

Statutory Review of the *Scrap Metal Industry Act 2016*



NSW Police Force

1. Executive Summary

The *Scrap Metal Industry Act 2016* (the Act) commenced in two parts, first on 16 December 2016, with most provisions in force by March 2017. The scrap metal industry has a high turnover of materials and historically had little regulation. Dealers could buy scrap metal for cash without requiring the establishment of a person's identity or original ownership of the goods. In the Second Reading of the *Scrap Metal Industry Bill 2016* (the Bill), it was said that *"Up until now, this trade has been largely unregulated and undocumented, making it extremely attractive to criminals as a way to make some quick cash."*

In accordance with section 29 of the Act, the Minister for Police and Emergency Services is to review the Act and the *Scrap Metal Industry Regulation 2016* (the Regulation) as soon as possible after the period of three years from the commencement of the Act. The review is to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. A report is to be tabled in Parliament within 12 months after the end of the period of three years.

While the Act does not specify the objects of the Act, the Second Reading of the Bill makes clear that the main policy objectives of the Act are to prevent property crime by regulating the scrap metal industry, while striking a balance as to not unduly interfere with business.

The Act delivers its policy objectives in three ways:

1. requiring scrap metal businesses to register as scrap metal dealers,
2. imposing duties and obligations on scrap metal dealers, and
3. providing appropriate powers to police to administer and ensure compliance with the Act.

The review was conducted by the NSW Police Force (NSWPF) on behalf of the Minister for Police and Emergency Services. We published a discussion paper on the Have your Say and the NSWPF websites and invited the public to comment on the operation of the Act and Regulation. Submissions closed on 30 August 2020. Key industry and government stakeholders were also consulted throughout the review.

The information collected through submissions and consultations revealed that the Act is generally well-supported. However, it is clear that the scrap metal industry has since evolved since the commencement of the Act and the consensus view is that more enforcement is required. We conclude that the policy objectives of the Act remain valid.

In this report, we discuss this evolution and the emergence of an overlap with the motor vehicle recycling industry needing further consideration and discussion with the Department of Customer Service and stakeholders to ensure both industries have the same integrity and professionalism.

We have made recommendations to ensure the terms of the Act remain appropriate to secure the original objectives and to address emerging policy considerations. These recommendations seek to:

- update obligations and penalties to deter non-compliance,
- improve clarity on who is considered a scrap metal dealer, and
- update the powers of the Commissioner of Police and police officers to effectively administer the Act.

2. Recommendations

Recommendation 1

Amend the Act to address inconsistencies between the Act and the motor vehicle recycling provisions in the *Motor Dealers and Repairers Act 2013*

Recommendation 2

Amend the Regulation to remove the exclusion of aluminium cans from the definition of *scrap metal* and amend the Act to exempt collection point operators under the *Waste Avoidance and Resource Recovery Act 2001* from the Act

Recommendation 3

Amend the Act to exempt gold and silver dealers licensed under the *Pawnbrokers and Second-Hand Dealers Act 1996* from the Act

Recommendation 4

Amend the Act to include the words “whether or not such person is registered under the Act” after the definition of scrap metal dealer

Recommendation 5

Amend the Act to specify that dealing in scrap metal over a prescribed number of days within a period of 12 months will give rise to a rebuttable presumption of carrying on a business

Recommendation 6

Amend section 5 of the Act to make the maximum penalty 500 penalty units and amend the Regulation to make \$5,500 the corresponding penalty notice amount

Recommendation 7

Amend the Regulation to provide for the adjustment the registration fee for inflation

Recommendation 8

Amend the Act to include the following as registration information: whether the scrap metal dealer is licensed under the *Motor Dealers and Repairers Act 2013* or *Tow Truck Industry Act 1998*; and where necessary approval is required to use a specified premise as a scrap metal yard, information that the necessary approval has been obtained

Recommendation 9

Amend the Act to clarify that scrap metal businesses without a scrap metal yard must still be registered and the appropriate details are included as registration information

Recommendation 10

Amend the Act to grant the Commissioner the power to create a public register which identifies people in breach of the Act

Recommendation 11

Retain 50 penalty units as the penalty for the offence of providing false or misleading information under section 11 of the Act

Recommendation 12

Amend the Act to make it an offence for a scrap metal dealer to advertise the payment of cash for scrap metal and amend the Regulation to prescribe the offence as a penalty notice offence

Recommendation 13

Amend section 14 of the Act to make the maximum penalty 500 penalty units and amend the Regulation to make \$5,500 the corresponding penalty notice amount

Recommendation 14

Amend section 15(4) of the Act to make the maximum penalty 500 penalty units and amend the Regulation to make \$5,500 the corresponding penalty notice amount

Recommendation 15

Amend the Regulation to remove the offence in section 16(4) of the Act as a penalty notice offence

Recommendation 16

Retain the exemption in clause 10 of the Regulation

Recommendation 17

Amend the Act to grant the Commissioner the power to suspend, revoke, or refuse registration in circumstances prescribed by the Regulation

Recommendation 18

Amend the Act to include repeated non-compliance as a ground to issue long-term closure orders

Recommendation 19

Amend the Act to provide police officers the power to stop and search a motor vehicle, where there is a reasonable suspicion that the vehicle is being used for the purpose of carrying on a scrap metal business, for the purposes of determining whether there has been compliance with, or a contravention of, the Act

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3. Introduction

3.1 Reason for review

Section 29 of the Act requires the Minister for Police and Emergency Services to review the Act and the Regulation as soon as possible after three years from the commencement of the Act. The review is to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

3.2 Conduct of review

NSWPF carried out the review on behalf of the Minister for Police and Emergency Services. We engaged in a consultation process to obtain views of stakeholders on the review. This included publishing a discussion paper on the “Have your Say” and the NSWPF websites in July 2020, inviting the public to comment on the operation of the Act and Regulation. Submissions closed on 30 August 2020. We received submissions from key stakeholders in the industry. These views informed our draft recommendations. A schedule of respondents who made submissions is at Annexure A.

We conducted targeted consultation with key industry and government stakeholders on the draft recommendations. These consultations informed our final recommendations. A schedule of stakeholders who participated in these consultations is at Annexure B.

This report is the outcome of the review process which considers the experience of the NSWPF in administering and enforcing the Act and the views of the stakeholders through submissions and consultation.

4. Overview of the Act

4.1 Background to the Act

The scrap metal trade consists of all manner of metal objects being sold as scrap to be crushed and recycled and has a high turnover of materials. Prior to the enactment of the Act, the scrap metal industry was largely unregulated and undocumented. Scrap metal dealers were able to buy scrap metal with cash without the requirement to establish a person's identity.

The Act commenced in two parts – first on 16 December 2016 with most provisions in force by March 2017.

4.2 Policy objectives of the Act

There are no provisions in the Act that specify its objects. The Second Reading of the *Scrap Metal Industry Bill 2016* indicate that the legislation was intended to:

- prevent property crime in NSW,
- regulate the activities of scrap metal dealers,
- provide police with visibility over the industry through scrap metal dealer registration and record keeping requirements,
- provide police with appropriate powers to administer and ensure compliance with the Act, and
- not unduly interfere with business.

4.3 Terms of the Act

The Act delivers its policy objectives in three main ways:

1. requiring scrap metal businesses to register as scrap metal dealers,
2. imposing duties and obligations on scrap metal dealers, and
3. providing appropriate powers to police to administer and ensure compliance with the Act.

Part 1: Preliminary

Sections 3 of the Act defines words used in the Act including *scrap metal dealer*, *serious criminal offence*, and *motor vehicles*. Section 4 of the Act clarifies that a reference to a person *carrying on a business* includes the person carrying on the business in partnership or by an employee, contractor, agent or other person.

Part 2, Division 1: Registration of scrap metal businesses

Sections 5-11 of the Act set out the provisions concerning the registration of scrap metal businesses.

Section 5 of the Act prohibits a person from carrying on a business of dealing in scrap metal, unless the business is registered. A business is registered when the scrap metal dealer provides the Commissioner with registration information for the business and pays the required fee. The Act and Regulation prescribe what registration information is required.

Scrap metal dealers are required to notify the Commissioner of any changes in registration information within 14 days of that change. Section 11 prohibits a person from providing false or misleading information when providing registration information.

Where a business is registered, Section 9 of the Act requires the Commissioner to provide the scrap metal dealer with a *certificate of registration* for the business. Section 10 of the Act requires the Commissioner to keep a publicly accessible register of scrap metal businesses. The register is maintained by the NSW Police Force Security Licensing and Enforcement Directorate and is available through the NSW Police Force website.

Part 2, Division 2: Obligations and duties of scrap metal dealers

Sections 12-16 of the Act set out the provisions concerning the obligations and duties of scrap metal dealers.

Section 12 prohibits scrap metal dealers from paying for scrap metal with cash, cashable cheque, or in kind with goods or services. Scrap metal dealers must purchase scrap metal electronically, leaving traceable records that may assist police in tracking stolen goods or identifying people of interest.

Section 13 imposes a duty on scrap metal dealers to report scrap metal to police if they suspect it was stolen or unlawfully obtained. Where a police officer reasonable suspects the scrap metal to be stolen, section 15 allows the officer to issue an order to prohibit the scrap metal dealer from disposing of the scrap metal.

Section 14 prohibits scrap metal dealers from buying or disposing of unidentified motor vehicles, unless authorised to do so by a police officer in writing.

Section 16 outlines record keeping obligations for scrap metal dealers. The dealer must keep a record of each transaction for buying scrap metal with the following details:

- a) the date of the transaction
- b) if the scrap metal is sold by an individual, the name, residential address and date of birth of the individual as shown on the individual's photo identification
- c) if the scrap metal is sold by a corporation, the name, business address, ABN of the corporation, and sale consent
- d) a description of the scrap metal and its quantity or weight

- e) if the scrap metal consists of a motor vehicle, the unique identifier of the motor vehicle
- f) the method of payment.

These records must be kept on the premises at which the dealer carries on business for a period of 3 years after they are made. Section 16 also creates an offence for a person or scrap metal dealer to make a false or misleading statement for the purposes of these record keeping obligations.

Part 3, Division 1: Closure Orders

Sections 17-20 of the Act set out the provisions concerning closure orders.

Section 17 of the Act grants the Commissioner the power to make an interim closure order to close specified premises if:

- a) an unregistered scrap metal business is being carried out on that premises, or
- b) if the Commissioner reasonably suspects that a serious criminal offence is being committed at the premises.

Interim closure orders take effect from the time they are served and have effect for 72 hours, unless sooner revoked.

Section 18 of the Act grants the Local Court the power to make a long-term closure order to close specified premises if:

- a) an unregistered scrap metal business is being carried out on that premises, or
- b) there have been, or there are likely to be, serious criminal offences committed at or in connection with the premises.

Long-term closure orders may be made regardless of whether an interim closure order is (or has been) in force with respect to the premises. The Local Court determines the duration that the long-term order is to remain in effect.

Section 19 of the Act prohibits a person from carrying on scrap metal business on premises subject to closure order. Section 20 states that compensation is not payable to any person for the closure of premises pursuant to closure orders.

Part 3, Division 2: Powers of entry and inspection

Sections 21-24 of the Act set out the provisions concerning police powers.

Section 21 of the Act grants police officers the power to enter premises at any reasonable time without a warrant for the purposes of determining compliance with the Act. The premises must be one where a scrap metal business is being carried on, or one which the police officer reasonably believes such a business is being carried on.

Section 22 of the Act allows a police officer to apply for a search warrant if the police officer believes, on reasonable grounds, that any provision of this Act has been contravened on any premises. Where the search warrant is issued, the police officer executing the warrant may:

- a) enter the premises
- b) search the premises for evidence of a contravention of this Act, and
- c) exercise any other function of a police officer under this Division.

Section 23 outlines the powers that police officers may exercise on lawful entry. These include any of the following –

- a) examine any document,
- b) make a copy of any document,
- c) require any person to make a copy on the premises of any document and give that copy to the police officer to retain,
- d) take photographs, films, audio, video or other recordings as the police officer considers necessary,
- e) require any person to produce any document,
- f) require any person to answer any question relating to any document or any other relevant matter,
- g) take any document from the premises for the purposes of copying it,
- h) seize any document or thing that the police officer reasonably believes is connected with an offence against the Act or the Regulation.

Section 24 makes it an offence for a person to hinder or obstruct a police officer in the exercise of a function under this Division unless they have a reasonable excuse.

Part 4: Miscellaneous

Section 25 of the Act states that a certificate signed by the Commissioner is admissible as evidence in court if it relates to whether the business was registered during a specified period or if a premises was subject to a closure order.

Section 26 states that proceedings for an offence against the Act or the Regulation may be dealt with summarily before the Local Court.

Section 27 grants police officers the power to issue penalty notices to a person if it appears that the person has committed an offence that is prescribed by the Regulation. The amount payable is also prescribed by the Regulation.

Section 28 grants the Governor the general power to make regulations to carry out and give effect to the Act.

Section 29 requires the Minister to review this Act and determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

4.4 Overview of the Regulation

The following table sets out the existing regulation making powers in the Act. It also identifies the powers that are used in the Regulation.

Section of Act	Regulation making power	Relevant regulation
3(1)	Prescribe objects that are not considered <i>scrap metal</i>	Clause 4 prescribes aluminium cans are not scrap metal
6(2)(e)	Prescribe other information as <i>registerable information</i>	Clause 5 prescribes the registration information to include the name of the manager of each scrap metal yard
7	Prescribe the registration fee	Clause 6 prescribes the registration fee of \$210
9(1)	Prescribe particulars to be included in a certificate of registration	Clause 7 prescribe particulars to be included in a certificate of registration
16(1)(b)(i)	Prescribe acceptable forms of photo identification	Clause 9 prescribes acceptable forms of photo identification
16(1)(b)(ii)	Prescribe other details relating to the identity of the individual	Not prescribed
27(2)	Prescribe penalty notice offences	Schedule 1 prescribes penalty notice offences
27(4)	Prescribe the amount payable for penalty notice offences	Schedule 1 prescribes the amount payable for penalty notice offences
28(1)	General power to make regulations necessary or convenient to be prescribed for carrying out or giving effect to this Act	
28(2)(a)	Create exemptions from the Act	Clause 10 creates an exemption from record-keeping requirements in section 16(1)(e) of the Act
28(2)(b)	Create requirements for displaying certificates of registration at scrap metal yards	Clause 8 creates an offence for not displaying the certificate of registration
28(2)(c)	Provide for the content of advertisements by scrap metal dealers	Not prescribed
28(3)	Create offences punishable by a penalty not exceeding 10 penalty units	Clause 8 creates an offence for not displaying the certificate of registration
28(4)	Contain provisions of a savings or transitional nature consequent on the enactment of this Act	Not prescribed

5. Statutory Review – Discussion

5.1 Definitions within the Act

The Act currently defines *scrap metal* to mean any object of commercial value that is made from or contains metal and is sold as scrap for recycling the metal. The only exclusion currently prescribed by clause 4 of the Regulation is aluminium cans.

Respondents who commented on the definitions in the Act considered these provisions inadequate. Issues raised include the:

- intersection of obligations and duties imposed on scrap metal dealers who are also motor vehicle recyclers under the *Motor Dealers and Repairers Act 2013*,
- risks associated with the exclusion of aluminium cans from the definition of *scrap metal*,
- scope of the definition of *scrap metal* being “far greater than the general application”, capturing businesses such as gold and silver dealers.

Scrap metal dealers and motor vehicle recyclers

Motor vehicle recyclers (colloquially known as car wreckers) under the *Motor Dealers and Repairers Act 2013* regularly transact with scrap metal dealers. Traditionally, motor vehicle recyclers primarily acquired damaged or end of life vehicles to extract parts for refurbishment or reuse. Once all marketable parts are removed, the remains of the vehicle are sold to scrap metal dealers. Licensees under the *Motor Dealers and Repairers Act 2013* are not prohibited from using cash. By comparison, under section 12 of the Act, scrap metal dealers are prohibited from paying for scrap metal with cash.

It has become apparent that since the commencement of the Act, an evolution of these two industries have occurred. Respondents have reported that a type of motor vehicle recycler colloquially known as ‘car breakers’ have recently emerged in NSW. To illustrate the distinction between car wreckers and car breakers, one respondent wrote:

Compared to removing and marketing spare parts like traditional motor wreckers, car breakers have little or no interest in the legitimate refurbishment or re-use of motor vehicle parts in the local (NSW) market and focus solely on stripping a vehicle as quickly as possible.

Major components and easily traded commodities obtained from this process are typically exported by shipping containers to be sold in overseas markets.

Despite operating like scrap metal recyclers, car breakers avoid the prohibition on buying scrap metal using cash under section 12 of the Act. They do so by purchasing motor vehicles under the pretence of recycling them. Respondents indicated that illegal operators who deal in cash account for a significant loss of business for compliant scrap metal dealers. One respondent claimed to have a 40% reduction in end of life vehicles intake volumes since the

commencement of the Act. Another respondent, an association which represents members in the scrap metal industry, submitted that its members have reported a similar loss. We acknowledge a common theme from the submissions that express the difficulties compliant dealers face when competing with operators who deal in cash.

Advice from the Department of Customer Service revealed that around 30% of registered scrap metal dealers also hold a motor recycler or repairer licences under the *Motor Dealers and Repairers Act 2013*. Like car breakers, these businesses could use their dual standing to avoid the cash prohibition in the Act, whether legitimately or illegitimately. There are legitimate instances where a motor vehicle is purchased using cash with the genuine intention of recycling its parts but is then processed as scrap metal. However, it is possible these businesses could abuse this process to avoid the cash prohibition.

The Department of Customer Service has completed the statutory review into the *Motor Dealers and Repairers Act 2013* and have recommended the introduction of a cash prohibition for motor recyclers to align the requirements in the two industries. The option of regulating motor vehicle recyclers under the Act (as is the case in the equivalent UK legislation), instead of the *Motor Dealers and Repairers Act 2013* was also discussed as an alternative. However, consulted stakeholders preferred the introduction of a cash prohibition for motor recyclers.

We have committed to continue to collaborate to address inconsistencies between the regulatory regime under the Act and the motor recycling provision in the *Motor Dealers and Repairers Act 2013*.

Recommendation

1. Amend the Act to address inconsistencies between the Act and the motor vehicle recycling provisions in the *Motor Dealers and Repairers Act 2013*

Exclusion of aluminium cans

The exclusion of aluminium cans from the definition of *scrap metal* in the Act means that all obligations imposed by the Act do not apply when dealing with aluminium cans.

Following the commencement of the Act, the NSW Government amended the *Waste Avoidance and Resource Recovery Act 2001* to roll out the NSW Container Deposit Scheme, "Return and Earn" in December 2017. Return and Earn is the largest litter reducing initiative introduced in NSW and focuses on recycling drink containers like plastic bottles or aluminium cans. People are paid a 10-cent refund for each redeemable container at return points, where the refund is often available in the form of cash.

Importantly, the exclusion of aluminium cans allows for the operation of Return and Earn without undue interference from the Act. *Collection point operators*, as defined in the

Waste Avoidance and Resource Recovery Act 2001, can pay for aluminium cans in cash without registering as scrap metal dealers. Further, people returning or selling aluminium cans are not required to provide proof of identity as usually required when selling scrap metal.

The exclusion also means that scrap metal dealers are able buy and sell aluminium cans with cash and are not required to keep transaction records. Respondents have raised the risk of dealers intentionally misidentifying scrap metal as aluminium cans to avoid their duties and obligations.

Further consultation with industry stakeholders revealed that the exemption is largely irrelevant for compliant dealers, as it is seldom used for two reasons. Firstly, the Return and Earn scheme pays a significantly higher price for eligible aluminium cans, where most cans are eligible. This means that only the remainder are collected and sold to scrap metal dealers, accounting for a small part of business. Secondly, legitimate scrap metal dealers do not deal in cash, and thus pay electronically for aluminium can deposits despite the exemption.

We found that while the exclusion of aluminium cans is necessary to facilitate Return and Earn, it has limited application for scrap metal dealers. Acknowledging the risks raised, we found it appropriate remove the exclusion and exempt collection point operators under the *Waste Avoidance and Resource Recovery Act 2001* from the Act. This clarification would mean scrap metal dealers would no longer be able to pay cash for aluminium cans, unless they are a collection point operator within the meaning of the *Waste Avoidance and Resource Recovery Act 2001*.

Recommendation

2. Amend the Regulation to remove the exclusion of aluminium cans from the definition of *scrap metal* and amend the Act to exempt collection point operators under the *Waste Avoidance and Resource Recovery Act 2001* from the Act.

Gold and Silver

Under the current definition of *scrap metal*, gold and silver is considered scrap metal if sold for the purposes of recycling the gold or silver. Businesses that deal in second-hand gold and silver typically offer cash for gold or silver before recycling or selling these precious metals. These businesses are regulated as second-hand dealers under the *Pawnbrokers and Second-hand Dealers Act 1996*.

It is not the intention of the Act to regulate these kinds of businesses. One respondent said that the scope of the definition of *scrap metal* is “far greater than the general application”. One approach to avoid the unintentional double regulation is to exclude gold and silver

from the definition of *scrap metal*. The equivalent UK legislation does this, presumably for similar reasoning.

We propose to exempt second-hand dealers licensed under the *Pawnbrokers and Second-hand Dealers Act 1996* from the Act if they carry on a business in dealing in gold or silver, or both. A similar exclusion currently exists in section 4 of the *Pawnbrokers and Second-hand Dealers Act 1996* which outlines activities to which the *Pawnbrokers and Second-hand Dealers Act 1996* does not apply. All consulted stakeholders were supportive of this proposal.

Recommendation

3. Amend the Act to exempt gold and silver dealers licensed under the *Pawnbrokers and Second-Hand Dealers Act 1996* from the Act

Definition of scrap metal dealer

Section 3(1) of the Act defines *scrap metal dealer* to mean ‘a person who carries on a business of dealing in scrap metal’, where *dealing in* includes ‘buying, receiving and obtaining’. Although implied, the definition of *scrap metal dealer* does not explicitly state that it applies whether or not a person is registered.

The equivalent UK legislation, which was referred to in the second reading of this Bill, does include that clarification. Section 21(5) of the *Scrap Metal Dealers Act 2013* (UK) defines a scrap metal dealer as ‘a person who is for the time being carrying on business as a scrap metal dealer, *whether or not authorised by a licence*’ (emphasis added). In the interest of clarity, we found that the inclusion of a similar definition is appropriate.

Recommendation

4. Amend the Act to include the words “whether or not such person is registered under the Act” after the definition of scrap metal dealer

Meaning of carrying on a business

Section 3(1) of the Act defines *scrap metal dealer* to mean ‘a person who carries on a business of dealing in scrap metal’. However, the Act does not define what *carrying on a business* means. The only guidance can be found in section 4 of the Act which states that ‘reference to a person *carrying on a business* includes a reference to the person carrying on the business in partnership or by an employee, contractor, agent or other person’

Respondents who commented on the meaning of *carrying on a business* found it vague. The main issue raised by respondents was that the ambiguity of this term may have led to people avoiding obligations imposed by the Act. In 2016, the number of scrap metal

businesses in NSW was estimated to be between 600 to 700. As of 1 September 2020, there are 366 registered scrap metal dealers. This discrepancy will be discussed below.

Operational police raised the issue of dealing with people who are clearly carrying on a business of dealing in scrap metal, but don't fit the traditional definition of a scrap metal dealer as currently defined. This includes people who use their residential premises to collect scrap metal to infrequently sell in bulk quantities. This also includes people who conduct their business using only a motor vehicle, without a business premises or scrap metal yard. Illustrating the effect of the ambiguity of the term, one respondent wrote:

The inability to police or enforce the banning of cash payments has seen the flourishing of operators in small utes and vans travelling all over NSW and offering cash payments/no receipts to industrial scrap generators.

We found that the Act is drafted in a way which envisioned scrap metal dealers to conduct their business in a traditional sense; that is, on a scrap metal yard or equivalent premises.

Trying to determine if a person is carrying on a business as opposed to a hobby is difficult without further guidance. The Australian Tax Office (ATO), for example, has a webpage titled 'Are you in a business' which provides guidance on the same matter, but for federal tax purposes. The ATO concludes that there is no single factor which determines this and requires multiple considerations. While the nuance and wide considerations are appropriate in the context of federal tax, they are unlikely to be useful in the application of the Act.

The *Pawnbrokers and Second-hand Dealers Act 1996* similarly uses the phrase *carry on a business* to define its scope. However, section 38 of the *Pawnbrokers and Second-hand Dealers Act 1996* outlines activities which give rise to a rebuttable presumption of carrying on a business of buying or selling second-hand goods.

This provision sets a concrete threshold (which is selling second-hand goods for more than 6 days within a period of 12 months) to determine when a person is carrying on a business. We found a similar provision would provide police and scrap metal dealers greater clarity on who the Act applies to. Key industry stakeholders and operational police have shown unanimous support for a similar provision, where dealing in scrap metal over a prescribed number of days within period of 12 months would give rise to the rebuttable presumption of carrying on a business. We will consult further to determine the appropriate number of days.

Recommendation

5. Amend the Act to specify that dealing in scrap metal over a prescribed number of days within a period of 12 months will give rise to a rebuttable presumption of carrying on a business

5.2 Registration of scrap metal businesses

Requirement for business to be registered

Section 5 of the Act prohibits a person from carrying on a business of dealing in scrap metal unless the business is registered and sets 100 penalty units as the maximum penalty for non-compliance. Schedule 1 of the Regulation currently prescribes \$2,200 as corresponding penalty notice amount.

As discussed earlier, there were only 366 registered scrap metal dealers in September 2020, despite there being an estimated 600-700 scrap metal businesses in 2016. Industry stakeholders have consistently made complaints to police from the commencement of the Act regarding unregistered dealers. Operational police have also confirmed that there are people who appear to be operating as scrap metal dealers but are evading requirements of the Act.

Industry stakeholders and operational police also raised that the current penalty notice amount is not substantial enough to act as a deterrent, nor is it an appropriate reflection of the seriousness of the offence. Non-compliant dealers who receive these fines could absorb these fines as mere business costs, effectively allowing them to continue to deal in scrap metal using cash, without records, and largely undetected. The difference in cost between registering a scrap metal business and the penalty notice amount for an offence under section 5 of the Act is \$1,900. This amounts to an insignificant financial risk for non-compliant dealers, which is easily offset by the profits made from being able to access the illegal cash market.

The comparable offence of carrying on a business without the appropriate licence under the *Motor Dealers and Repairers Act 2013* currently attracts a maximum penalty of 1,000 units, where the penalty notice amount is \$5,500. In the case of a second or subsequent offence, the maximum penalty is 1,000 penalty units or imprisonment for 12 months, or both. Additionally, a court could order the forfeiture of motor vehicles and proceeds by unlicensed motor dealers and motor vehicle recyclers, appropriately reflecting the seriousness of the offence.

Because of the significant overlap between the two industries, we have found it appropriate to introduce better consistency between the Act and the *Motor Dealers and Repairers Act 2013* (see Recommendation 1). The Department of Customer Service share this view and has recommended that the *Motor Dealers and Repairers Act 2013* be amended to address any inconsistencies with the Act in its Report on the Statutory Review of the *Motor Dealers and Repairers Act 2013*.

We agree that the current penalty is not proportionate to the seriousness of the offence and ineffective as a deterrent. As part of a holistic approach to address the issue of non-compliant dealers, we found it appropriate to increase the maximum penalty and corresponding penalty notice amount for an offence under section 5 of the Act. We consider

these amounts are reasonable and proportionate to the seriousness of the offence. This will effectively strengthen the terms of the Act to achieve the policy objectives and will bring the Act closer to alignment with the *Motor Dealers and Repairers Act 2013*.

Recommendation

6. Amend section 5 of the Act to make the maximum penalty 500 penalty units and amend the Regulation to make \$5,500 the corresponding penalty notice amount

Registration fees

Clause 6 of the Regulation currently prescribes the registration fee of \$210 for three years. We found the fee adequately covers the current administrative costs incurred by the NSWPF and is an amount that is unlikely to be prohibitive to any person dealing in scrap metal. For the registration fee to remain appropriate in the future, we have found that fee should be adjusted for inflation on an ongoing basis, calculated using the Consumer Price Index (All Groups Index) for Sydney published by the Australian Bureau of Statistics. Schedule 2 of the *Pawnbrokers and Second-hand Dealers Regulation 2021* provides for the adjustment of licensing fees for inflation under that Act. We consider this an appropriate model to replicate for the registration fee under the Act.

We also note that industry stakeholders proposed that the registration fee be significantly increased to cover the costs of police officers dedicated to the enforcement of the Act. However, we have found that is an operational consideration, rather than a legislative one.

Recommendation

7. Amend the Regulation to provide for the adjustment the registration fee for inflation

Registrable information

Section 6(2) of the Act and clause 5 of the Regulation currently prescribe the following as *registration information*:

- a) the name of the business and scrap metal dealer (if different to the business name),
- b) the dealer's ABN
- c) the address of each scrap metal yard used by the dealer
- d) if the business is carried on by a corporation –
 - I. the corporation's business address
 - II. the name of the manager of each scrap metal yard
- e) if the business is carried on by an individual or in partnership, the name of the manager of each scrap metal yard.

We consider that *registration information* should also include if a person or business is licensed or registered under another relevant Act such as the *Motor Dealers and Repairers*

Act 2013 or the Tow Truck Industry Act 1998. These Acts govern industries and activities which often overlap. As discussed above, around 30% of registered scrap metal dealers also hold a motor recycler or repairer licences under the *Motor Dealers and Repairers Act 2013*.

Industry stakeholders proposed that *registration information* should include, when appropriate, any approval for the use of a specified premise as a scrap metal yard in carrying out the applicant's business. This might include development consent from Local Council or an Environment Protection Licence from the NSW Environment Protection Authority where the dealer intends to use a specified place as a scrap metal yard.

A similar requirement can be found in section 20B(2)(c) of the *Motor Dealers and Repairers Act 2013*. Where planning approval is required to use the premises for that purpose, section 20B(2)(c) requires the applicant for a licence to carry on a business at that premise to include information demonstrating that the required planning approval is in force. In the *Tow Truck Industry Act 1998*, a licence can be refused where an applicant has not obtained a necessary approval for the use of a specified place as a holding yard in carrying on their business. We found it is appropriate to include a provision similar to section 20B(2)(c) of *Motor Dealers and Repairers Act 2013*.

Currently, the Act suggests that a scrap metal yard is a requirement for a scrap metal business to register. As discussed in this report, the evolution of the scrap metal industry has seen the ability for dealers to operate without a scrap metal yard. The Act should be updated to reflect this evolution.

A respondent to the Discussion Paper suggested NSWPF create and maintain a public register that identifies people in breach of the Act. This could create more confidence in the industry. We find merit in this suggestion and found a similar register published by the NSW Food Authority. Through their 'Name and Shame register,' the NSW Food Authority publishes lists of businesses that have breached or are alleged to have breached NSW food safety laws. It details penalty notices issued and prosecutions made for breaches under NSW food safety laws.

Similarly, NSW Fair Trading has a 'Public warnings' page on their website which identifies unfair business practices and the people who engage in them. Section 86A of the *Fair Trading Act 1987* allows the Minister or Secretary to issue these statements where there is a public interest to do so. Consulted stakeholders were supportive of these proposals. We committed to consulting further to determine what breaches would be appropriate to publish on the register.

Recommendation

8. Amend the Act to include the following as registration information: whether the scrap metal dealer is licensed under the *Motor Dealers and Repairers Act 2013* or *Tow Truck Industry Act 1998*; and where necessary approval is required to use a specified premise as a scrap metal yard, information that the necessary approval has been obtained
9. Amend the Act to clarify that scrap metal businesses without a scrap metal yard must still be registered and the appropriate details are included as registration information
10. Amend the Act to grant the Commissioner the power to create a public register which identifies people in breach of the Act

Providing false or misleading information

In the Discussion Paper, we asked if the current penalty of 50 penalty units (\$5,500) is appropriate for providing false or misleading registration information under section 11 of the Act. Respondents think that the penalty should be increased to 100 penalty units (\$11,000) at a minimum.

In light of these views, we reviewed NSW Criminal Court statistics provided by the NSW Bureau of Crime Statistics and Research. The data shows that no charges under section 11 of the Act have been finalised in court, suggesting that the penalty remains an effective deterrent. The comparable offence under section 24 of the *Pawnbrokers and Second-hand Dealers Act 1996* prohibits making false or misleading statements in the course of complying with that Act. The maximum penalty for that offence is also 50 penalty units. Further, NSWPF indicate that scrap metal dealers have not been providing false or misleading registration information due to a lack of deterrence.

Recommendation

11. Retain 50 penalty units as the penalty for the offence of providing false or misleading information under section 11 of the Act

5.3 Obligations and duties of scrap metal dealers

In the Discussion Paper, we asked if the obligations and duties of scrap metal dealers under Part 2, Division 2 of the Act are appropriate. Respondents consider the obligations and duties remain appropriate, but strongly advocated for penalties for non-compliance with the Act to be significantly increased. A key theme raised by respondents is that non-compliance with the Act, particularly with registration requirements and the cash prohibition, is common in the industry. Industry stakeholders expressed the same views when consulted, advocating for higher penalties and stronger enforcement. We found that the demand for cash for scrap metal still existed in the industry.

Prohibition on paying cash for scrap metal

The prohibition on paying cash for scrap metal under section 12 of the Act is paramount to achieving the objectives of the Act. Paying electronically for scrap metal adds an additional form of record which can be used for the purposes of ensuring compliance with other obligations and duties under the Act. It also assists police officers in identifying people suspected of selling stolen scrap metal and aids investigations in general.

When industry stakeholders were consulted, it was suggested that consideration be given to removing the cash prohibition. Stakeholders claimed that their compliance has resulted in the loss of business because they cannot meet sellers' expectations to be paid in cash for their scrap metal. While we sympathetic of the difficulties faced by compliant dealers, the cash prohibition is essential to achieving the objectives of the Act and must remain in place.

Another common complaint from industry stakeholders is that there are scrap metal dealers who advertise cash payments for scrap metal. Operational police have raised the difficulty in proving that dealers are paying in cash when investigating these advertisements. Without this proof, police are unable to penalise the dealers responsible for these adverts. The Act also does not provide police with any power to stop advertisements for cash.

Acknowledging that consumers may make complaints to the Australian Competition and Consumer Commission for false or misleading claims, we found scope to prohibit the advertising of cash for scrap metal. The prohibition on paying cash to buy scrap metal under section 12 implies that it is not legitimate to advertise the purchasing of scrap metal with cash. Industry stakeholders were supportive of this proposal and gave evidence of misleading advertisements and signage, where a small "no" is placed in front of the large "cash for scrap metal".

We will conduct further assessment and consultation to determine the appropriate amount to prescribe.

Recommendation

12. Amend the Act to make it an offence for a scrap metal dealer to advertise the payment of cash for scrap metal and amend the Regulation to prescribe the offence as a penalty notice offence

Prohibition on buying or selling unidentified motor vehicles

Section 14 of the Act prohibits a scrap metal dealer from buying, selling or disposing of an unidentified motor vehicle, unless authorised by a police officer. The offence carries a maximum penalty of 100 penalty units and the Regulation currently prescribes \$1,100 as the penalty notice amount.

Industry stakeholders and operational police have raised that the current penalty notice amount does not reflect the seriousness of the offence in section 14 of the Act, particularly as the offence is directly related to a central policy objective of the Act. Operational police consider that crimes like motor vehicle theft and motor vehicle rebirthing are facilitated by the unrecorded buying and selling of unidentified vehicles. In other words, the easier it is to buy or sell unidentified vehicles, the more appealing vehicle theft becomes.

Industry stakeholders and operational police also raised that the current penalty notice amount is not substantial enough to act as a deterrent. We found that the current amount was low enough that non-compliant dealers could viably absorb it as a mere business cost, effectively allowing them to access a market that is inaccessible to compliant dealers. The risk of being fined \$1,100 is insignificant compared to the profits obtainable by buying and selling unidentified motor vehicles. A single vehicle for example, even in unroadworthy condition, could be worth multiple times the amount of this fine.

As indicated by the second reading of the Bill, one of the main types of property crime that this Act intended to reduce was motor vehicle theft and by extension, its corollary crimes, like vehicle rebirthing. The *Crimes Act 1900* imposes a maximum penalty of 5 years of imprisonment for dishonest possession of a motor vehicle where its unique identifier has been interfered with. The *Crimes Act 1900* also imposes a maximum penalty of 14 years of imprisonment for facilitating organised car rebirthing activities. Clearly, criminal offences of this nature are considered serious under our legislation.

We found that the current penalty for an offence under section 14 of the Act is not proportionate to the seriousness of the offence and is ineffective as a deterrent. We also found there is a sufficient nexus between the buying, selling or disposing of an unidentified motor vehicle and related crimes such as motor vehicle rebirthing. The maximum penalty and corresponding penalty amount should be increased to address these findings. The proposed penalties are reasonable in the circumstances and proportionate to the seriousness of the offence. Further, the proposed amounts are consistent with the amounts proposed in Recommendations 6 and 14 of this report.

Recommendation

13. Amend section 14 of the Act to make the maximum penalty 500 penalty units and amend the Regulation to make \$5,500 the corresponding penalty notice amount

Prohibition on disposing of suspected stolen scrap metal

Section 15 of the Act allows a police officer, who reasonably suspects scrap metal to be stolen, to order a dealer to not alter or dispose of it. Section 15(4) of the Act prohibits non-compliance with the order. The offence carries a maximum penalty of 50 penalty units and the Regulation currently prescribes \$550 as the penalty notice amount.

Industry stakeholders and operational police raised the same concerns – that the penalty does not reflect the seriousness of the offence, nor is it an effective deterrent. Situations can be reasonably contemplated where the suspected stolen scrap metal subject to a non-disposal order under section 15 is valued significantly higher than \$550 (the penalty notice amount). In these instances, it is clear that the risk of a \$550 penalty notice would not be an effective deterrent.

It was also raised that contravention of this provision not only concerns the disposing of suspected stolen scrap metal, but also requires disobeying an explicit order made by police not to do so. The equivalent offence in section 102 of the *Motor Dealers and Repairers Act 2013*, for example, appropriately reflects the seriousness of the offence as it carries a maximum penalty of 500 penalty units.

We found this offence to be directly related to a central policy objective of the Act – that is, to reduce property crime in NSW by closing off scrap metal businesses as an avenue to cash in stolen goods. We found it appropriate to increase the maximum penalty and corresponding penalty notice to reflect its seriousness and to strengthen the terms of the Act to achieve its objectives.

As discussed earlier, there is significant overlap between the scrap metal industry and the motor recycling industry, and as a result, both NSWPF and the Department of Customer Service have committed to addressing any inconsistencies between the Act and the *Motor Dealers and Repairers Act 2013*. For this reason, we found it appropriate and reasonable to adopt the same maximum penalty of the equivalent offence in section 102 of the *Motor Dealers and Repairers Act 2013*.

Recommendation

14. Amend section 15(4) of the Act to make the maximum penalty 500 penalty units and amend the Regulation to make \$5,500 the corresponding penalty notice amount

Record-keeping obligations

Section 16(4) of the Act prohibits a person, in purported compliance with any requirement reasonably made of the person by a scrap metal dealer for the purposes of the dealer's compliance with their record keeping obligations, from furnishing information or making any statement knowing that it is false or misleading. This offence is currently prescribed as a penalty notice offence by the Regulation. Data from Revenue NSW shows that no penalty notices have been issued for this offence.

We found that this offence is not appropriate to be prescribed as a penalty notice offence because of the mental element required. All other offences in the Act that refer to false or misleading statements are not prescribed as penalty notice offences for the same reason.

Recommendation

15. Amend the Regulation to remove the offence in section 16(4) of the Act as a penalty notice offence

Exemption to record-keeping obligations

Clause 10 of the Regulation exempts scrap metal dealers from the requirement of recording the unique identifier of a motor vehicle under section 16(1)(e) of the Act, if the motor vehicle was crushed, cubed or shredded before the transaction of that motor vehicle occurred. In the Discussion Paper, we asked if the exemption in clause 10 of the Regulation is appropriate. Two respondents submitted it is not appropriate, reasoning that scrap metal dealers could crush, cube or shred vehicles to avoid these obligations using this exemption.

This exemption caters for the on-sale of motor vehicles from one scrap metal dealer to another, where during this process the motor vehicle is crushed, cubed or shredded for transportation.

This exemption does not remove the initial requirement to record the motor vehicle's unique identifier, when that vehicle first comes into possession of a scrap metal dealer prior to it being crushed, cubed or shredded. In line with advice from operational police, we are satisfied that existing record-keeping obligations allows for enough traceability for police if required. Consulted industry stakeholders accepted this reasoning and supported the proposal.

Recommendation

16. Retain the exemption in clause 10 of the Regulation

5.4 Enforcement powers

In the Discussion Paper, we asked if the enforcement powers under Part 3 of the Act are appropriate. All respondents thought the enforcement powers remain appropriate. However, a key theme raised was the need for more effective enforcement of the Act. The experience of the NSWPF also shows frustration when enforcing the Act with the current powers. We have also found the Act to lack appropriate penalties for repeated non-compliance, as penalty notices alone may not be enough to deter some dealers.

On further consultation, industry stakeholders advocated for stronger enforcement powers and more enforcement from police. As the operational enforcement is outside the scope of this review, the discussion in the consultation focused on following legislative proposals.

Power for Commissioner to refuse registration

The Act does not currently provide for any circumstances in which the Commissioner can suspend, revoke or refuse registration of scrap metal business. Similar regulatory regimes such as the *Motor Dealers and Repairers Act 2013* and *Pawnbrokers and Second-hand Dealers Act 1996* contains provisions which allow for refusing, suspending or revoking licences.

For example, section 25 of the *Motor Dealers and Repairers Act 2013* outlines grounds for refusing licences. These grounds include where an applicant is not likely to carry on the business honestly and fairly, or has been found guilty of motor vehicle theft in the last 10 years. Similarly, section 36 of the *Pawnbrokers and Second-hand Dealers Act 1996* grants the Secretary the power to revoke or suspend a licence under certain conditions. These include when a licensee may be dealing in stolen goods, found guilty of an offence involving dishonesty, or is carrying on the business in a dishonest or unfair manner.

We found that similar provisions allowing the Commissioner to suspend, revoke, or refuse registration is an appropriate disciplinary power for the Commissioner to have. The power to suspend, revoke or refuse registration under prescribed circumstance would strengthen the policy objectives of the Act and increase confidence in the industry by keeping nefarious dealers from operating. Key industry stakeholders have unanimously supported this proposal in principle. We will conduct further assessment and consultation with stakeholders on circumstances which may be appropriate for suspending, revoking or refusing registration.

Recommendation

17. Amend the Act to grant the Commissioner the power to suspend, revoke, or refuse registration in circumstances prescribed by the Regulation

Interim and long-term closure of premises

Section 18 of the Act allows the Local Court, on the application of the Commissioner, to order a long-term closure of a premises in certain circumstances. Currently, these circumstances are where a scrap metal business is being conducted without registration, or if there is reasonable suspicion that a serious criminal offence is being committed on the premises.

Long-term closure orders may have significant financial impacts on scrap metal dealers. For the same reasons above, this could be an appropriate disciplinary power to strengthen the policy objectives of the Act and increase confidence in the industry.

Industry stakeholders supported including repeated non-compliance as an additional ground to issue a long-term closure order. This may be an appropriate punitive measure before considering revoking, suspending or cancelling a dealer's registration. We will conduct further assessment and consultation with stakeholders to determine what the appropriate definition for repeated non-compliance should mean.

Recommendation

18. Amend the Act to include repeated non-compliance as a ground to issue long-term closure orders

Power to stop and search motor vehicles

Section 21 of the Act grants police officers the power to enter premises where a scrap metal business is being carried on without a warrant for the purposes of determining compliance with the Act. Section 22 of the Act allows a police officer to apply for a search warrant if the police officer believes on reasonable grounds that any provision of this Act has been contravened on any premises. Upon lawful entry, section 23 of the Act outlines the powers that may be exercised; this includes examining and copying any document, taking photographs or other recordings, or requiring a person to answer relevant questions. However, there are no powers for police to stop and search a motor vehicle for determining if there has been compliance with, or a contravention of, this Act.

As discussed, the scrap metal industry has evolved and people are able to carry on a business using a motor vehicle without a yard, generally advertising pick up and drop off services online. Industry stakeholders have stated that this practise has significant impacts to their commercial interests. Motor vehicles are also frequently used in the course of carrying on traditional scrap metal businesses for transporting scrap metal.

Operational police raised that efforts to enforce the Act are frustrated by the inability to stop and search motor vehicles and that scrap metal dealers can evade police when carrying on their business using a motor vehicle.

In light of the views and the experience of the NSWPF, we found it appropriate for police to have powers to stop and search vehicles for the purpose of enforcing the Act. It is important for the legislation to respond to an evolving industry and continue to provide the necessary foundations for preventing property crime in the scrap metal trade. Industry stakeholders supported this proposal when consulted.

Recommendation

19. Amend the Act to provide police officers the power to stop and search a motor vehicle, where there is a reasonable suspicion that the vehicle is being used for the purpose of carrying on a scrap metal business, for the purposes of determining whether there has been compliance with, or a contravention of, the Act

Expanding entry and inspection powers to be conferred to authorised officers

The Act currently provides entry and inspection powers to police officers only. Industry stakeholders have requested that consideration be given to conferring these powers to authorised officers, like an investigator as defined in the *Fair Trading Act 1987*.

The rationale provided by industry stakeholders was that police officers have difficulty detecting non-compliance with the Act and will continue to do so unless specialised training was provided. Further, anecdotal evidence was provided that police are often unable to investigate complaints due to conflicting priorities, such as investigating serious crime.

On balance, we found that conferring these powers to authorised officers would likely not address the concerns raised by stakeholders and ultimately would not have any genuine impact on enforcement.

6. Conclusion

The scrap metal industry has evolved since the commencement of the Act. Considering the views of the stakeholders and the experiences of the NSWPF in administering the Act, we have determined that the policy objectives of the Act remain valid.

The intersecting regulation of scrap metal dealers and motor vehicle recyclers will remain a focus for continuing discussions between the NSWPF and the Department of Customer Service. In the final report of the statutory review of the *Motor Dealers and Repairers Act 2013*, the Department of Customer Service made the recommendation to introduce a cash prohibition for motor recyclers to introduce consistency between the two industries.

With the evolution of the scrap metal industry, the policy objectives now encompass matters not envisaged when the Act commenced. The existing terms of the Act, therefore, require strengthening. Additional terms are required to be implemented to secure the policy objectives.

The recommendations made as a result of this review, if implemented, will:

1. allow for more effective regulation of the scrap metal industry,
2. assist in securing the policy objectives of the Act, and
3. assist in delivering NSWPF's priority to prevent crime and achieve its vision for a safer NSW.

Further assessment and consultation with key stakeholders will be carried out to determine the best approach to implement relevant recommendations.

We thank the stakeholders who participated in this review, particularly the industry stakeholders and the Department of Customer Service.

Annexure A – schedule of respondents to the Discussion Paper

- A.1 Elizabeth Billiau
- A.2 Luckys Scrap Metals Pty Ltd
- A.3 Hensel Recycling Australia Pty Ltd
- A.4 Millers Metal Recycling
- A.5 Southern Cross Metals Pty Ltd
- A.6 Peter Francis
- A.7 Sims Metal Management
- A.8 InfraBuild Recycling
- A.9 Waste Contractors & Recyclers Association of NSW
- A.10 Sell and Parker Pty Ltd
- A.11 Waste Management & Resource Recovery Association of Australia

Annexure B – schedule of stakeholders who participated in further consultation

- B.1 Sims Metal Management
- B.2 InfraBuild Recycling
- B.3 Sell and Parker Pty Ltd
- B.4 Hensel Recycling Australia Pty Ltd
- B.5 Southern Cross Metals Pty Ltd
- B.6 Peter Francis
- B.7 The NSW Police Force
- B.8 The Department of Customer Service
- B.9 NSW Fair Trading
- B.10 NSW Environment Protection Authority
- B.11 The Department of Communities and Justice
- B.12 National Motor Vehicle Theft Reduction Council Inc.