

**In the High Court of New Zealand
Auckland Registry**

**I te Kōti Matua o Aotearoa
Tāmaki Makaurau Rohe**

Commercial Panel

CIV-2022-

Under Section 100A Commerce Act 1986
In the matter of a case stated by the Commerce Commission relating to the application of the Credit Contracts and Consumer Finance Act 2003 to pawnbroking contracts

On application of **Commerce Commission** a body corporate established under section 8 of the Commerce Act 1986 having its offices at level 6, 44-52 The Terrace, Wellington.

Applicant

And **National Pawnbrokers Association of New Zealand** a registered incorporated society having its registered office at 212 Kitchener Road, Milford, Auckland, 0620, New Zealand.

Respondent

Case stated for the opinion of the Court

5 December 2022

MC.

Solicitors:

K Mills | L Dittrich

PO Box 90750, Victoria Street West, Auckland 1142

Ph: +64 9 336 7500



Case stated for the opinion of the Court

May it please the Court:

1 Introduction

- 1.1 The Commerce Commission (the **Commission**) respectfully requests the opinion of the Court under s 100A of the Commerce Act 1986 (**Commerce Act**) on the applicability of the Credit Contracts and Consumer Finance Act 2003 (**CCCFA** or the **Act**) to 'Pawnbroking Contracts'¹ provided by persons who meet the definition of 'pawnbroker' in s 4 of the Secondhand Dealers and Pawnbrokers Act 2004 (**SDPA**), and which have the features set out in **Schedule 1** of this case stated.
- 1.2 Under s 111(1) of the CCCFA, the Commission has a role to promote compliance with the Act. The Commission's functions in relation to the CCCFA are set out in s 111(2), and include taking prosecutions in relation to breaches of the Act, taking civil proceedings under the Act, and exercising the powers in Part 5A of the Act to certify certain persons involved in the provision of consumer credit.
- 1.3 The opinions sought concern the interpretation and application of ss 6, 7, 11 and 15A of the CCCFA. These provisions, respectively: provide the definition of 'credit contract' (ss 6-7) and 'consumer credit contract' (s 11), and exclude the application of Part 2 of the CCCFA to Pawnbroking Contracts where certain criteria are met (s 15A).
- 1.4 The respondent (the National Pawnbrokers Association of New Zealand) (**Association**) considers 'Pawnbroking Contracts' do not meet the definition of a 'credit contract' under the Act and, therefore, the CCCFA does not apply to Pawnbroking Contracts. If Pawnbroking Contracts are credit contracts, the Association's position is that s 15A of the CCCFA operates to exclude the application of the CCCFA to all Pawnbroking Contracts.
- 1.5 The Commission takes a different view and considers that Pawnbroking Contracts are 'credit contracts' as well as 'consumer credit contracts' under the CCCFA. It also considers that s 15A does not operate to exclude the application of the CCCFA to Pawnbroking Contracts generally, but provides for a limited exception.
- 1.6 Given the divergence of opinion between the Commission, the Association and other pawnbrokers, and additional questions these discussions have raised, the Commission seeks clarification from the Court as to whether Pawnbroking Contracts with the features set out in **Schedule 1** of this case stated are 'credit contracts' and 'consumer credit contracts' within the meaning of ss 6, 7 and 11 of the CCCFA (respectively), and how s 15A operates under the CCCFA.
- 1.7 These questions address whether, and in what circumstances, Pawnbroking Contracts will be regulated by the CCCFA. Specifically:

¹ As defined below at [3.1]-[3.2].

- (a) Whether Pawnbroking Contracts involve the creation of a debt, and are ‘credit contracts’ (ss 6 and 7 of the CCCFA) – this relates to Questions 1 and 2 of the case stated;
 - (b) Whether Pawnbroking Contracts provide for a credit fee and / or security interest, and are ‘consumer credit contracts’ (s 11(1)(c) of the CCCFA) – this relates to Questions 3 and 4 of the case stated; and
 - (c) The operation of s 15A of the CCCFA – this relates to Questions 5 and 6 of the case stated.
- 1.8 The opinion of the Court will help the Commission, pawnbrokers and interested persons ascertain when pawnbrokers entering into Pawnbroking Contracts may be subject to obligations under the CCCFA, including standing disclosure obligations and certification requirements, and will assist the Commission in undertaking its role and functions under the CCCFA.
- 1.9 The Association has indicated it wishes to be a party to these proceedings and be heard on Questions 1, 2, 5, and 6. However, the Association does not wish to be heard in respect of Questions 3 and 4 and will abide the decision of the Court on Questions 3 and 4.

2 Jurisdiction to consider case stated

- 2.1 There are currently no active proceedings by the Commission against any pawnbrokers under the CCCFA. This application is therefore not brought as part of any live dispute before the Court.
- 2.2 However, s 113(g) of the CCCFA expressly empowers the Commission to bring a case stated to the High Court pursuant to s 100A of the Commerce Act in relation to a “matter before it” under the CCCFA. Section 100A of the Commerce Act is expressed in broad terms. It provides:
- (1) The Commission may at any time state a case for the opinion of the Court on any question of law arising in any matter before it.
- 2.3 In *Commerce Commission v Harmony*,² this Court held that the phrase ‘any matter before it’ in s 100A is to be interpreted in a broad and unrestrictive manner, having regard to the Commission’s role under the CCCFA and the purposes of the CCCFA. The purpose of the empowering provision in s 113 of the CCCFA is to ensure the Commission has the tools it needs to discharge its functions under the CCCFA.
- 2.4 The questions stated in this application are a ‘matter before the Commission’ for the purposes of s 100A. The questions raised arise squarely in the context of the Commission carrying out its statutory functions under s 111 of the CCCFA. The purpose is to clarify whether the CCCFA applies to Pawnbroking Contracts and determine whether the Commission must carry out its statutory functions under s 111(2) in relation to those. The Commission therefore submits the case stated

² *Commerce Commission v Harmony* [2017] NZHC 1167, (2017) 14 TCLR 572 (per Courtney J) at [17]-[24] citing *Securities Commission v Contributory Mortgage Investments* HC Wellington CIV-2008-485-792, 19 November 2008. Regarding the approach to s 100A of the Commerce Act 1986, see also: *Commerce Commission v Orion NZ Ltd* [2013] NZHC 1181, (2013) 13 TCLR 610 at [12], affirmed in *Harmony*.

procedure under s 100A of the Commerce Act is appropriate and available in the present circumstances.

3 Legal context

Statutory framework under the SDPA

3.1 The SDPA sets out the key features of what constitutes a 'pawnbroking' contract and how pawnbroking arrangements are to operate. Section 4 provides that a 'pawnbroker' is a person:

(a) who, in expectation of profit, gain, or reward, lends money on the security of goods of which the person takes possession, but not ownership; and

(b) who is not a secondhand dealer or the employee of a secondhand dealer and pawnbroker.

3.2 Where such a pawnbroking arrangement (**Pawnbroking Contract**) exists,³ the SDPA provides the following:

(a) The pawnbroker may not dispose of pawned goods until the redemption date, except by providing them to the pledger if they redeem the goods or as otherwise provided in the SDPA.⁴

(b) The pledger may redeem the goods at any time before the redemption date expires by paying the redemption price,⁵ which is defined in s 57 as:

(1) ... (a) the amount of money advanced on the goods; plus

(b) the redemption fee payable by the pledger on redemption of the goods.

(c) If the goods are not redeemed before the redemption date, s 63 of the SDPA empowers the pawnbroker to sell the goods and retain the redemption price.⁶

3.3 Although the SDPA does not define 'security' or 'security interest', the Personal Property Securities Act 1999 (**PPSA**) provides that a 'security interest' applies to a "pledge...that in substance secures the payment or performance of an obligation without regard to the form of the transaction and the identity of the person who has title to the collateral".⁷

³ The term 'Pawnbroking Contract' does not appear in the SDPA.

⁴ SDPA, s 60. The 'redemption date' is the last day on which the pawnbroker must hold the goods for redemption by the borrower and must be the later of either 3 months after the date on which the pledge was entered into, or a date agreed between the pawnbroker and borrower, see s 58.

⁵ SDPA, s 62.

⁶ SDPA, s 64(1). If the sale price is greater than the redemption price, s 64 requires any 'excess' to be divided between the pawnbroker and the borrower: the borrower is entitled to 90% of the excess and the pawnbroker may retain the remaining 10%.

⁷ PPSA, s 17. See s 17(3): "Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage [etc]....that secures payment or performance of an obligation".

‘Credit contracts’, ‘consumer credit contracts’ and exceptions for pawnbrokers under the CCCFA

- 3.4 Pawnbroking Contracts would be regulated by certain provisions of the CCCFA if they meet the definition of a ‘credit contract’ in ss 6-7 of the Act. Additional obligations would also apply if Pawnbroking Contracts meet the definition of ‘consumer credit contract’ in s 11 of the Act.⁸
- 3.5 Section 7(1) provides that a ‘credit contract’ means “a contract under which credit is or may be provided”. Section 6 then defines what it means to provide ‘credit’ under a contract. Relevantly, credit will be “provided under a contract if a right is granted by a person to another person to” either defer the payment of a debt (s 6(1)(a)), or incur a debt and defer its payment (s 6(1)(b)).⁹
- 3.6 Where a contract meets the definition of a ‘credit contract’, it will be a ‘consumer credit contract’ if it also meets each of the elements of s 11(1) of the CCCFA:
- (a) the debtor must be a natural person,¹⁰
 - (b) the credit must be used wholly or predominantly for personal or domestic purposes,¹¹
 - (c) the provider must be in the business of providing ‘credit’ as required,¹² and
 - (d) any of the following must apply:¹³
 - (i) interest charges are or may be payable under the contract:
 - (ii) credit fees are or may be payable under the contract:
 - (iii) a security interest is or may be taken under the contract;...
- 3.7 Section 15A provides that Part 2 of the Act does not apply to Pawnbroking Contracts if:
- (1)...
 - (a) the contract was entered into by a pawnbroker in the ordinary course of the pawnbroker’s business in accordance with the Secondhand Dealers and Pawnbrokers Act 2004; and
 - (b) in the case that the pledger is in default of his or her obligations under the pawnbroking contract or does not

⁸ Because of the scheme of the Act, in order for a contract to be a ‘consumer credit contract’ under s 11, it must first meet the definition of ‘credit contract’ in ss 6-7 of the Act: CCCFA, ss 6, 7 and 11.

⁹ CCCFA, s 6(a) and (b). Subsection (c) provides a further circumstance i.e. where a right is granted to: “purchase property or services and defer payment for that purchase (in whole or in part).”

¹⁰ CCCFA, s 11(1)(a).

¹¹ CCCFA, s 11(1)(b).

¹² CCCFA, s 11(1)(d).

¹³ CCCFA, s 11(1)(c).

redeem his or her pawned goods on or before the redemption date, the pawnbroker's only right of recourse is under section 63 of the Secondhand Dealers and Pawnbrokers Act 2004.

(2) In this section, **pawnbroker** has the same meaning as in section 4 of the Secondhand Dealers and Pawnbrokers Act 2004.

4 Matter before the Commerce Commission¹⁴

4.1 Following engagement with the Association and other pawnbrokers, a number of questions have arisen with respect to how ss 6, 7, 11 and 15A of the CCCFA apply to Pawnbroking Contracts, and how the Commission is to approach its regulatory functions under the Act in respect of pawnbrokers.

Issues raised by the Association

4.2 The Association has raised a number of arguments as to why it says the CCCFA does not apply to Pawnbroking Contracts.

4.3 The Association argues that Pawnbroking Contracts are not 'credit contracts' because they do not involve the creation of 'a debt' under s 6 of the CCCFA, and therefore fail to meet the definition of 'credit contract' in ss 6 and 7 of the Act. The Association's position is that there is no 'debt' in a Pawnbroking Contract because there is no obligation under the SDPA on a pledger to redeem the goods or repay any money advanced under a Pawnbroking Contract. As a result, the Association says that the CCCFA does not apply to Pawnbroking Contracts.

4.4 The Association argues that even if Pawnbroking Contracts are 'credit contracts', they are not '*consumer* credit contracts' pursuant to s 11 of the CCCFA. This is because on the Association's interpretation, s 15A of the CCCFA operates to exclude the application of Part 2 of the Act to Pawnbroking Contracts.¹⁵ The definition of 'consumer credit contract', contained in s 11, sits in Part 2 (whereas ss 6-7, which define 'credit contract', sit in Part 1). The Association's position is therefore that s 15A of the CCCFA operates to exclude Pawnbroking Contracts from the definition of 'consumer credit contracts' in s 11, because s 15A excludes the application of Part 2 to Pawnbroking Contracts (which contains the s 11 definition).

Issue identified by the Commission

4.5 The Commission takes a different view to the Association on these issues, set out in detail below in parts 5-8.

4.6 In addition to the questions raised by the Association, the Commission has identified two further aspects of the CCCFA that it anticipates may be the subject of dispute, and in respect of which it seeks guidance from the Court to assist it to carry out its regulatory functions.

¹⁴ Section 113(g) of the CCCFA; section 100A of the Commerce Act.

¹⁵ The Commission does not understand it to be in dispute that, in the event the Court considers Pawnbroking Contracts are 'credit contracts', at least some (if not the majority) of Pawnbroking Contracts will meet the criteria in ss 11(1)(a) and (b) of the Act. It accordingly asks the Court to proceed on the basis that at least some Pawnbroking Contracts will meet the first two requirements of s 11.

- 4.7 First, if the definition of ‘consumer credit contract’ in s 11 is not excluded by virtue of that provision being within Part 2, a further question remains whether Pawnbroking Contracts meet the criteria in s 11(1)(c) and (d) of the CCCFA and are therefore ‘consumer credit contracts’. The answer to that question will have consequences for what other Parts of the CCCFA apply to Pawnbroking Contracts (other than Part 2), for example, the certification requirements in Part 5A.
- 4.8 The second issue relates to the interpretation of s 15A(1)(b) of the CCCFA. Specifically, the Commission seeks guidance on how the phrase “in the case that” is to be interpreted in s 15A(1)(b). The Commission has identified two available interpretations of s 15A(1)(b), set out in detail below. The interpretation adopted has important consequences for when obligations in Part 2 of the CCCFA will cease to apply to Pawnbroking Contracts.

5 Suggested approach to case stated

5.1 As described above at [1.7], the Commission considers the above issues can be helpfully considered under the following three broad headings, considered in turn from Part 6 below:

- (a) Whether Pawnbroking Contracts involve the creation of a debt, and are ‘credit contracts’ (ss 6 and 7 of the CCCFA) – this relates to Questions 1 and 2 of the case stated;
- (b) Whether Pawnbroking Contracts provide for a credit fee and / or security interest, and are ‘consumer credit contracts’ (s 11(1)(c) of the CCCFA) – this relates to Questions 3 and 4 of the case stated (the Association does not wish to take part in relation to these two questions);¹⁶ and
- (c) The operation of s 15A of the CCCFA – this relates to Questions 5 and 6 of the case stated.

Preliminary point: Pawnbroking Contracts that are the subject of this application

- 5.2 To assist the Court, and before turning to consider these issues below, the Commission emphasizes that it seeks clarification of the issues in this case stated as they apply to Pawnbroking Contracts that have the features outlined in **Schedule 1**.
- 5.3 The Commission accepts some Pawnbroking Contracts may include additional or different terms to those set out in Schedule 1. However, it considers that – as a matter of law – pawnbrokers providing services that meet the definition of a ‘pawnbroker’ in s 4 of the SDPA will, at a minimum, be entering into contracts that involve money being lent to a ‘pledger’ in exchange for the pledger’s property, which is provided to the pawnbroker as security for the loan amount and redemption fee (i.e. Pawnbroking Contracts). This is because by definition, all contracts entered into by ‘pawnbrokers’ (within the meaning of that term in

¹⁶ The Commission considers that if the Court determines Pawnbroking Contracts are ‘credit contracts’ pursuant to ss 6-7 of the Act, the requirement in s 11(1)(d)(i) that the “creditor...carries on a business of providing credit” will also be met.

s 4 of the SDPA), will have these features as those pawnbrokers must operate according to the provisions of the SDPA.

- 5.4 For that reason, this case stated is limited to Pawnbroking Contracts with the features outlined in **Schedule 1**, which follow the definition of ‘pawnbroker’ in s 4 of the SDPA and the key provisions of that Act.
- 5.5 To assist the Court, the Commission has also appended two sample Pawnbroking Contracts which the Commission considers exemplify the features outlined in **Schedule 1**. They are appended to **Schedule 1** as **Appendix 1 and 2**.

6 Whether Pawnbroking Contracts involve the creation of a debt, and are ‘credit contracts’ (Questions 1 and 2)

- 6.1 What constitutes a ‘debt’, as well as the arrangements captured by the terms ‘to incur a debt’ or ‘to defer a debt’ are not defined in the CCCFA or the SDPA. There has also been limited judicial consideration domestically¹⁷ and in cognate jurisdictions of what it means to incur or defer ‘a debt’ and provide ‘credit’ in analogous contexts.
- 6.2 The Commission considers that Pawnbroking Contracts with the features set out in **Schedule 1** do involve the creation of a ‘debt’ within the meaning of s 6 of the CCCFA either because such contracts grant the pledger a right to defer the payment of a debt (s 6(1)(a)), or incur a debt and defer its payment (s 6(1)(b)).¹⁸ The Commission considers that the Association’s argument that Pawnbroking Contracts do not create a ‘debt or obligation on the pledger to repay a debt’ conflates the concept of the *recovery* of a debt with that of the creation of a debt.
- 6.3 The Commission considers Pawnbroking Contracts with the features set out in **Schedule 1** create a debt either because funds are advanced without an immediate obligation to repay or because the Pawnbroking Contracts create a right to incur a debt in the future and defer its payment.
- 6.4 Specifically, and by reference to the provisions of the SDPA set out in Part 3 above, the Commission considers that a ‘debt’ is created under a Pawnbroking Contract when the money is advanced in exchange for security over the goods, with no obligation to repay it immediately. The SDPA governs the redemption price if the pledger does redeem the goods. It also sets out what the pawnbroker’s rights are if they do not. If the pledger wishes to redeem the goods, they must repay the full redemption price to the pawnbroker.¹⁹ If the pledger fails to do so, the pawnbroker can recover some or all of the money advanced by selling the goods.
- 6.5 The Commission considers that in the first scenario – where the pledger returns to collect the goods – the requirement to repay the redemption price creates at

¹⁷ This has previously been noted by the High Court in *Howe v Westpac New Zealand Ltd* [2016] NZHC 2050 at [22].

¹⁸ CCCFA, s 6(a) and (b). Subsection (c) provides a further circumstance i.e. where a right is granted to: “purchase property or services and defer payment for that purchase (in whole or in part).”

¹⁹ The effect being that, the pawnbroker is repaid the full amount of the loan and the redemption fee.

least an implicit expectation that the full amount loaned is to be repaid plus the redemption fee. In the second scenario - if the pledger does not redeem the goods - the pawnbroker is entitled to sell the goods and recover the amount of money advanced plus the redemption fee.

- 6.6 The right to receive payment of the redemption price or dispose of the goods exists because the Pawnbroking Contract creates a debt – to borrow the Court of Appeal’s terminology in *Harmony*: a claim to have the right to do so by pawnbrokers could not be advanced without reliance on there being a debt.²⁰ Whether – in the second scenario – the pawnbroker is able to recover the totality of their debt is a separate question to whether a debt is incurred in the first place. That being the case, the Commission’s view is that the definition of ‘credit contract’ in ss 6-7 of the CCCFA encompasses Pawnbroking Contracts with the features set out in **Schedule 1**.
- 6.7 As described above, the Association considers that Pawnbroking Contracts are not ‘credit contracts’ because they do not involve the creation of ‘a debt’ under s 6 of the CCCFA, and therefore are not ‘credit contracts’ as defined in ss 6 and 7 of the CCCFA. The Association considers that there is no ‘debt’ in a Pawnbroking Contract because there is no obligation under the SDPA on a pledger to redeem the goods or repay any money advanced under a Pawnbroking Contract.
- 6.8 Given this divergence of views, the Commission requests the Court’s guidance on these issues as stated in Question 1 and 2 of **Part 9**.

7 Whether Pawnbroking Contracts provide for a credit fee and / or security interest, and are ‘consumer credit contracts’ (Questions 3 and 4)

- 7.1 The Commission’s view is that Pawnbroking Contracts will involve the payment of credit fees under the contract (s 11(1)(c)(ii)), and / or the taking of a security interest under the contract (s 11(1)(c)(iii)).
- 7.2 The Commission considers s 11(1)(ii) is met because the redemption fee charged as part of the redemption price is likely to meet the definition of ‘credit fee’ in s 11(1)(c)(ii).²¹
- 7.3 In the event s 11(1)(c)(ii) does not apply, the Commission considers s 11(1)(c)(iii) would nevertheless be met because a security interest is taken. As noted above, the security obtained by the pawnbroker over the pawned goods in exchange for the loan is essential to the definition of what a ‘pawnbroker’ is under s 4 of the SDPA. Although ‘security’ is not defined in the SDPA, the definition of ‘security interest’ in s 17 of the PPSA (quoted in paragraph [3.3] above) is broad and squarely captures pawnbroking arrangements. It covers any transaction which creates an interest in personal property that in substance secures

²⁰ *Harmony Ltd v Commerce Commission* [2020] 3 NZLR 552 (CA) at [32] and [40] (and noting [82] for the discussion of how the debt came into existence in this case).

²¹ The Commission notes that s 11(1)(c)(i) may also apply where interest is charged under a Pawnbroking Contract. However, for the purpose of this case stated, the Commission is only concerned with Pawnbroking Contracts that have the essential features set out in **Schedule 1**, which follows the provisions of the SDPA. As such, this application is not concerned specifically with Pawnbroking Contracts that do charge interest under the contract since that is not a requirement in s 4 of the SDPA.

payment of an obligation without regard to the form of the transaction. The Commission therefore considers that, as a matter of law, every ‘pawnbroker’ entering into a Pawnbroking Contract will take a ‘security interest’ in the pawned goods, in accordance with s 11(1)(c)(iii).

- 7.4 It is acknowledged that whether the requirements of ss 11(1)(a) and (b) are also met will necessarily be a question of fact, in each case.²² The Commission requests the Court’s guidance on these issues as stated in Questions 3 and 4 in **Part 9**.
- 7.5 The Association has indicated it does not wish to be heard on these questions and will abide the decision of the Court on Question 3 and 4.

8 The operation of section 15A (questions 5 and 6)

- 8.1 Two issues arise with respect to s 15A (which is quoted above at paragraph [3.7]):
- (a) The first is *whether* s 15A operates to exclude the application of the definition of ‘consumer credit contract’ in s 11 (and therefore the application of the CCCFA as a whole) to Pawnbroking Contracts.
 - (b) The second is, if so, *when* the criterion in s 15A(1)(b) will be met.
- 8.2 With respect to the first issue, the Association’s position is as summarised at [4.4] above, namely, that s 15A of the CCCFA operates to exclude Pawnbroking Contracts that meet the criteria in clause 15A from the definition of ‘consumer credit contracts’ in s 11, because s 15A excludes the application of Part 2 to Pawnbroking Contracts, and Part 2 contains the s 11 definition.
- 8.3 The Commission considers s 15A does not exclude the definition of ‘consumer credit contracts’ in s 11 from applying to Pawnbroking Contracts, by mere dint of s 11 being in Part 2 of the Act. The cross-reference in s 5 to s 11,²³ as well as the self-evident necessity of providing a definition of ‘consumer credit contract’ that is applicable to the entirety of the CCCFA, supports the conclusion that s 11 was intended to apply beyond Part 2 of the CCCFA.
- 8.4 In any case, the Commission’s position is that s 15A does not constitute a blanket exclusion for Pawnbroking Contracts, but a limited one. Section 15A applies to exclude Pawnbroking Contracts only where the elements in s 15A(1)(a) and (b) are met, and was not intended to be an exclusion of *all* CCCFA requirements to Pawnbroking Contracts generally.
- 8.5 The second issue is *when* the criterion in s 15A(1)(b) will be met.²⁴ The Commission considers there are two available interpretations, set out at [8.6]-[8.7] below, which turn on how the term “in the case that” should be

²² However, as noted at footnote [15], the Commission does not understand it to be in dispute that at least some (if not the majority) of Pawnbroking Contracts will meet the criteria in ss 11(1)(a) and (b) of the Act. In addition, as noted at footnote [16], if the Court is satisfied that Pawnbroking Contracts are ‘credit contracts’ under ss 6-7 of the Act, the requirement in s 11(1)(d)(i) that the “creditor...carries on a business of providing credit” will also be met.

²³ Section 5 of the CCCFA provides that “consumer credit contract has the meaning set out in section 11”.

²⁴ Assuming the criterion in s 15A(1)(a) is also met.

interpreted. The Commission considers that the first interpretation is likely the correct one, and understands the Association's view is that the first interpretation is the correct one. As there are two interpretations available, however, the Commission seeks the Court's guidance on the issue.

- 8.6 On the first interpretation, s 15A of the Act applies to Pawnbroking Contracts where the *contract itself* provides that the pawnbrokers' only remedy if the pledger defaults on their obligations under the Pawnbroking Contract or does not redeem their pawned goods on or before the redemption date is under section 63 of the SDPA. This interpretation requires that the term "in the case that" is read as "in the case that the *Pawnbroking Contract provides that*". This interpretation has the effect of avoiding duplication of disclosure requirements under the CCCFA and SDPA – the only expressly stated purpose of the exception in s 15A when that provision was inserted.²⁵ This would, however, have the effect of excluding Pawnbroking Contracts from all the obligations under Part 2 of the CCCFA, for the duration of the contract, where the contract contains such a term.
- 8.7 The second available interpretation is that s 15A only applies when the qualifying acts in s 15A(1)(b) have actually occurred i.e. the pledger is in fact in default or does not redeem their goods before the redemption date, and the only right of recourse is under s 63 of the SDPA. This would, however, mean that the provisions of Part 2 apply up and until that time, meaning that the disclosure provisions in Part 2 will be engaged throughout the life of the Pawnbroking Contract. This is at odds with the aim of avoiding duplication of the disclosure requirements in Part 2 of the CCCFA and the SDPA.
- 8.8 The Commission therefore requests the Court's guidance on the circumstances in which s 15A of the CCCFA applies to exclude the application of Part 2 of the Act to Pawnbroking Contracts with the essential terms of the contract set out in **Schedule 1** and the example contracts appended as **Appendix 1 and 2** (as stated at Question 5 and 6 of **Part 9** below).

9 Questions for the opinion of the Court

- 9.1 The Commission respectfully requests the Court's opinion on the following questions:

(a) *Question 1*

Does a Pawnbroking Contract with the essential terms of the contract set out in **Schedule 1** provide 'credit' within the meaning of s 6(a) of the CCCFA such that it meets the definition of 'credit contract' in s 7(1) of the CCCFA?

(b) *Question 2*

Alternatively, does a Pawnbroking Contract with the essential terms of the contract set out in **Schedule 1** provide 'credit' within the meaning of

²⁵ Credit Contracts and Consumer Finance Amendment Bill (104—2, Explanatory Note at 8): "We recommend the insertion of new Clause 12A to exempt pawnbroking contracts from Part 2 of the CCCFA *because disclosure is already provided for in the [SDPA]*" (emphasis added). The Bill (104—2) also recorded pawnbrokers would remain subject to the responsible lending provisions (which exist outside of Part 2).

s 6(b) of the CCCFA such that it meets the definition of 'credit contract' in s 7(1) of the CCCFA?

(c) *Question 3*

If the answer to Question (1) or (2) is "yes", does a Pawnbroking Contract with the features set out in **Schedule 1** involve 'credit fees' which "are or may be payable under the contract" such that it meets the definition of a 'consumer credit contract' in s 11(1)(c)(ii) of the CCCFA?

(d) *Question 4*

If the answer to Question (1) or (2) is "yes", does a Pawnbroking Contract with the features set out in **Schedule 1** involve the taking of a 'security interest' which "[is] or may be taken under the contract" such that it meets the definition of a 'consumer credit contract' in s 11(1)(c)(iii) of the CCCFA?

Question 5

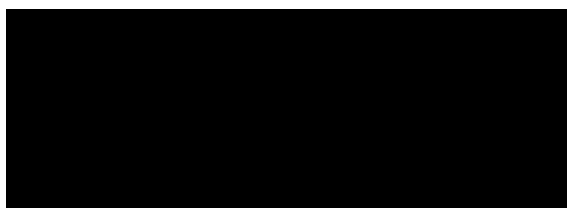
- (e) If the answer to Question 1 or 2 *and* either 3 or 4 is "yes", and Pawnbroking Contracts are found to meet the definition of 'consumer credit contract' in s 11 of the CCCFA, does s 15A of the CCCFA otherwise exclude the application of the CCCFA to Pawnbroking Contracts with the essential terms of the contract set out in **Schedule 1** because s 11 is located in Part 2 of the CCCFA?

Question 6

- (f) If the answer to Question 5 is "no", which interpretation of the phrase "in the case that" in s 15A(1)(b) of the CCCFA is correct?

9.2 The Association does not wish to be heard in respect of Questions 3 and 4.

Date:



Crystal Euden
Chief Legal Counsel, Credit, Commerce Commission

This case stated is filed by Kate Mills, solicitor for the Commerce Commission. The address for service of the Commerce Commission is at the offices of Meredith Connell, Level 7, 8 Hardinge Street, Auckland.

Documents for service on the Commerce Commission may be:

- (a) emailed to [redacted] provided it is also emailed to [redacted] (solicitors Meredith Connell); or

- (b) if email is not practical:
 - (i) posted to Meredith Connell (attn. Kate Mills) at PO Box 90750, Victoria Street West, Auckland 1142; or
 - (ii) left at the solicitor's address as noted above (attn. Kate Mills).

Schedule 1: the key features of Pawnbroking Contracts in respect of which the Commission seeks the Court's guidance

- 1 The Commission seeks the Court's guidance in respect of the questions stated in Part 9 above, where the Pawnbroking Contract has the following features:
 - (a) In accordance with s 4 of the SDPA:
 - (i) The pawnbroker enters into the arrangement in expectation of profit, gain, or reward; and
 - (ii) Money is advanced "on the security of goods of which the person takes possession, but not ownership"; and
 - (iii) The contract is entered into by persons who are not "a secondhand dealer or the employee of a secondhand dealer and pawnbroker"; and
- 2 The provisions of the SDPA regulate how the core features of a Pawnbroking Contract, set out in s 4 (and above), are to operate in practice, including that Pawnbroking Contracts must provide for:
 - (i) A redemption date, which is the last day on which the pawnbroker must hold the goods for redemption by the pledger (and after which, the pawnbroker can sell the goods);²⁷ and
 - (ii) A redemption price, which is the amount of money a pledger must pay in order to redeem their goods before the redemption date;²⁸ and
 - (iii) The amount of money advanced to the pledger on the goods.²⁹
- 3 Two sample Pawnbroking Contracts with the core features of a Pawnbroking Contract outlined above at paragraph [1], and which are consistent with requirements of the SDPA at paragraph [2] are **appended** to assist the Court, as follows:
 - (i) **Appendix 1:** Dollar Dealers contract;
 - (ii) **Appendix 2:** Cash Converters contract.

²⁶ In accordance with ss 51 and 59 of the SDPA. Section 59 of the SDPA sets out the requirements of a 'pledge ticket', which includes the information at s 51(2)(b) to (h). Section 51 requires pawnbrokers to keep a record of the information therein.

²⁷ As defined in s 58 of the SDPA.

²⁸ As defined in s 57(1) of the SDPA. This comprises the amount of money advanced on the goods "plus" the redemption fee payable by the pledger on redemption of the goods (s 57(1)(a) and (b)).

²⁹ This must be noted on the 'pledge ticket' pursuant to s 59(2)(c) and s 51(2)(f) of the SDPA.



Pledge Agreement

Below is an example of our pledge agreement. At DollarDealers, we are proud to be open and transparent about our practices, policies and redemption fees. This pledge agreement is guided by the rights and obligations as set out in the Secondhand Dealers and Pawnbrokers Act 2004.

Should you have any questions with how to pawn, please contact us and our friendly and experienced staff will assist you.

ALL PLEDGES KEPT FOR 3 MONTHS

THIS IS YOUR PLEDGE TICKET. KEEP IT SAFE

We accept payments by Cash, EFTPOS & Bank Transfer only

Goods cannot be redeemed without suitable ID or this ticket

You are entering into a Pawn agreement. This means that you hand us your goods as a pledge, and we provide you with money. You do not have to pay back any money unless you want your goods back.

IF YOUR GOODS ARE IMPORTANT TO YOU AND YOU THINK THAT YOU MIGHT NOT BE ABLE TO PAY TO GET THEM BACK, YOU MUST NOT SIGN THIS AGREEMENT.

YOUR RIGHTS AND OBLIGATIONS RELATING TO PAWNED GOODS ARE SET OUT IN THE SECONDHAND DEALERS AND PAWNBROKERS ACT 2004 (the Act”)

- You (“the Pledger”) are pledging the pawned goods to the Pawnbroker. This means that the Pawnbroker holds the pawned goods and has rights in them. You have the right to get the goods back but only if you pay the redemption fee for the goods on or before the redemption date.
- **You do not have to pay us money at all, unless you want your pawned goods back.**
- To redeem your pawned goods, you must come in and pay us the redemption amount set out in the table on the reverse of this ticket. The redemption amount increases each month we hold the pawned goods, to cover our costs.
- If you want us to extend the final redemption date, you must come in and pay us 1 month fees that are shown to extend the contract to a new redemption date, but you must do this **before** the current redemption date.
- **If you do not redeem the pawned goods by the redemption date, we can sell the goods at a public or internet auction. (initial)**
- If we sell the pawned goods and get more than \$10 over the redemption price, you will be entitled to be paid 90% of that extra amount. We will use the latest contact details you have given us, to contact you in writing. It is in your interest to tell us if your contact details change. You must claim that money within 6 months. We may pay you via online banking. The bank account must be in the same name as the original pledger. If you do not contact us, or we cannot contact you using your latest address, under the Act you will lose the rights to that money after 6 months.
- You have the right to see the pawned goods while we hold them. You can see them but not touch them. If you want to check that your goods are still working, our staff can check that for you. Please contact us 2 days before you want to see the pawned goods if you have asked us to put them in offsite storage.
- **Take care of this pledge ticket.** Under the Act, we are able to give the pawned goods to any person who holds this ticket, unless we have proof that they are not entitled to it. If you lose the ticket we can give you a copy but you must first show us suitable photographic identity documentation

such as a passport or drivers licence.

- You can choose to sell the pawned goods to us after you have pawned them. We must pay you more than the redemption price if we agree to buy the pawned goods. If you decide to do this, please let us know as you must come in to collect the money in cash.
- **24 Hour Pledge: This is a special low-cost service that we may offer to Gold House & City DollarDealers cliental only. If you wish to redeem your pawned goods under the 24 Hour Pledge, you must redeem them BEFORE the 24 hours are up (check store opening hours). If goods are not redeemed within 24 hours of the time noted on the ticket, the standard redemption rate will apply. (initial)**
- We will take care to store the pawned goods, **but we do not insure them.** We are not responsible for Police seizure of the goods, **or loss or damage for reasons outside of our control, including fire, water damage or burglary.**
- All advances under \$30 incur a \$10 charge per month.

Henderson (2006) Ltd trading as Dollar Dealers & Gold House are licensed Pawnbrokers under the Secondhand Dealers and Pawnbrokers Act 2004

DollarDealers management reserves the right to change this pledge agreement at its discretion and without notice. The above text is an example only and cannot be used to create a pawn loan online, in our store or by any other format. Only licensed Pawnbrokers operating in a licensed Pawnbrokers can create pawn loans.

ENQUIRE NOW

Make a simple payment online

Scan the QR code or enter XXXXXXXXX
at payments.cashconverters.co.nz



XXXXXXX

Amount Lent is \$XXX.XX

Redeem by DD/MM/YYYY for \$XXX.XX or

Extend by a month for \$XXX.XX

Redemption Fee	\$XXX.XX	Contract Date	DD/MM/YYYY
Redemption Price	\$XXX.XX	Redemption Date	DD/MM/YYYY

Our details Name: Cash Converters [store] ("we", "us", "our")
 Address: [store address]

Your details Name: [customer name] ("you", "your")
 Address: [customer address]
 Phone: [customer phone number]
 ID: [customer ID details]
 Date of Birth: DD/MM/YYYY

Pledge Terms:

- you can extend the Redemption Period by one month by making a payment of \$xx.xx before the Redemption Date. You can extend the Redemption Period as many times as you wish.
- you must produce this pledge ticket and pay the Redemption Price during the Redemption Period to redeem the Goods. You cannot pay by cheque or credit card.
- we are entitled to assume the holder of this pledge ticket is the owner of the Goods unless we have evidence to the contrary.
- if you do not redeem the Goods we can offer them for sale, first by public internet auction and then by any other reasonable means.

Your Rights are to:

- pay the Redemption Price during the Redemption Period and redeem the pledged Goods.
- to inspect pledged Goods (by viewing but not handling the Goods or us demonstrating their operation) at any reasonable time.

Our Obligations are to:

- keep at our address an accurate record about you, the Goods, redemption or purchase of the Goods and the transaction you and we are entering into.
- verify your identity and age (you must be 18 years or older).
- provide you with this document and to provide a replacement if you ask and we are satisfied with your identity (which you can establish with a current passport, current driver licence or Kiwi Access Card).
- retain the Goods (labelled as prescribed) until the Redemption Date, unless you have redeemed them earlier.
- pay 90% of any amount above the Redemption Price to you and as prescribed if the Goods are not redeemed and we later sell them.

By signing, you confirm:

- your details are correct and your identity has been correctly established.
- you are the owner of the Goods and there are no other security interests in them or any claims to them.
- you grant us a security interest in the Goods
- you have received the Amount Lent.
- you are legally competent to enter into a contract and are not under the influence of any other drug.
- you will keep the Goods insured and acknowledge we are not liable for loss or damage of the Goods (unless statutory obligations exist)
- You consent to receiving marketing materials from us regarding our products and services.

Signed by: [customer name]

Signed by: [staff member] on behalf of Cash Converters [store]

Schedule

Item number

Description

Serial # / Unique Identifiers

SAMPLE