Ayres-Wearne (n 140) 4.

<sup>151</sup> Between September and December 1999, the author of this study identified 131 pawnbrokers operating in Victoria, though she was unable to verify this figure’s accuracy. At that time, pawnbrokers were not distinguished from second hand dealers in the Victorian registration system: Ayres-Wearne (n 140) ii. This research also involved case studies, ‘[i]nformal discussions with pawnbrokers’ and interviews with ‘people on low-incomes who regularly pawn goods’ and ‘a range of community workers who come into contact with and assist people who pawn goods’: at 10–11.

<sup>152</sup> Ibid 78.

<sup>153</sup> The study observed that many users of pawn loans are borrowing money to meet ‘essential living costs ... to provide needed cash flow for a struggling business or to finance a drug habit or gambling difficulties’: ibid 80.

<sup>154</sup> According to the study, ‘[t]he eighteen people who participated in this survey were known to Good Shepherd Youth and Family Service staff via their counselling and support work’: ibid 43.

the chess set.<sup>155</sup> Another involved a 24-year-old woman who pawned a video player for \$60 and paid \$85 to redeem it four weeks later.<sup>156</sup> One man, with ‘no regular accommodation’, pawned a radio worth \$150 to obtain a \$15 loan. He was unable to redeem the radio and it was sold by the pawn shop.<sup>157</sup> Several consumers profiled in the study admitted that they pawned their possessions because they had no other means of raising funds.<sup>158</sup> Many said they used the money to purchase drugs,<sup>159</sup> and one said he used it to access a detoxification programme.<sup>160</sup>

Since the publication of these reports, consumer advocates have continued to offer case studies illustrating the harms experienced by some vulnerable consumers as a consequence of using pawn loans.<sup>161</sup> In a submission to Treasury in 2017, a national coalition of consumer advocates stated that they ‘regularly receive[d] complaints from consumers who have pawned goods to pay for basic necessities, or to fund drug and gambling addictions’.<sup>162</sup> They noted that goods pawned often had little monetary value, but great ‘sentimental value’ for the borrowers concerned. For this reason, ‘desperate consumers’ who could not repay their loans on time could often be persuaded to extend the loans, so as to avoid the permanent loss of their possessions. According to the advocates, ‘the most disadvantaged Australians can end up paying significant amounts of interest ... and become stuck in a debt spiral’ through their use of pawn loans.<sup>163</sup> In a further submission in 2019, the advocates contended that some pawnbrokers ‘target’ vulnerable consumers with unfair contracts and ‘exorbitant fees’.<sup>164</sup> They pointed out that some consumers of pawn loans ‘end up paying more interest than the total value of the item.’<sup>165</sup> Both submissions included numerous case studies. One described a mother of seven who had taken out 76 pawn loans with effective annual interest rates ranging from 360 to 420 per cent per annum.<sup>166</sup> Another involved ‘a middle-aged man with significant health problems’, reliant on a

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<sup>155</sup> Ibid 55.

<sup>156</sup> Ibid 50.

<sup>157</sup> Ibid 59.

<sup>158</sup> Ibid 59.

<sup>159</sup> Ibid 46, 50, 51, 55, 56. The report quoted one consumer who stated: ‘When I was in an active drug addiction phase, I pawned and lost lots of stuff. Now I feel sad knowing just how much of my own stuff and things belonging to my family that I’ve lost’: at 43.

<sup>160</sup> Ibid 49.

<sup>161</sup> *Industry Self-Regulation in Consumer Markets* (n 7) 37; CALC 2017 Submission (n 7); CALC 2019 Submission (n 7). See also Consumer Credit Law Centre SA, Submission No 33 to Senate Economic References Committee, *Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (9 November 2018) 14–15; Consumer Action Law Centre, Submission No 37 to Senate Economic References Committee, *Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (9 November 2018) 19–21 (‘CALC Submission to Senate Inquiry’).

<sup>162</sup> CALC 2017 Submission (n 7) 20

<sup>163</sup> Ibid 20–1.

<sup>164</sup> CALC 2019 Submission (n 7) 4.

<sup>165</sup> Ibid 4.

<sup>166</sup> CALC 2017 Submission (n 7) 22–3.

Disability Support Pension.<sup>167</sup> The man had entered into 35 pawn loan contracts with ‘a well-known pawnbroking franchise’, 23 of them within a 15-month period. When he could not afford to redeem his pawned belongings, he ‘often had to pay ... interest charges for several months in order to keep [the] items on hold.’ On several occasions, according to the advocates, the man ‘purchased his own items back from the pawnbroker on laybuy at more than double the amount which was originally loaned to him.’ In total, he paid the pawnbroker over \$6,000, more than twice the sum of all his loans. He also lost several personal items, which were sold by the pawnbroker at a profit.<sup>168</sup>

Further examples of consumer harm have appeared in the media. In 2009, the national broadcaster reported claims from former customers and staff of a large pawnbroking chain that the company was ‘thriving’ on the ‘desperation’ of people addicted to drugs.<sup>169</sup> The report described one man, a long-term cannabis user, who pawned his PlayStation 3 to support his drug use. The man said the PlayStation had cost him \$1,000. According to the report, he ‘got \$200’ for pawning it, but ‘had to pay almost twice as much to buy it back three months later.’<sup>170</sup> Another customer said that he had used the company at least 50 times to obtain money to buy drugs. He told the journalist that he and his friends would regularly steal garden equipment, including mowers and whipper snippers, and pawn it to fund their addictions. A former employee of the chain said that staff were aware that many customers were selling stolen goods to pay for drugs. A spokesman for the company did not dispute the claims, but insisted that this was a matter for the customer’s ‘discretion’. ‘We don’t take the role and we don’t expect our staff to take the role to get behind the reasons why people use our services,’ the spokesman said.<sup>171</sup>

In 2015, the ABC published a further report in which a Melbourne woman claimed that pawnbrokers were ‘profiting off people’s misery’.<sup>172</sup> The woman, a single mother, said that she regularly pawned her late mother’s jewellery when ‘in desperate need of cash’. She said that, at that time, she owed a total of \$575 to her local pawnbroker, which belonged to a national chain. With a monthly interest rate of 35 per cent, or an effective annual rate of 420 per cent, these loans required monthly repayments of approximately \$200. The woman said that she had

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<sup>167</sup> This is an Australian social security payment for individuals who cannot work due to an enduring ‘physical, intellectual or psychiatric condition’: Services Australia, *Disability Support Pension* (Web Page, 2 November 2023) <<https://www.servicesaustralia.gov.au/disability-support-pension>>.

<sup>168</sup> CALC 2019 Submission (n 7) 4.

<sup>169</sup> Amy Simmons, ‘Cash Converters “Thriving on Junkies”’, *ABC News* (online, 1 December 2009) <<https://www.abc.net.au/news/2009-12-01/cash-converters-thriving-on-junkies/1164554>>.

<sup>170</sup> *Ibid.*

<sup>171</sup> The spokesman stated: ‘Like every lending institution ... the cash that we do lend is used for a variety of reasons that falls to the discretion of the customer’: *ibid.*

<sup>172</sup> Claire Rawlinson, ‘Pawnbrokers Charging 420 Per Cent Interest on Unregulated Industry, “Profiting from Misery” Say Low Income Earners’, *ABC News* (online, 16 July 2015) (‘Profiting from Misery’) <<https://www.abc.net.au/news/2015-07-16/pawnbrokers-profiting-from-desperation/6622310>>.

previously lost a diamond ring worth \$4,000 after missing a repayment while she was in hospital. She originally pawned the ring for \$400 and had already paid more than \$700 in interest when she defaulted.<sup>173</sup> With the assistance of consumer advocates, the woman commenced legal action against the chain, arguing that it had engaged in unconscionable conduct, but discontinued the proceedings in exchange for a \$4,000 settlement.<sup>174</sup>

### C Survey of Australian Pawn Loan Users

In 2019, the authors obtained ethics approval<sup>175</sup> to conduct an anonymous online survey of Australian consumers regarding their experiences using Buy Now Pay Later services ('BNPL'), payday loans and pawn loans. The authors focussed on these three products as they all provide access to small amounts of credit, over relatively short periods, and all are regulated differently from the credit products offered by major banks, such as credit cards and personal loans.<sup>176</sup> To varying extents, all three products are designed to appeal to low-income consumers,<sup>177</sup> and all have been criticised by consumer advocates, who argue that they

<sup>173</sup> Ibid.

<sup>174</sup> See Rawlinson, 'Cash Converters' (n 75). See also Claire Rawlinson, 'Turning Points: Melbourne Women Face Traps Along Their Road to Recovery', *ABC News* (online, 16 July 2015) <<https://www.abc.net.au/news/2015-07-14/turning-points-episode-4/6618316>>. In 2015, the *Sydney Morning Herald* offered an alternative perspective on the pawnbroking industry in a profile of several customers attending a pawnshop in outer western Sydney. They included a Disability Support Pensioner who 'pawned her laptop, on which she was writing her memoir, for \$100 every few weeks'; a man who regularly used pawn loans to pay for milk, bread, cigarettes and beer; and another customer who pawned a musical instrument for \$80 to cover her rent and pay for groceries. The pensioner stated that pawn loans 'can be lifesavers for people'. The owner of the pawn shop 'said the majority of loans he issued were under \$100 and more than half of his customers redeemed their items.' See Melanie Kembrey, 'Pawn Industry Faces Tough Competition but Remains a Quick Fix', *Sydney Morning Herald* (online, 9 May 2015) <<https://www.smh.com.au/national/nsw/pawn-industry-faces-tough-competition-but-remains-a-quick-fix-20150507-ggvxex.html>>.

<sup>175</sup> Ethics approval was granted by the Law Human Ethics Advisory Group at Melbourne Law School on 7 June 2019.

<sup>176</sup> BNPL is currently exempt from regulation under the *NCCPA*, though it is regulated under the *ASIC Act*: Australian Securities and Investment Commission, *Review of Buy Now Pay Later Arrangements* (Report No 600, November 2018) ('Review') 7, 15. Payday loans are subject to the general responsible lending obligations contained in the *NCCPA* but are also subject to additional, specific rules under the *NCC* (eg s 31A of the *NCC*, which imposes caps on the fees charged under a payday loan contract): Bolitho et al (n 69) 460, 452–3. As discussed above, pawn loans are largely exempt from the *NCCPA*, with the exception of ss 76–81 of the *NCC*, relating to unjust transactions (see Part III(B)).

<sup>177</sup> See *Review* (n 176) 22–3, 26; Paul Ali, Cosima McRae and Ian Ramsay, 'Payday Lending Regulation and Borrower Vulnerability in the UK and Australia' (2015) 3 *Journal of Business Law* 223, 230–1.

exacerbate financial hardship.<sup>178</sup> The researchers conducted the survey in collaboration with a Sydney-based independent market research company, Pureprofile.<sup>179</sup> The survey contained 71 questions relating to respondents' use of pawn loans, payday loans and BNPL. Respondents could answer the questions in one, two or all three sections, depending on how many of these products they had used. Pureprofile recruited the survey participants from its 'panel' of consumers, who register for the express purpose of participating in research studies.<sup>180</sup> The research team requested 500 unique completed surveys from users of each product. The survey launched on 12 December 2019 and closed on 21 February 2020, having gathered 1,472 complete responses.<sup>181</sup> In collaboration with a consultant statistician, the authors employed statistical tests to analyse the survey data.<sup>182</sup>

There were some limitations to the survey data. The research company imposed quotas for gender, age and state or territory of residence, to increase the likelihood that respondents to the survey were broadly representative of the Australian population. To ensure that the survey reached its target of 500 responses in each wave, however, it was necessary to relax these stratification requirements. This led to some variation in the age and gender composition of the three unique groups.<sup>183</sup> A further limitation related to the sizes of some groups within the total sample of 1,472. In total, responses were gathered from 1,128 users of BNPL, 805 users of payday loan and 582 users of pawn loans. However, there was some overlap between these groups, as 31 per cent of respondents (459 individuals) had used two products, while 20 per cent (292 individuals) had used all three products. To maximise the accuracy of comparisons between these groups, the research team used 'unique' groups, being those who had used only

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<sup>178</sup> See, eg, CALC Submission to Senate Inquiry (n 161); Financial Counselling Australia, Submission No 57 to Senate Economic References Committee, *Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (November 2018); Financial Rights Legal Centre, Submission No 31 to Senate Economic References Committee, *Inquiry into Credit and Financial Products Targeted at Australians at Risk of Financial Hardship* (November 2018).

<sup>179</sup> Pureprofile recruits individuals to complete surveys on a wide range of topics. These individuals earn 'rewards' for completing surveys, with rewards calculated according to the amount of time taken to complete each survey. Rewards can be exchanged for cash, gift cards or movie tickets: see Pureprofile, *60-Second Guide to Earning* (Web Page) <<https://www.pureprofile.com/60-second-guide/>>.

<sup>180</sup> Pureprofile pays these individuals a nominal amount to complete surveys on a wide range of topics. Payments are calculated according to the amount of time taken to complete a survey.

<sup>181</sup> This does not include a small number of responses excluded due to their questionable authenticity or reliability. These responses were identified based on the respondents' answers to certain questions, as well as the respondents' IP addresses (with duplicate responses from the same address being excluded).

<sup>182</sup> The data in Tables 1, 2 and 3 was analysed using the Chi-square test of independence. This test allowed the authors to compare the responses of various sub-groups to a single proposition.

<sup>183</sup> It was difficult, for example, to obtain sufficient responses from those aged over 65. This is likely to be due, in part, to the fact that the survey was administered online. In the final sample, 7.6 per cent of all respondents were aged 65 or over. Respondents aged 65 or over accounted for 8.1 per cent of the total BNPL users, 1.7 per cent of payday loan users and 4.1 per cent of pawn loan users.

one product — pawn loans, payday loans or BNPL — for the purposes of statistical analysis. This left three smaller groups: 458 BNPL users, 152 payday loan users and 111 pawn loan users. These small sample sizes limit the extent to which the findings from the survey can be generalised to the wider population.

Despite these limitations, the survey offers some useful insights into the demographic and financial attributes of the pawn loan users who responded to the survey. Of the three ‘unique’ user groups in the survey, the pawn loan users were the least likely to own their homes. They were the most likely to live on incomes below \$25,000 per year. They were the most likely to nominate completion of Year 10 as their highest qualification. These differences were statistically significant.<sup>184</sup> While not statistically significant, the data also suggested that pawn loan users were more likely to rely on social security as their main source of income and that they were the least likely to hold any credit cards. These findings are shown in Table 1.

**Table 1: Demographic and Financial Attributes (Unique Groups)<sup>185</sup>**

	Pawn only (per cent) (n = 111)	Payday only (per cent) (n = 152)	BNPL only (per cent) (n = 458)
Home owner	26	36	43
Income less than \$25,000 per year	41	30	28
Social security main source of income	34	23	28
Year 10 highest qualification	23	13	14
No credit cards	46	32	38

<sup>184</sup> For the first, second and fourth rows of the demographic and financial attributes listed in Table 2, the Chi-square test of independence indicated a statistically significant difference between *at least one* group and the other two groups (or between all three groups), with a p-value of 0.05 or less (indicating a high degree of statistical significance). These results allowed the authors to conclude with reasonable certainty that, for most items, there was a statistically significant difference between the *highest* and the *lowest* result. The results in the third and fifth rows were not statistically significant, but were indicative. This means it is likely that they would have been statistically significant if the sample size had been larger.

<sup>185</sup> The results of Chi-Square tests of independence between the three groups were as follows: ‘Home owner’ statistically significant at 0.01 level (p = 0.003); ‘Income less than \$25,000 per year’ statistically significant at 0.05 level (p = 0.021); ‘Social security main source of income’ *not* statistically significant; ‘Year 10 highest qualification’ statistically significant at 0.05 level (p = 0.048); ‘No credit cards’ *not* statistically significant.



These findings indicate that, in comparison with the BNPL and payday loan users in the sample, pawn loan users were socio-economically disadvantaged.

The survey data also offered evidence that pawn loans cause harm to some consumers. Of the three groups, pawn loan users were the most likely to report having experienced the following negative impacts, as a result of using the product: requesting more time to pay a bill; borrowing money from friends or family; ‘going without’ or cutting back on essential household items; and selling a personal possession. They were the least likely to state that they had experienced *none* of the specific adverse outcomes listed in the survey. These results were statistically significant.<sup>186</sup> These results are shown in Table 2.

**Table 2: Harms Experienced Following Use of the Product (Unique Groups)<sup>187</sup>**

	<b>Pawn only (per cent) (n = 111)</b>	<b>Payday only (per cent) (n = 152)</b>	<b>BNPL only (per cent) (n = 458)</b>
Requesting more time to pay a bill	27	21	8
Borrowing money from friends or family	30	24	8
Going without or cutting back on essential household items	25	21	13
Selling a possession	21	13	6
None of the above	27	29	69

Respondents were asked whether or not they intended to continue to use the product they had used. Pawn loan users were the least likely to say that they planned to keep using the product ‘regularly’ or ‘occasionally’. More than half, 52 per cent, stated that they would not use pawn loans again. These results were statistically significant. They are shown in Table 3.

<sup>186</sup> In each row, the Chi-square test of independence identified a statistically significant difference between at least one group and at least one other group, with a p-value of 0.01 or less. This indicates a high degree of statistical significance.

<sup>187</sup> Respondents were invited to select from a list 11 possible impacts, as well as a 12<sup>th</sup> option, ‘None of the above’. Some were not applicable to those respondents in the ‘unique’ groups (since they asked about use of other products, eg, ‘Purchased an essential item using Afterpay or another buy now pay later service’, ‘Borrowed money from a payday lender’). All results were statistically significant on Chi-Square tests of independence at the 0.01 level.

**Table 3: Intentions Regarding Future Use of the Product (Unique Groups)<sup>188</sup>**

	Pawn (per cent) (n = 97)	Payday (per cent) (n = 136)	BNPL (per cent) (n = 427)
Plan to keep using regularly	5	15	16
Plan to keep using occasionally	42	40	65
Won't use again	52	46	19

The survey data suggested that use of payday loans and BNPL was common among pawn loan users. Of the 582 pawn loan users who completed the survey (including those who had used more than one product), 64 per cent had also used payday loans and 67 per cent had also used BNPL.

V ANALYSIS AND RECOMMENDATIONS

A Analysis

1 A Vulnerable Cohort at Risk of Harm

Based on the data currently available, it appears that at a significant portion Australian pawn loan users are socio-economically disadvantaged and vulnerable to harm as a consequence of using pawn loans. In the course of Parliamentary debates, members of several state legislatures have acknowledged the acute vulnerability of some pawn loan users and the ‘desperate need’ that prompts many to take out a pawn loan.<sup>189</sup> This has been shown by qualitative research published in Victoria in 1997 and 2000; case studies published by consumer advocates in law reform submissions and the media; and the case law. These sources indicate that pawn loan users typically borrow small amounts, and that many of these consumers are vulnerable, due to factors such as homelessness, drug addiction, or reliance on a social security income that is insufficient to meet basic needs. Many of these consumers say they have no access to other forms of credit and use pawn loans to meet immediate, urgent expenses. Many express dissatisfaction with the fees attaching to pawn loans and the amounts they are

<sup>188</sup> Chi-Square Tests of independence between the three groups indicated statistical significance at the 0.01 level (df = 4; p = 0.000). As this question was not compulsory, some respondents did not answer, resulting in a slightly smaller sample size in each group.

<sup>189</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 23 June 2005, 17379 (Tony Kelly); Victoria, *Parliamentary Debates*, Legislative Council, 5 December 2001, 1723 (Ronald Best).

lent, relative to the market price or sentimental value of the goods they pawned.

<sup>190</sup>

The authors' online survey offers further qualitative evidence that pawn loan users are a disadvantaged cohort, with respect to income, home ownership, workforce participation, educational attainment and access to mainstream credit (specifically, credit cards). Almost a quarter, 23 per cent, nominated Year 10 as their highest level of formal education.<sup>191</sup> Forty-one per cent said that they held no credit cards, indicating a degree of exclusion from mainstream financial products. Only 26 per cent were homeowners,<sup>192</sup> compared with 66 per cent of all Australian households.<sup>193</sup> Thirty-four per cent cited social security as their main source of income and 41 per cent lived on less than \$25,000 per year. The pawn loan users in the survey exhibited many signs of disadvantage, even when compared with users of payday loans and BNPL services.<sup>194</sup> This finding correlates with recent United States research, which has found that pawn loan users are not only disadvantaged, relative to the general population, but that they are more disadvantaged than users of other 'fringe' financial products.<sup>195</sup> The pawn loan users were most likely to report adverse impacts, including borrowing money from friends or family, asking for more time to pay a bill or 'going without' essentials, as a consequence of using the product. They were also far more likely than users of payday loans or BNPL services to say that they did not intend to use the product again. It may be inferred that this was due, at least in part, to lower levels of satisfaction with the product. While these results must be treated with some caution, due to the small sample size, they offer further evidence that pawn loan use can entrench hardship for consumers whose financial position is already precarious.

## 2 *Lack of Transparency*

Despite the vulnerability of many pawn loan users, there is almost no public data available regarding the industry or its clientele. As noted above, the regulatory bodies responsible for pawn lending in Australia's three most populous states do not publish any data regarding the scale of the industry — either in terms of the number of businesses operating or the estimated number of pawn loan users in the population. The most reliable information regarding the number of

<sup>190</sup> See Densley and Ayres-Wearne (n 140) 3; Rawlinson, 'Profiting from Misery' (n 172).

<sup>191</sup> See above Table 1.

<sup>192</sup> See *ibid*.

<sup>193</sup> Australian Bureau of Statistics, *Latest Release: Housing Occupancy and Costs* (Web Page, 25 May 2022) <<https://www.abs.gov.au/statistics/people/housing/housing-occupancy-and-costs/latest-release>>.

<sup>194</sup> As discussed above, compared with the payday loan and BNPL users in the survey, pawn loan users were the least likely to own their own homes. They were the most likely to earn incomes below \$25,000 and to cite Year 10 as their highest level of educational attainment.

<sup>195</sup> Bolen, Elliehausen and Miller (n 48) 1589.

pawnbrokers in operation derive from Regulatory Impact Statements and other Parliamentary documents published in conjunction with changes to the law or regulations. However, these documents, appearing on a sporadic basis, do not provide any reliable insight into long-term trends in the industry. They provide no insight into the demographic profile of pawn lenders' customers.

### 3 *Lack of Access to Dispute Resolution*

This lack of transparency is compounded by the fact that, in the current regulatory environment, users of pawn loans must apply to a court to enforce their very limited consumer rights under the NCCPA. This process is 'far too complex, costly and intimidating for most people', according to advocates.<sup>196</sup> Even when a community legal centre assisted one of its clients to initiate legal proceedings against a Melbourne pawnbroker, in 2016, her 'history of social phobia and mental illness' prompted her to discontinue her claim, rather than endure the stress and scrutiny of a court case.<sup>197</sup> The absence of accessible, quick and simple avenues for enforcing the NCCPA effectively renders its protections illusory, while allowing pawnbrokers who contravene the law to avoid exposure.

### 4 *Risk of Regulatory Arbitrage*

It is apparent that some providers of short-term credit have, in the past, sought to evade their legal obligations under consumer credit laws by characterising themselves as pawnbrokers. In April 2008, prior to the enactment of the NCCPA, the Queensland Government introduced new restrictions on payday lending, including a 48 per cent cap on interest, fees and charges.<sup>198</sup> By August 2008, a Queensland newspaper reported that some outlets of a national chain were 'writing loans under pawnbroking laws' with effective annual interest rates of up to 420 per cent, and encouraging customers 'to buy a CD or DVD from the store ... for only \$1' to serve as collateral.<sup>199</sup> More recently, as discussed above, ASIC has alleged that a company in northern Queensland has purported to act as a pawnbroker while, in reality, providing credit services regulated by the NCCPA.<sup>200</sup> The company attracted significant media attention in 2018 after its director was 'fined \$1.2 million for repeatedly signing up poor, Indigenous people in far north Queensland to exorbitant loans'.<sup>201</sup> According to consumer advocates, the director had been offering loans to people from the Aboriginal community of Yarrabah,

<sup>196</sup> CALC Submission to Senate Inquiry (n 161) 19.

<sup>197</sup> Rawlinson, 'Cash Converters' (n 75).

<sup>198</sup> Explanatory Notes, Consumer Credit (Queensland) and Other Acts Amendment Bill 2008 (Qld).

<sup>199</sup> Patrick Lion, 'Sky-High Loan Rates Exposed as Lenders Skirt New Law', *Courier-Mail* (online, 17 August 2008) <<https://www.couriermail.com.au/news/queensland/bligh-looks-at-lending-loophole/news-story/3b927a6304beac073d471714e9739c37>>.

<sup>200</sup> 'Cairns Pawnbroker Charged' (n 122).

<sup>201</sup> Kim (n 126).

south of Cairns, since at least 2009. The director avoided paying his fine, and another order requiring him to pay \$47,699 in compensation to affected consumers, by declaring bankruptcy. In 2018, when it emerged that he was working as a pawnbroker, ASIC stated that it would ‘continue to monitor’ the director’s activities. Despite this, it appears that the individual in question was able to operate a business providing high-cost credit products, to a cohort of highly disadvantaged consumers, for up to five years after he was fined for serious contraventions of the NCCPA.<sup>202</sup> These reports suggest that the current exemption of pawn lending from the national legislative regime allows significant scope for regulatory arbitrage on the part of lenders seeking to skirt the edges of the NCCPA.<sup>203</sup>

### 5 *Risks Posed by Recent Amendments to the NCCPA*

Recent and impending changes to the NCCPA create a risk that demand for pawn loans will increase in Australia. These reforms are likely to create an expanding group of low-income consumers with no access to any form of credit other than pawn loans. Under new payday lending provisions introduced in December 2022,<sup>204</sup> a payday loan is ‘presumed to be unsuitable’ if the borrower has already taken out two payday loans within the preceding 90 days.<sup>205</sup> These provisions reduce the capacity for borrowers to ‘roll over’ loans, that is, to take out new and higher loans in order to repay old ones. Under the new provisions, payday lenders are also prohibited from offering loans that would result in the prospective borrower’s repayments exceeding a prescribed proportion of their income.<sup>206</sup> Many Australian payday loan providers already offer pawn loans on the same premises, or via the same online platform. They also have extensive databases containing the details of previous customers, which may be used to market pawn loans.<sup>207</sup> In the light of the ‘inextricable link between payday lending and

<sup>202</sup> The Federal Court found that many of the individuals who took out car loans with Channic ‘endured difficult family circumstances, were of limited education ... lacked financial literacy’ and were in ‘very difficult financial circumstances ... [T]hey depended on [social security] benefits to keep their family going and they expended their benefit receipts virtually immediately once they were obtained’: *ASIC v Channic Pty Ltd (No 5)* [2017] FCA 363, [26].

<sup>203</sup> The Financial Rights Legal Centre (‘FRLC’) says it has ‘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’: Financial Rights Legal Centre, Submission to NSW Fair Trading, *Regulatory Impact Statement: Pawnbrokers and Second-hand Dealer Regulation 2020*, July 2020 (28 July 2020) 13, 15–16 (‘Submission to NSW Fair Trading’).

<sup>204</sup> *Financial Sector Reform Act 2022* (Cth); Consumer Action Law Centre, ‘Consumer Protections for High-Cost and Harmful Payday Loans and Consumer Leases Finally Pass Parliament’ (Media Release, 2 December 2022) (‘Consumer Protections’).

<sup>205</sup> Explanatory Memorandum, *Financial Services Reform Bill 2022* (Cth) 116–17.

<sup>206</sup> *Ibid* 116, 118–19.

<sup>207</sup> Cash Converters’ recent presentation to investors notes that its database contains ‘over 3.2 m[illion] unique customer records’, offering it a ‘competitive advantage’ in the industry: Cash Converters International Limited, *FY 2022 Investor Presentation* (n 66) 4.

pawnbroking',<sup>208</sup> it is likely that some payday lenders will encourage these consumers to take out pawn loans in the event that they no longer qualify for payday loans. This has been the experience in New Zealand, where changes to responsible lending laws have made it more difficult for some consumers to obtain credit.<sup>209</sup> According to consumer advocates, pawn lending has increased significantly following these changes.<sup>210</sup> Further reforms, expected by the end of 2023, will also bring BNPL services within the NCCPA, reducing their availability to low-income consumers.<sup>211</sup> The tighter regulation of BNPL may stimulate still more demand for pawn loans, a prospect welcomed as an 'opportunity' by some members of the pawnbroking industry.<sup>212</sup> The rising cost of living will further compound this risk as increasing numbers of Australians resort to credit to meet essential expenses.<sup>213</sup>

## B Recommendations

### 1 External Dispute Resolution for Pawn Loan Users

Some consumer advocates maintain that lack of access to External Dispute Resolution ('EDR') is 'the most critical omission in the pawnbroking regulatory regime'.<sup>214</sup> In the United Kingdom, consumers of pawn loans can complain free of charge to the Financial Ombudsman Service if they are dissatisfied with the

<sup>208</sup> CALC 2017 Submission (n 7) 21.

<sup>209</sup> Jenée Tibshraeny, 'Government Unveils Plans to Further Loosen Consumer Lending Rules', *NZ Herald* (online, 2 August 2022) <<https://www.nzherald.co.nz/business/government-unveils-plans-to-further-loosen-consumer-lending-rules/STQ5GCUUOQQZJFDYSAEJUJ7GU/>>.

<sup>210</sup> 'Just last month, Tauranga financial mentor Shirley McCombe told government officials that pawn brokers were one of the forms of lending that was on the rise following the introduction of responsible lending rules that slowed finance company lending. "We now see clients struggling with multiple buy now, pay later schemes, organisations selling 'refurbished' items such as phones for exorbitant prices, but not charging interest, or pawn brokers who hold a family's precious heirlooms such as Tapa cloths and charge, 25%, 60% or even 90% interest per month," she said.' Rob Stock, 'The "3000-Year-Old" Pawn Industry is in the Commerce Commission's Sights', *Stuff* (online, 13 November 2022) <<https://www.stuff.co.nz/business/money/130350099/the-3000year-old-pawn-industry-is-in-the-commerce-commissions-sights>>.

<sup>211</sup> Stephen Jones, Treasury, 'Address to the Responsible Lending & Borrowing Summit' (Speech, Responsible Lending & Borrowing Summit, 22 May 2023) <<https://ministers.treasury.gov.au/ministers/stephen-jones-2022/speeches/address-responsible-lending-borrowing-summit>>.

<sup>212</sup> The company has advised investors that '[r]egulation risk for unregulated lending sectors (e.g. BNPL) presents opportunities': Cash Converters International Limited, FY 2022 *Investor Presentation* (n 66) 4.

<sup>213</sup> Ferdi Botha, Melbourne Institute: Applied Economic & Social Research, *Taking the Pulse of the Nation: Australians using various measures to deal with higher cost of living* (Report, 21 September 2022).

<sup>214</sup> Submission to NSW Fair Trading (n 203) 11.

conduct of a pawn lender.<sup>215</sup> In Australia, by contrast, pawnbrokers are not required to join an EDR scheme. Australian consumers of pawn loans must apply to a federal court if they wish to enforce their rights under the *NCCPA* or the *ASIC Act*.<sup>216</sup> State laws may be enforceable in state tribunals, offering a slightly less formal and less costly alternative. However, such tribunals do not always grant leave for lawyers to represent parties in hearings.<sup>217</sup> This means that consumers may be required to appear unrepresented, even if they have obtained advice from a community legal centre or Legal Aid office. This daunting prospect acts as a significant disincentive to pursue legitimate claims under state legislation. Consumer advocates argue that without accessible enforcement mechanisms, many of the legal obligations on pawnbrokers, such as the requirement to obtain a reasonable price when selling goods, are ‘ineffective’ in practice.<sup>218</sup> These advocates maintain that pawnbrokers should be required, under the *NCCPA* or state legislation, to become members of AFCA.<sup>219</sup> This national body, established in 2018,<sup>220</sup> has been lauded by consumer advocates as a ‘world class’ EDR scheme providing consumers with an ‘extremely important alternative to the court system’.<sup>221</sup> Requiring membership of AFCA would afford pawn loan users a free and accessible forum in which to resolve their disputes with pawn lenders, and in appropriate circumstances, to obtain financial compensation for lenders’ misconduct. AFCA publishes most of its decisions,<sup>222</sup> and is also required to

<sup>215</sup> Financial Conduct Authority, *How to Complain* (Web Page, 31 July 2023) <<https://www.fca.org.uk/consumers/how-complain>>. It should be noted that Financial Ombudsman Service appears to be underutilised by pawn loan users in the United Kingdom. In 2018, the Financial Conduct Authority estimated that the United Kingdom’s pawnbroking industry served approximately 350,000 customers per year: Financial Conduct Authority, *Pawnbroking Sector Review* (n 55). Since then, the United Kingdom market has grown significantly: Oso Alabi and Venkataramakrishnan (n 8); Marsh (n 8). Yet of the 61,995 ‘new cases’ determined by the Financial Ombudsman Service in 2022–23, only 28 related to pawnbroking. Pawnbroking had the ‘lowest uphold rate’ of products in the ‘credit’ category, with only 19 per cent of complaints being upheld: Financial Ombudsman Service, *Annual Complaints Data and Insight 2022/23* (Web Page, 14 June 2023) <<https://www.financial-ombudsman.org.uk/data-insight/annual-complaints-data/annual-complaints-data-insight-202223>>.

<sup>216</sup> Submission to NSW Fair Trading (n 203) 11.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid. This obligation applies to pawnbrokers in New South Wales and Victoria: see Part III(C).

<sup>219</sup> Ibid. See also Victorian Law Reform Commission, *The Law Reform Longlist 2023: 77 Suggestions from the Community* (Report, August 2023) 25 <<https://www.lawreform.vic.gov.au/publication/law-reform-longlist-2023/>>.

<sup>220</sup> See *Treasury Laws Amendment (Putting Consumers First — Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth); Australian Financial Complaints Authority, Submission to Treasury, *Review of the Australian Financial Complaints Authority* (March 2021) <<https://treasury.gov.au/sites/default/files/2021-11/c2021-147524-afca.pdf>>.

<sup>221</sup> Consumer Action Law Centre et al, Submission to Treasury, *Review of the Australian Financial Complaints Authority* (April 2021) 10 <<https://treasury.gov.au/sites/default/files/2021-11/c2021-147524-cag.pdf>>.

<sup>222</sup> Australian Financial Complaints Authority, *AFCA Determinations Public Reporting* (Web Page) <<https://www.afca.org.au/what-to-expect/search-published-decisions/public-reporting-of-determinations>>.

identify and report ‘systemic issues’ emerging from its casework.<sup>223</sup> Compulsory membership of AFCA would therefore offer policymakers and the general public an insight into the operation of the industry.<sup>224</sup> It would help to identify areas in which state laws or the NCCPA require reform, to provide more effective protection for vulnerable consumers of pawn loans.

## 2 *ASIC Review of the Industry and Ongoing Data Collection*

As this study has demonstrated, there is at present almost no publicly available information regarding the size of the Australian pawnbroking industry, the extent of its customer base or the characteristics of these customers. Other than the case studies published by consumer advocates, and infrequent media reports, there is no public information about the impact of pawn loans on their customers. Given the risks posed by pawn lending, as suggested by the qualitative data presented in this study, it is important to address this gap in knowledge. ASIC should use its extensive information-gathering powers under the *ASIC Act* to undertake a national review of the industry, similar to its reviews of the BNPL industry published in 2018 and 2020.<sup>225</sup> Like these reports, an ASIC review of the pawnbroking industry could draw on business data obtained from providers, quantitative and qualitative data gathered from surveys and interviews with consumers, as well as consultations with consumer advocates and industry associations.<sup>226</sup> Such research would help state and Commonwealth policymakers to assess the need for reform to pawnbroking laws. In addition to this discrete review, ASIC should liaise with state regulators to gather and publish industry data on a regular basis. Such data could include the number of pawnbrokers operating in each state and territory and the number of disciplinary actions taken by state regulators in each reporting period, including fines imposed and licences cancelled due to non-compliance with state laws. Access to data of this nature would facilitate informed public policy debate over the pawnbroking industry and its impact on consumers.

<sup>223</sup> Australian Financial Complaints Authority, *Systemic Issues* (Web Page) <<https://www.afca.org.au/about-afca/systemic-issues>>; *Corporations Act 2001* (Cth) s 1052E.

<sup>224</sup> The United Kingdom’s Financial Ombudsman Service publishes many decisions regarding pawn lenders on its website. See, eg, Financial Ombudsman Service, *Decision Reference DRN-4180350* (Web Page, 17 August 2023) <<https://www.financial-ombudsman.org.uk/decision/DRN-4180350.pdf>>; Financial Ombudsman Service, *Decision Reference DRN-2169986* (Web Page, 23 November 2020) <<https://www.financial-ombudsman.org.uk/decision/DRN-2169986.pdf>>.

<sup>225</sup> Review (n 176); Australian Securities and Investment Commission, *Buy Now Pay Later: An Industry Update* (Report No 672, November 2020) (‘Buy Now Pay Later’).

<sup>226</sup> Review (n 176) 40–3; *Buy Now Pay Later* (n 225) 24–5.



### 3 *Further Measures to Address Regulatory Arbitrage*

There is currently a strong incentive for lenders to present themselves as pawnbrokers, governed by state legislation, to avoid the application of the *NCCPA*. Regulatory arbitrage is a longstanding problem in the context of ‘fringe’ financial products such as payday loans, consumer leases and other forms of short term lending.<sup>227</sup> Consumer advocates contend that unscrupulous businesses are adept at ‘find[ing] ways to frame their services in ways that “fit” the gaps’ in regulation.<sup>228</sup> ASIC’s recent investigation of a Queensland provider, and the ensuing prosecution of this provider for breaches of the *NCCPA*, suggest that the current legal framework facilitates conduct of this kind.<sup>229</sup> This problem may be addressed, at least in part, by the recent incorporation of new anti-avoidance provisions into the *NCCPA*.<sup>230</sup> These 2022 amendments explicitly prohibit providers of payday loans and consumer leases from structuring their products in such a way as to avoid the application of the *NCCPA*.<sup>231</sup> These reforms have been welcomed by consumer advocates, who say they will give ASIC far greater capacity to ‘tackle business models that repeatedly avoid the law through tricky contractual structures’.<sup>232</sup> The effectiveness of these reforms will depend on robust enforcement by ASIC. It will also depend on ongoing consultation with consumer advocates who have, in the past, alerted ASIC to misconduct in the industry.<sup>233</sup> To facilitate this, ASIC should devote appropriate resources to monitoring the pawnbroking industry and continue to liaise with consumer representatives who have direct contact with pawn loan users. As the High Court case of *Palgo* demonstrates, some pawnbrokers have taken steps to evade even their limited obligations under state laws by adopting unusual contractual structures. To address this, all Australian states should adopt provisions mirroring those of the current NSW Act, to make it clear that the application of

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<sup>227</sup> See generally Paul Ali et al, ‘Consumer Leases and Consumer Protection: Regulatory Arbitrage and Consumer Harm’ (2013) 41(5) *Australian Business Law Review* 240; Lucinda O’Brien, Ian Ramsay and Paul Ali, ‘Australia’s Product Intervention Power and Protection from Consumer Harm: An Evaluation’ (2022) 29(1) *Competition and Consumer Law Journal* 32.

<sup>228</sup> Submission to NSW Fair Trading (n 203) 13. See also Stock (n 207).

<sup>229</sup> ‘Cairns Pawnbroker Charged’ (n 122).

<sup>230</sup> *Consumer Protections* (n 204).

<sup>231</sup> *Financial Sector Reform Bill 2022* (Cth) sch 4 pt 4; *National Consumer Credit Protection Act 2009* (Cth) ss 323A–323D.

<sup>232</sup> *Consumer Protections* (n 204).

<sup>233</sup> ASIC’s website states that ‘[t]he Indigenous Consumer Assistance Network (ICAN) first brought ASIC’s attention to the conduct that led to the charges [against the pawnbroker] in the Cairns Magistrates’ Court [in 2023]. ICAN provides financial counselling services to Indigenous consumers in North QLD’: ‘Cairns Pawnbroker Charged’ (n 122).

state pawnbroking law depends upon ‘the substance of the loan transaction rather than its form or other legal technicalities’.<sup>234</sup>

## VI CONCLUSION

Australian consumers typically turn to pawn loans in situations of dire necessity. While there is at present almost no public data regarding the size of the industry, or the profile of its clientele, the quantitative evidence presented in this study suggests strongly that many pawn loan users are vulnerable low-income earners. These consumers tend to borrow small amounts, offering personal items such as jewellery, electronics and musical instruments as security. The research and policy submissions of consumer advocates contain numerous examples of people using pawn loans to fund drug addictions, gambling, or essential expenses such as food. The authors’ online survey provides further evidence that, even compared with users of other ‘fringe’ financial products such as payday loans, pawn loan users are likely to be in precarious financial circumstances and to exhibit signs of social disadvantage. The survey also indicates that use of pawn loans can exacerbate consumers’ pre-existing financial problems, causing them to fall behind with other payment obligations, go without essentials or seek further loans from friends or family.

In the light of the consistent evidence of harm caused by pawn loans, as documented by this study, it is difficult to rationalise the paucity of consumer protections for pawn loan customers under current state and Commonwealth law. Unlike payday loans and consumer leases, pawn loans are not subject to any restrictions on fees or interest rates. Pawnbrokers are not required to belong to an EDR scheme, meaning that their customers must apply to a court or tribunal to enforce their limited legal rights. Consumer advocates say that, as a consequence, these rights are almost never enforced. Recent regulatory action by ASIC, as well as anecdotal evidence provided by consumer advocates, suggests that the light regulation of pawn loans acts as an incentive for unscrupulous lenders to characterise themselves as pawnbrokers, in order to evade more stringent regulation under the NCCPA. Recent and impending changes to the NCCPA, which may reduce access to payday loans and BNPL services, create a heightened risk that some consumers will resort to pawn loans as a substitute.

To address this risk, and the wider problem of inadequate consumer protection in the pawn lending industry, the present study makes four recommendations. It concludes that, at a minimum, all Australian pawnbrokers should be required to belong to an EDR scheme such as AFCA. This would give consumers a meaningful avenue for enforcing their limited existing rights under

<sup>234</sup> *Pawnbrokers and Second-Hand Dealers Act 1996* (NSW) s 3A(3)(a). As noted above, Western Australia has already incorporated these provisions into its pawnbroking legislation: see *Pawnbrokers and Second-hand Dealers Act 1994* (WA) s 3A.

the NCCPA and state legislation. It would have the additional advantage of providing policymakers and the wider community with greater insight into systemic problems in the industry and the types of harm suffered by pawn loan users. These insights would assist in identifying ways in which state and Commonwealth law could be amended, to provide more effective protection for pawn loan users. To address the almost total absence of reliable public data concerning pawnbroking, the authors recommend that ASIC undertake a detailed review of the industry and publish updated industry data on a regular basis. This would greatly improve transparency and facilitate informed debate over the regulation of pawn lending. Finally, noting the recent incorporation of new anti-avoidance provisions into the NCCPA, the authors conclude that ASIC should devote resources to the ongoing monitoring of the industry, in consultation with consumer advocates. This would enable ASIC to identify future attempts at regulatory arbitrage, on the part of unscrupulous providers, and to enforce the new anti-avoidance measures swiftly and effectively. They also recommend that all state and territory legislatures adopt provisions mirroring those introduced in New South Wales in 2005, to ensure that 'legal technicalities' cannot be exploited by pawnbrokers to evade the application of state laws.

ANNEXURE

*Table 4: Key features of pawnbroking laws in Victoria, New South Wales and Queensland*

Legislation and Regulations	Requirements for entry into the pawnbroking industry	Ongoing obligations of pawnbrokers
<i>Second-Hand Dealers and Pawnbrokers Act 1989</i> (Vic) and <i>Second-Hand Dealers and Pawnbrokers (General, Exemption and Record-Keeping) Regulations 2018</i> (Vic)	<ul style="list-style-type: none"><li>• Must be registered (s 5)</li><li>• Cannot be insolvent or subject to an order under the <i>Guardianship and Administration Act 2019</i> (Vic) (s 6)</li><li>• Cannot have been convicted of a ‘disqualifying offence’ (an offence involving fraud, dishonesty, violence or drug trafficking), have had a professional licence suspended or cancelled, or have been disqualified from a profession within the previous five years (s 6)</li></ul>	<ul style="list-style-type: none"><li>• Identify customers (s 19)</li><li>• Keep accurate records of every transaction (s 20)</li><li>• Retain goods for at least seven days before disposing of them (s 21)</li><li>• Accurately record the place in which goods are stored (s 21 A)</li><li>• Co-operate with police (s 22)</li><li>• Issue consumers a pawn ticket setting out the charges associated with the loan and the consumer’s rights and responsibilities (s 23)</li><li>• Return to consumers any residual equity in unredeemed goods that are sold, if claimed up to 12 months after sale (s 23A)</li><li>• Offer the goods for sale ‘as soon as practicable and so as to receive the best price reasonably obtainable’ if the period of a loan expires and is not extended and pawned goods are unredeemed (r 24)</li></ul>
<i>Pawnbrokers and Second-hand Dealers Act 1996</i> (NSW) and <i>Pawnbrokers</i>	<ul style="list-style-type: none"><li>• Must be licensed (s 6)</li><li>• Must be ‘a fit and proper person to hold a licence’ (s 8)</li></ul>	<ul style="list-style-type: none"><li>• Identify customers (s 15)</li><li>• Refuse ‘any goods offered for sale or pawn if the</li></ul>

<p><i>and Second-hand Dealers Regulation 2021</i> (NSW)</p>	<ul style="list-style-type: none"> <li>• Cannot have received a conviction in New South Wales or elsewhere for an offence involving dishonesty in the previous 10 years (8A)</li> <li>• Cannot have been an undischarged bankrupt or the executive officer of a company in administration within the previous three years (s 8A)</li> <li>• Cannot be 'mentally incapacitated' (s 8A)</li> </ul>	<p>licensee has reasonable grounds to believe that the goods concerned are not the property of the person by whom they are offered' (s 15(2))</p> <ul style="list-style-type: none"> <li>• Keep detailed records, retain them for at least three years and produce them on request (ss 16–17, 28)</li> <li>• Report 'suspicious goods' (s 19)</li> <li>• Retain goods for at least 14 days (s 21)</li> <li>• Issue each customer a pawn ticket containing an itemised list of fees and charges and a statement of the customer's rights and obligations (s 28)</li> <li>• Permit redemption of goods for at least three months after they are pawned (s 29)</li> <li>• Sell unredeemed goods 'in a manner conducive to securing the best price reasonably obtainable' (s 30)</li> <li>• Return any 'surplus proceeds of the sale' to consumers, their representatives or executors, if claimed up to</li> </ul>
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		12 months after sale (s 31) <sup>235</sup>
<i>Second-hand Dealers and Pawnbrokers Act 2003</i> (Qld) and <i>Second-hand Dealers and Pawnbrokers Regulation 2004</i> (Qld)	<ul style="list-style-type: none"> <li>• Must be licensed (s 6)</li> <li>• Cannot be an insolvent under administration (s 7)</li> <li>• Cannot have been convicted of a 'disqualifying offence' (including stealing, forgery, receiving stolen property or other fraudulent offences) within the previous five years (s 7)</li> <li>• Cannot be subject to a 'control order' (s 7)<sup>236</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Keep a 'property register' (s 53) and provide information from the register to police on request (s 55)</li> <li>• Provide a pawn ticket setting out the interest payable and the redemption period (s 58)</li> <li>• Permit redemption of goods for at least three months after they are pawned (s 60)</li> <li>• Maintain a trust account to hold the balance of proceeds of sale, minus any sums owed to the pawnbroker (s 60)</li> <li>• Give notice of the imminent sale of pawned property by public auction<sup>237</sup> at least twice 'in a newspaper circulating</li> </ul>

<sup>235</sup> The FRLC contends this provision is regularly circumvented by pawnbrokers, through reliance on sub-s 31A(2)(a) of the NSW Act, which 'allows pawnbrokers not 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.' The FRLC states that many pawn loan contracts contain 'standard, non-negotiable' terms 'designed... to circumvent s 31(A) of the Act and the requirement to notify consumers of a surplus': Submission to NSW Fair Trading (n 203) 6-7.

<sup>236</sup> Control orders were introduced into Queensland's *Penalties and Sentences Act 1992* (Qld) in 2016. They are court orders intended 'to prevent, restrict or disrupt an offender's involvement in serious criminal activity'. They may 'prohibit an offender from associating with certain people... from going to a certain place' or from working in particular occupations, including motor dealing, second hand dealing and pawnbroking: see Queensland Government, *Serious and Organised Crime Legislation* (Web page, 1 June 2017) <<https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/fair-trading-services-programs-and-resources/consultation-regulatory-reform/serious-organised-crime>>; *Penalties and Sentences Act 1992* (Qld) pt 9D div 3.

<sup>237</sup> This notice requirement does not apply if the unredeemed property is sold 'at the place where the pawn was taken', or if the loan secured by the property was less than \$40: *Second-hand Dealers and Pawnbrokers Act 2003* (Qld) sub-ss 62(1), (2), 63(1).

		<p>generally in the area the property was pawned’ before selling the property, after the expiration of the redemption period (ss 62, 63)</p> <ul style="list-style-type: none"><li>• Hold balance of proceeds of sale on trust for consumers for 12 months after sale (s 64)</li><li>• Give balance of proceeds of sale to the public trustee, to be placed in the unclaimed moneys fund, if not claimed by consumers within 12 months (s 64)</li><li>• Repay consumers the gross proceeds of sale, or a sum equivalent to ‘the fair value of the property’, if goods are sold prior to the expiration of the redemption period (s 66)</li><li>• Avoid acquiring goods from a person ‘under the influence of alcohol or a drug’ (s 69)</li><li>• Inform police if goods received ‘may be stolen or unlawfully obtained’ (s 71)</li></ul>
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