HIGH COURT OF AUSTRALIA

McHUGH, GUMMOW, KIRBY, HAYNE AND HEYDON JJ

PALGO HOLDINGS PTY LTD APPELLANT

AND

KELVIN GOWANS, A PUBLIC OFFICER ON BEHALF OF THE DIRECTOR GENERAL OF DEPARTMENT OF FAIR TRADING RESPONDENT

Palgo Holdings Pty Ltd v Gowans [2005] HCA 28
25 May 2005
S317/2004

ORDER

1. *Appeal allowed with costs.*

2. *Set aside paragraphs 3 and 4 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 25 July 2003, and in their place order:*

   (a) the appeal to the Court of Appeal is allowed with costs;

   (b) the order of Sperling J made on 30 September 2002 is set aside and, in its place, order:

      (i) the appeal against conviction and sentence is allowed with costs; and

      (ii) the appellant's conviction and sentence by the Local Court of New South Wales at Lismore on 18 December 2001 is quashed.

On appeal from the Supreme Court of New South Wales

Representation:

L J W Aitken for the appellant (instructed by Hewlett & Company Lawyers)

M G Sexton SC, Solicitor-General for the State of New South Wales with R A Greenaway for the respondent (instructed by D I Catt, Solicitor on behalf of the Office of Fair Trading)

CATCHWORDS

Palgo Holdings Pty Ltd v Gowans

Statutes – Construction – *Pawnbrokers and Second-hand Dealers Act* 1996 (NSW) – Lender charged with carrying on the business of lending money on the security of pawned goods whilst not being the holder of a licence – Lender made short-term secured loans – Loan documents recorded that title in goods passed to lender – Chattel mortgage security – Goods usually kept by the lender for term of loan – Characterisation of transaction – Whether chattel mortgage was a bill of sale under *Bills of Sale Act* 1898 (NSW) – Whether the lender's business was the "business of lending money on the security of pawned goods" – Meaning of "pawned goods" in the *Pawnbrokers and Second-hand Dealers Act* 1996 (NSW).

Pawnbroking – History of meaning of "pawn" or "pledge" in Roman and common law – Understanding of "pawn" or "pledge" as one class of bailment of goods, distinct from mortgage and lien – Relevance of possession of goods.

Statutes – Construction – *Pawnbrokers and Second-hand Dealers Act* 1996 (NSW) – Purposive construction – Contextual construction – Technical and common words – Relevance of Minister's Second Reading Speech – Relevance of consumer credit legislation – Relevance of sham arrangement.

Words and phrases – "pawn", "pawned goods", "pledge".

Pawnbrokers and Second-hand Dealers Act 1996 (NSW), s 6.
Bills of Sale Act 1898 (NSW).

1 McHUGH, GUMMOW, HAYNE AND HEYDON JJ. Palgo Holdings Pty Ltd (which we refer to as "the lender") carried on business in Byron Bay, New South Wales, under the name "Cash Counters Byron". It was charged in the Local Court of New South Wales at Lismore with carrying on, between 16 October 2000 and 1 March 2001, the business of lending money on the security of pawned goods within the meaning of the *Pawnbrokers and Second-hand Dealers Act* 1996 (NSW) ("the 1996 Pawnbrokers Act") whilst not being the holder of a licence under that Act.

2 The lender was convicted in the Local Court, and fined. Its appeal to the Supreme Court of New South Wales[1] against conviction and sentence was dismissed[2]. Its appeal to the Court of Appeal against those orders (by leave, because the appeal was instituted out of time) was dismissed[3]. By special leave the lender now appeals to this Court.

3 The central issue debated in the courts below, and the only issue in the appeal to this Court, is whether the lender's business was the business of lending money on the security of pawned goods. In particular, were the loans which it made to its customers loans on the security of "pawned goods"?

The facts

4 There was little controversy about the facts. The lender made short-term loans of small amounts. Typically, the loans were for a term of seven days. The loans were secured. Each borrower signed a document, the first part of which bore the heading "Secured Loan Agreement", and the second part the heading "Bill of Sale/Goods Mortgage". The first part of the document ("the Secured Loan Agreement") recorded the amount of the loan and the date on which the principal and an agreed amount for interest were due for repayment. (In the example contained in the Appeal Book, and drawn from the evidence given at the hearing in the Local Court, the amount lent was $70 and the amount due, one week later, was $77.)

5 The second part of the document ("the Bill of Sale/Goods Mortgage") was made as a deed between the borrower as mortgagor and the lender as mortgagee

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1 *Justices Act* 1902 (NSW), s 104.

2 *Palgo Holdings Pty Ltd v Gowans* [2002] NSWSC 894.

3 *Palgo Holding Pty Ltd v Gowans* [2003] NSWCA 204.

and recorded that the parties agreed "that the terms of the bill of sale are set out in the schedule of terms attached". The document identified certain goods as the "Mortgaged Property" and recorded the "Location of Goods" as being "In storage at mortgagors request".

6 The Schedule of Terms referred to in the Bill of Sale/Goods Mortgage provided that, if the mortgaged property was situated in New South Wales (as was the case in all of the transactions the subject of evidence in the Local Court proceedings), the borrower "transfer[red] title in the Mortgaged Property to [the lender] as security for the repayment" of the balance of the loan. The Schedule of Terms contained a number of "Undertakings Regarding the Mortgaged Property", including terms requiring the borrower to "keep the Mortgaged Property in good condition and repair", "keep the Mortgaged Property in [the borrower's] possession and custody" and take out and maintain comprehensive insurance "against loss, theft, damage, accident, fire, storm, tempest and any other risk that a prudent owner would [insure] against".

7 Despite the provision about keeping the Mortgaged Property in the borrower's possession and custody, the evidence in the Local Court suggested that in all of the cases about which evidence was given the Bill of Sale/Goods Mortgage recorded the location of the goods as being "[i]n storage at mortgagors request" and that in all except one of those cases (where a motor car was provided as security), the goods were kept by the lender. Sometimes borrowers were told that this was necessary; sometimes they assumed that it was necessary.

8 The lender sought to explain what was done as being a means of its satisfying the borrower's obligation to insure the goods. It was said that, by the lender keeping the goods on its premises, the goods would be covered by its insurance policy. Nothing turns on whether that explanation was to be accepted. For present purposes, all that matters is that, in all but exceptional cases, goods offered as security were kept by the lender at its premises until the loan was repaid or, if the borrower defaulted and did not make good the default, the goods were sold.

The issue

9 Were those loans on the security of pawned goods? In the context of the 1996 Pawnbrokers Act, what does "pawned goods" mean? To answer those questions it is necessary to look to the context provided not only by the 1996 Pawnbrokers Act but also by the history of that and other relevant legislation. It is also necessary to recognise that "pawn" has a recognised and long-established

legal meaning. As with any question of statutory construction, however, it is necessary to begin with the legislative text[4].

The 1996 Pawnbrokers Act

10 Section 6 provided for the offence with which the appellant was charged. It provided that "[a] person must not carry on a business of lending money on the security of pawned goods except in accordance with a licence held by the person". Section 6 appeared in Pt 2 of the Act, dealing with licensing of pawnbrokers and second-hand dealers. The text of s 6 reflected the definition of "pawnbroker" set out in s 3: "a person who carries on a business of lending money on the security of pawned goods".

11 The 1996 Pawnbrokers Act contained no definition of "pawned" or "pawned goods". Some indication of the meaning to be given to these expressions, however, may be had from the provisions of ss 4 and 5. Section 4 specified a number of activities to which the Act was not to extend. It provided:

> "(1) This Act does not apply so as to affect any activities conducted in accordance with a licence, permit or other authority under another Act (for example the *Property, Stock and Business Agents Act 1941*, the *Firearms Act 1996*, or the *Motor Dealers Act 1974*). In particular, this Act does not require a person to obtain a licence under this Act to carry on a business or any activity that is authorised by a licence, permit or other authority issued to that person under any other Act.
>
> (2) This Act does not apply:
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> (a) to dealing in second-hand goods in the course of a fundraising appeal authorised under the *Charitable Fundraising Act 1991*, or
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> (b) to the business of an auctioneer, or
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> (c) to the extent provided by the regulations, in relation to such persons and circumstances as the regulations may prescribe."

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4 After the events giving rise to this matter, the *Pawnbrokers and Second-hand Dealers Act* 1996 (NSW) was amended in a number of respects. These reasons refer to the statutory text as it stood in 2001.

By contrast, s 5 extended the reach of the Act. It provided:

> "If a person receives goods under a contract of sale where the seller has the right to buy back the goods, then for the purposes of this Act:
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> (a) the person receiving the goods is taken to be lending money on the security of the goods, and
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> (b) the price at which the goods are to be sold under the contract is taken to be the amount lent, and
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> (c) the difference between the amount lent and the price at which the goods may be bought back is taken to be the interest payable."

The heading to this section "Buy-back contracts regarded as pledge and loan" is taken not to be part of the Act[5]. Nevertheless, as pointed out in *Pelechowski v Registrar, Court of Appeal (NSW)*[6], it is extrinsic material which may be considered when seeking to identify the purpose or object which underlies the statute.

12 What s 4 indicates is that the 1996 Pawnbrokers Act may be seen as part of a long line of legislation for the regulation of particular kinds of occupation concerned with used goods. Sub-section (1) provided that that Act did not apply to *any* activities conducted in accordance with a licence, permit or other authority under another Act and gave the *Property, Stock and Business Agents Act* 1941 (NSW), the *Firearms Act* 1996 (NSW) and the *Motor Dealers Act* 1974 (NSW) as examples of such other Acts; sub-s (2) provided further exceptions. The 1996 Pawnbrokers Act was neither the first nor the only piece of legislation dealing with that subject. It repealed[7] the *Pawnbrokers Act* 1902 (NSW) ("the 1902 Pawnbrokers Act"), the *Second-hand Dealers and Collectors Act* 1906 (NSW) and the *Hawkers Act* 1974 (NSW).

13 What s 5 indicates is that the expressions "pawned goods" and "lending money on the security of pawned goods" were not thought wide enough to encompass one particular kind of transaction by which a person obtained the use of money for a period upon parting with possession of their goods for that period.

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5 *Interpretation Act* 1987 (NSW), s 35(2)(a).

6 (1999) 198 CLR 435 at 448-449 [40] per Gaudron, Gummow and Callinan JJ.

7 s 44.

14 More significant indications of the meaning to be attributed to "pawned", in the expression "lending money on the security of pawned goods", come elsewhere in the 1996 Pawnbrokers Act, particularly Pts 3 and 4. Part 3 (ss 14-27) contained provisions for the regulation of all businesses authorised by licence granted under the Act. That is, those provisions applied to both pawnbrokers and second-hand dealers licensed under the Act. Part 4 (ss 28-32) made special provisions relating to pawnbrokers. Provisions of both Parts made frequent use of the word "pawn", or cognate terms. For example, s 15 made repeated reference to "goods offered for sale or pawn", s 28 spoke of "an agreement by which the goods are pawned" and "the person pawning the goods", and ss 29, 30 and 31 took the expression "pawned goods" or "pawned article" as the hinge about which their operation turned. These uses of the word "pawn", or cognate terms, must be understood in the light of the Act's use, elsewhere, of the expressions "pawned" or "pawned goods" in conjunction with "pledge". That reveals that "pawn" and "pledge" were used interchangeably to describe the transaction of lending money on the security of pawned goods. It is sufficient to point to some examples of this usage.

15 Section 28 required a pawnbroker to make certain records. That obligation[8] was to make a record of the agreement "[a]t the time possession of goods is taken under an agreement by which the goods are pawned". Among other things, the record had to include[9] "the date of the pledge", and no pledge was "validly made unless the person pawning the goods" signed the record[10]. Sections 29 and 30 regulated the redemption of pawned goods and the sale of forfeited pledges and, apart from the heading to s 30 ("Sale of forfeited pledges"), spoke only of "pawned goods". But s 16(1)(b) required licensees to keep records, including records of all transactions "for the redemption of any pawned goods, or the disposal of any forfeit pledge". "Pawn" (and its cognate expressions) and "pledge" can thus be seen to have been used interchangeably.

"Pawn" and "pledge"

16 Both "pawn" and "pledge" are words having a long-established legal meaning. That is hardly surprising when the ancient origins of such transactions

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8 s 28(1).

9 s 28(2)(e).

10 s 28(3).

are recalled[11]. For centuries, pawn or pledge (the terms are used interchangeably) has been recognised as one class of bailment of goods. It was treated as such in Roman law[12]. This understanding of pawn or pledge was established very early in the common law[13] and was reflected in the writings of the great commentators[14]. It underpinned the way in which legislation regulating the activities of pawnbrokers was framed in Great Britain[15], in the Australian colonies[16] and later in the Australian States[17].

17 Commentators and the courts have long recognised that pawn or pledge is "a bailment of personal property, as a security for some debt or engagement"[18]. They have identified such a transaction as distinct and different from mortgage where "the whole legal title passes conditionally to the mortgagee"[19]. This distinction was sometimes expressed in terms of the difference between the "special property" of the pledgee and the "general property" which remained in the pledgor[20]. The "special property" of the pledgee was described[21] as the right

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11 See, for example, Turner, *The Contract of Pawn*, (1866) at 1-23, where the history is traced from Genesis 38:17-20, through early British legislation regulating pawnbroking (for example, 25 Geo 3 c 48) to the middle of the nineteenth century.

12 *Digest of Justinian*, bk 50, tit 16 l 238.

13 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 913 per Holt CJ [92 ER 107 at 109].

14 Blackstone, *Commentaries*, 9th ed (1783), vol 2 at 452; Story, *Commentaries on the Law of Bailments*, 7th ed (1863) (*Story on Bailments*), §286 at 240; Kent, *Commentaries on American Law*, 7th ed (1851) (*Kent's Commentaries*), vol 2 at 741-742.

15 For example, 35 & 36 Vict c 93.

16 For example, *Pawnbrokers Act* 1849 (NSW) (13 Vict No 37).

17 For example, *Pawnbrokers Act* 1902 (NSW).

18 *Story on Bailments*, §286 at 240. See also *Kent's Commentaries*, vol 4 at 138.

19 *Story on Bailments*, §287 at 240.

20 *Story on Bailments*, §287 at 241.

21 *Ryall v Rolle* (1749) 1 Atk 165 at 167 [26 ER 107 at 108-109].

to detain the goods for the pledgee's security and "is in truth no property at all"[22]. That "special property" depends upon delivery of possession[23], whereas in the case of a mortgage of personal property the right of property passes by the conveyance and possession is not essential to create or support the title.

18 It has also long been recognised that pawn and pledge must also be distinguished from lien. "One who has a lien has only a right of detaining the *res* until the money owing is paid: a lien disappears if possession is lost, and there is no right of sale"[24]. A lien is merely a personal right and cannot be taken in execution; a pledge creates an interest in the pledgee that can be seized in execution[25].

19 Time has not dulled these distinctions. They are distinctions that underpinned the nineteenth century decisions[26] referred to in the reasons of the Court of Appeal. But they are distinctions which still are to be observed[27]. In his third edition of *Commercial Law*, published in 2004, Professor Sir Roy Goode wrote[28]:

> "A pledge ... involves the transfer of possession of the security, actual or constructive, to the creditor. *But the delivery of possession does not necessarily signify the existence of a pledge; it may equally be referable to an intention to create an equitable mortgage or charge.* The capacity in which the creditor holds possession depends on the agreement of the parties. Is he intended merely to have possession, with a right of sale in

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22 *The Odessa; The Woolston* [1916] 1 AC 145 at 158 per Lord Mersey.

23 *Story on Bailments*, §287 at 241; Paton, *Bailment in the Common Law*, (1952) (*Paton on Bailment*) at 355.

24 *Paton on Bailment* at 352.

25 *In re Rollason; Rollason v Rollason; Halse's Claim* (1887) 34 Ch D 495; *Paton on Bailment* at 352.

26 *Ex parte Hubbard; In re Hardwick* (1886) 17 QBD 690 at 698 per Bowen LJ; *Ex parte Official Receiver; In re Morritt* (1886) 18 QBD 222 at 232 per Cotton LJ.

27 See, for example, *In re Cosslett (Contractors) Ltd* [1998] Ch 495 at 508 per Millett LJ.

28 at 617-618.

> the event of the debtor's default, or is he to be a security owner (mortgagee) or chargee? *It seems clear that the three types of security are mutually exclusive and that it is not possible, for example, for the creditor to be both a pledgee and a mortgagee of the same asset at the same time.*" (emphasis added)

20 Legislation dealing with pawnbrokers has often included provisions intended to extend its operation to transactions of kinds other than pawn and pledge. Section 6 of the 1872 British Act (35 & 36 Vict c 93) provided:

> "In order to prevent evasion of the provisions of this Act, the following persons shall be deemed to be persons carrying on the business of taking goods and chattels in pawn (that is to say), every person who keeps a shop for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases or receives or takes in goods or chattels, and pays or advances or lends thereon any sum of money not exceeding ten pounds with or under an agreement or understanding expressed or implied, or to be from the nature and character of the dealing reasonably inferred, that those goods or chattels may be afterwards redeemed or repurchased on any terms; and every such transaction, article, payment, advance, and loan shall be deemed a pawning, pledge, and loan respectively within this Act."

So too, the 1902 Pawnbrokers Act contained provisions extending the legislation's reach beyond transactions of pawn and pledge. It extended to transactions where money was advanced "upon interest, or for or in expectation of profit, gain, or reward ... *upon security, whether collateral or otherwise*, of any article taken ... by way of pawn, pledge, *or security*" (emphasis added)[29]. Other extensions were made in later legislation[30]. By contrast, as noted earlier, the 1996 Pawnbrokers Act spoke of lending money on the security of pawned goods but provided only one form of extension to its reach, by including sale and buy-back arrangements within "lending money on the security of ... goods"[31].

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29 Section 3 definition of "pawnbroker".

30 For example, *Pawnbrokers (Amendment) Act* 1980 (NSW).

31 s 5(a).

21 The Second Reading Speech for the Bill that became the 1996 Pawnbrokers Act described[32] the purpose of the Bill as being "to establish a new regulatory scheme for pawnbrokers and second-hand dealers". Apart from referring to what was said to be "streamlined licensing of pawnbrokers and second-hand dealers who deal in high-risk-of-theft goods" the speech was silent about why a new regulatory scheme was thought necessary and about why any particular changes were thought necessary. One difference between the 1996 Pawnbrokers Act and the 1902 Pawnbrokers Act was that in the 1996 Pawnbrokers Act there was no reference in the definition of "pawnbroker" to advancing money "upon security, *whether collateral or otherwise*, of any article taken ... by way of pawn, pledge, *or security*"[33]. Instead, the definition of pawnbroker in the 1996 Pawnbrokers Act spoke only of advancing money "on the security of *pawned* goods"[34].

The decisions below

22 Neither Sperling J, who decided the appeal from the Local Court to the Supreme Court, nor the Court of Appeal expressly attached significance to this or any other difference between the 1902 Pawnbrokers Act and the 1996 Pawnbrokers Act. Rather, Sperling J, having first recognised that pawn or pledge and mortgage are distinct[35], concluded[36] that there was no legal reason why a transaction could not be both a mortgage and a pawnbroking transaction. Otherwise, he concluded[37], "ordinary pawnbroking transactions could be removed from the purview of the Act at the stroke of the pen, which cannot have been intended".

23 In the Court of Appeal, Hodgson JA, who gave the principal reasons of the Court, said[38] that "the mere circumstance that the [appellant] had a document

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32 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 April 1996 at 438.

33 *Pawnbrokers Act* 1902 (NSW), s 3 (emphasis added).

34 s 3 (emphasis added).

35 [2002] NSWSC 894 at [33]-[36].

36 [2002] NSWSC 894 at [37].

37 [2002] NSWSC 894 at [38].

38 [2003] NSWCA 204 at [34].

which gave it rights as a mortgagee [was] not sufficient to prevent these transactions being fairly described as pledges or pawns". It appears that his Honour was intending to use the words "pledges or pawns" in their accepted legal meaning. So much follows from what Hodgson JA described[39] as "another approach that can be taken" to the matter. He said[40]:

> "The statute refers to 'the business of lending money on the security of pawned goods'. Where the [appellant] carried on business in the fashion of a pawnbroker, receiving possession of goods in circumstances where the intention of both parties was plainly that possession be retained until the loan was repaid and that the [appellant] could sell in the event of default, the goods in question are fairly described as 'pawned goods' even if, on a technical legal analysis, they were subject to a mortgage contract and the transactions were not pledges or pawns strictly so called. *If I were wrong to say that the transactions were pledges or pawns strictly so called*, I would have accepted that alternative argument." (emphasis added)

Handley JA, who agreed with Hodgson JA, gave some additional reasons and the third member of the Court, Beazley JA, agreed with both Handley JA and Hodgson JA. Handley JA said[41] that if a mortgage of personal chattels which are in the mortgagee's possession "has all the rights of a pledgee plus the additional rights conferred by his mortgage, including the general property in the goods, then the transaction can fairly and properly be characterised as a combined pledge and mortgage".

A "combined pledge and mortgage" or "pledges or pawns" that include "mortgages"?

24 If "pawn" and "pledge" are given their accepted legal meaning, the reasoning of the Court of Appeal (and of Sperling J) is necessarily flawed. That reasoning can be supported only by understanding "pawned goods" (and "pawn" and "pledge") as embracing transactions which centuries of legal writing has distinguished as being different from a transaction of pawn or pledge. Why should that be done?

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39 [2003] NSWCA 204 at [37].

40 [2003] NSWCA 204 at [37].

41 [2003] NSWCA 204 at [7].

25 Nothing in the text of the 1996 Pawnbrokers Act provides a foothold for arguing that "pawned goods" include goods that are the subject of other forms of security transaction. On the contrary, the text of the legislation, read in the context provided by the history of this kind of legislation, reveals that those who drafted the 1996 Pawnbrokers Act used one of the known "building blocks of the law of property"[42] when using the expression "pawned goods". "Pawn" and "pledge" refer to a *bailment* of personal property as security for a debt. That is a transaction which is distinct from a chattel mortgage and the distinction is not to be elided by treating one kind of transaction as being subsumed in the other.

26 None of the courts below found the transactions which the lender made with borrowers to be shams. As five members of the Court pointed out in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*[43]:

> "'Sham' is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences[44]."

While the word "sham" appears to have been used in submissions in the Local Court, it was not, and never has been, suggested that the transactions now in question were without any legal effect. It is not to the point to ask whether the statement that goods were stored at the borrower's request was accurate. What is important is whether the transactions were pledges or were mortgages of chattels. All of the courts below found that the transactions which the lender made with borrowers were mortgages of chattels.

27 Because the transactions were mortgages of chattels they were "bills of sale" as defined in the *Bills of Sale Act* 1898 (NSW). Section 4 of that Act provided that if not registered within 30 days after its making, the bill of sale should be void against the persons identified in sub-s (2) of that section. No question about the application of those avoiding provisions need be decided in this matter. What is important for present purposes is the observation that the mortgages which the lender took were not unregulated. It is important because

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42 *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588 at 595 [5] per Gaudron, McHugh, Gummow and Hayne JJ.

43 (2004) 79 ALJR 206 at 213 [46] per Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ; 211 ALR 101 at 111.

44 *Sharrment Pty Ltd v Official Trustee* (1988) 18 FCR 449.

the premise for the reasoning adopted in the courts below has been that to give "pawned goods" a meaning that did not embrace all transactions (whether of pawn, mortgage or, presumably, of any other character) in which the appellant, as lender, in fact had possession of the goods offered by a borrower as security would defeat the purposes of the 1996 Pawnbrokers Act.

28 No doubt the 1996 Pawnbrokers Act is to be given a purposive construction[45]. But that purpose is not to be identified by making an a priori assumption that the 1996 Pawnbrokers Act was intended to reach all of the transactions just identified. Nothing in the text of the Act, its history, or what (little) was said about its purpose in the Second Reading Speech warrants the conclusion that the purpose of the Act was so wide. On the contrary, considering the text of the Act, the indications of purpose provided by such matters as the headings in ss 5 and 30, and the legislative framework into which the 1996 Pawnbrokers Act fitted, reveals that the Act's purposes were more limited. It follows that consideration of legislative purpose reveals no foundation for reading the relevant provisions of the Act otherwise than according to their terms. In particular, there is no basis for reading the definition of pawnbrokers as extending to a business embracing all kinds of transaction in which a lender of money takes possession or custody of goods. Yet unless that is done, the course of business proved against the lender fell outside the statutory definition.

29 When enacted, the 1996 Pawnbrokers Act took its place as only one of several Acts of New South Wales regulating the provision of credit to borrowers. (The position in other States was not materially different.) Foremost among that other legislation was the *Consumer Credit (New South Wales) Act* 1995 (NSW), adopting the Consumer Credit Code ("the Code") set out in the *Consumer Credit (Queensland) Act* 1994 (Q). The Code commenced operation in the mainland States of Australia on 1 November 1996. The 1996 Pawnbrokers Act commenced operation on 30 April 1997. Section 7(1) of the Code provided that it did not apply to the provision of credit limited by the contract to a total period not exceeding 62 days. Section 7(7) provided that (apart from certain provisions dealing with reopening unjust transactions) the Code did not apply to the provision of credit by a pawnbroker in the ordinary course of a pawnbroker's business which was being lawfully conducted.

30 The making of those provisions (taken in conjunction with the recasting of the law relating to consumer credit) might suggest that their enactment provoked the revisions made to the law relating to pawnbrokers reflected not only in the

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45 *Interpretation Act*, s 33.

1996 Pawnbrokers Act but also in the pawnbroking legislation of other States enacted at about that time[46]. No express reference, however, to a connection between the enactment of the Code and revision of the law relating to pawnbrokers is to be found in second reading speeches about those laws[47]. Rather, extrinsic material in States other than New South Wales tends to suggest that the revision of pawnbroking legislation may have been undertaken as part of a general review of occupational regulation[48].

31 Be this as it may, the presence of other general legislation regulating the provision of consumer credit, when coupled with the longstanding provisions of the *Bills of Sale Act* 1898 (NSW) regulating chattel mortgages, reveals no evident reason to read the 1996 Pawnbrokers Act as designed to cover a field wider than its words mark out.

32 Subject to the express extensions made by the 1996 Pawnbrokers Act (at the time, only s 5), lending money on the security of pawned goods referred to lending money on the security of pledges of goods – bailments of goods as security for debts. That was not shown to be the appellant's business. It lent money on the security of chattel mortgages.

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46 For example, *Second-Hand Dealers and Pawnbrokers Act* 1989 (Vic); *Second-hand Dealers and Pawnbrokers Act* 1996 (SA); *Pawnbrokers and Second-hand Dealers Act* 1994 (WA).

47 Second Reading Speech on the Second-Hand Dealers and Pawnbrokers Bill, Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 April 1989 at 1053-1055; Legislative Council, 24 May 1989 at 992-994; Second Reading Speech on the Second-hand Dealers and Pawnbrokers Bill, South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 4 December 1996 at 744-747; Legislative Council, 13 November 1996 at 484-486; Second Reading Speech on the Pawnbrokers and Second-hand Dealers Bill, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 September 1994 at 4728-4730; Legislative Council, 25 October 1994 at 5879-5882. See also Second Reading Speech on the Consumer Credit (New South Wales) Bill, New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 May 1995 at 71-76; Legislative Council, 30 May 1995 at 320-324.

48 Law Reform Commission of Victoria and Regulation Review Unit, Occupational Regulation Discussion Paper No 3, "Second Hand Dealers Marine Stores Dealers and Pawn Brokers", (1988). Cf Law Reform Commission of Western Australia, *Report on the Pawnbrokers Act 1860-1984*, Project No 81, (1985).

Conclusion and orders

33 For these reasons, the appeal should be allowed with costs. Paragraphs 3 and 4 of the orders of the Court of Appeal of New South Wales made on 25 July 2003 should be set aside. In their place, there should be the following orders:

(a) appeal allowed with costs;

(b) set aside the order of Sperling J made on 30 September 2002 and, in its place, order that the appeal against conviction and sentence is allowed with costs, and the appellant's conviction and sentence by the Local Court of New South Wales at Lismore on 18 December 2001 is quashed.

34 KIRBY J. The problem in this appeal arises in a challenge to a judgment of the Court of Appeal of the Supreme Court of New South Wales[49]. It concerns the *Pawnbrokers and Second-hand Dealers Act* 1996 (NSW) ("the 1996 Act"). The appeal tests the adherence of this Court to three oft-repeated principles for the elucidation of contested statutory language.

Three interpretive principles

35 *Purposive interpretation*: The first principle holds that a purposive and not a literal approach[50] is the method of statutory construction that now prevails[51]:

> "A search for the grammatical meaning still constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act."

36 Courts are no longer satisfied with a literal or grammatical meaning of words that does not conform to the presumed legislative intention, including the policy that can be discerned from the law in question[52]. As Lord Diplock explained, in an extra-judicial comment[53], "if … the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed"[54].

37 *Contextual interpretation*: The second principle holds that the meaning of words in legislation is not derived by taking a word in isolation and construing it as if it existed in a vacuum. In the law, context is critical[55]. In a statute, a word

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49 *Palgo Holding Pty Ltd v Gowans* [2003] NSWCA 204.

50 *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 272-273, 275, 280, 290.

51 *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423 per McHugh JA, approved in *Bropho v Western Australia* (1990) 171 CLR 1 at 20.

52 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321.

53 Referring to *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 at 641.

54 Diplock, "The Courts as Legislators", in *The Lawyer and Justice*, (1978) 263 at 274 cited in *Kingston* (1987) 11 NSWLR 404 at 424.

55 *R (Daly) v Home Secretary* [2001] 2 AC 532 at 548 [28] per Lord Steyn.

(if undefined) normally takes its meaning from the surrounding text. Isolating a word, such as "pawned", and affording it meaning torn from its context is a discredited approach to interpretation, given the way that language is ordinarily used and understood by human beings[56].

38 *Access to extrinsic materials*: The third principle holds that courts, in construing contested statutory language, may have resort to extrinsic materials, in order to throw light on the meaning of that language and the purpose of Parliament[57]. This development allows a court, resolving the question, to consider a wider range of materials than was previously available to judges. Such materials may not contradict the statutory text[58]. However, where, as here, there is ambiguity in the statutory text – such that there is a question as to whether the language has a *strict* meaning of a particular kind or is used in a more *common* sense of everyday speech – courts now have access to extrinsic materials, to help resolve that ambiguity. In this case, such extrinsic materials include the Minister's Second Reading Speech, made in support of the Bill that became the Act that contains the contested expression[59].

39 Time was, not so long ago, that Australian lawyers could say with reasonable confidence that this Court consistently applied the foregoing principles, which are obviously inter-related. That trend was encouraged by legislative instruction[60]. Obviously, there are limits to any interpretation that involves an apparent departure from requirements that appear to be demanded by

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56 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397 citing *R v Brown* [1996] AC 543 at 561.

57 cf *Interpretation Act* 1987 (NSW), s 34(1).

58 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

59 *Interpretation Act* 1987 (NSW), s 34(2)(f).

60 *Acts Interpretation Act* 1901 (Cth), s 15AA; *Interpretation Act* 1987 (NSW), s 33; *Interpretation of Legislation Act* 1984 (Vic), s 35(a); *Acts Interpretation Act* 1954 (Q), s 14A; *Acts Interpretation Act* 1915 (SA), s 22; *Interpretation Act* 1984 (WA), s 18; *Acts Interpretation Act* 1931 (Tas), s 8A; *Legislation Act* 2001 (ACT), s 139; *Interpretation Act* (NT), s 62A.

the language of the legislation. Moreover, interpretation is a text-based activity[61] in which divergences of opinion are common and inescapable[62].

40 Because the approach taken by this Court to problems of statutory interpretation is influential upon all Australian courts, we should be on guard against any temptation to return to the dark days of literalism[63]. Above all, this Court should strive to be consistent. In all cases, but especially in legislation enacted to achieve important social objectives, the purposive approach is the correct one to follow.

41 *Technical legal words*: The foregoing interpretive principles remain applicable where a term used in a statute has both a technical legal meaning and an ordinary meaning of everyday speech[64]. The search is always for the legislative purpose, and unthinking importation of technical legal meanings into statutory interpretation cannot be permitted if they would frustrate the intention of the legislature. Indeed, the correct question is not whether a legal or an ordinary meaning should be given to a particular statutory term. Rather, it is what is the natural and ordinary meaning of the language as read in its context and with attention to the legislative purpose and available materials that disclose that purpose.

The facts

42 *The inconvenient facts*: A thorough understanding of the facts of a case often casts light on the application and meaning of the relevant law[65]. The facts in this appeal are inconvenient for Palgo Holdings Pty Ltd ("the appellant"). Unsurprisingly perhaps, in this Court the appellant presented its argument as one tendering a problem concerned with the meaning of the single word "pawned"[66]. So presented, that word was disjoined from the circumstances of the operation of

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61 *Trust Co of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585 at 602 [87]; 205 ALR 1 at 24.

62 *Federal Commissioner of Taxation v Scully* (2000) 201 CLR 148 at 175-176 [54]; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42].

63 *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 146 [82].

64 See eg Barak, *Purposive Interpretation in Law*, (2005) at 344.

65 Greenberg, "How Facts Make Law", (2004) 10 *Legal Theory* 157; cf Neta, "On the Normative Significance of Brute Facts", (2004) 10 *Legal Theory* 199.

66 In s 6 of the 1996 Act.

the 1996 Act. In its submissions, the appellant did not dwell on the facts; nor did it trouble the Court with references to the purposes of that Act.

43 The duty of courts is to apply valid laws of a State Parliament to facts where those facts properly engage such laws. Doing so is not achieved by simply looking at a printed contract, prepared here by the appellant and presented to borrowers who are scarcely in a position to quibble about its terms. It is achieved by looking at the document in the context of all of the surrounding facts and considering whether the 1996 Act fairly responded to those facts, giving to the language of the Act the meaning that best achieves its purposes.

44 *The appellant's documents*: The appellant's documentation was received in evidence in the proceedings brought against it by Mr Kelvin Gowans, a public officer acting on behalf of the Director General of the New South Wales Department of Fair Trading ("the respondent"). The documents were not disputed. A typical example comprised two printed forms.

45 The first form, a single sheet, contained the heading "Cash Counters". This document was titled "Secured Loan Agreement". The name of the appellant appears as the "Lender". The name of the individual "Borrower" follows. The agreement recites that the appellant "is carrying on a business as a short term money lender" and that the Borrower has approached it "for a short term loan" in respect of which the parties "wish to record the terms and conditions" of their agreement.

46 In the form, the Lender agrees to "loan to the borrower the amount of $70.00". The Borrower agrees to "repay the loan amount plus interest by [a date, one week after the date of the agreement] the amount due is $77.00". There follows a statement called "Bill of Sale/Goods Mortgage". This part of the form states: "This Bill of Sale is made as a deed between the mortgagor and [the appellant] in respect of the mortgaged goods, as described in the details of the bill of sale". A section titled "Details of the bill of sale" follows. The appellant is described as the "mortgagee". The Borrower is described as the "mortgagor". The loan contract is stated to be "attached". The form then provides a space for a description of "Mortgaged Property" and "Location of Goods". In the sample form the mortgaged property was described as a microwave and two speakers. The goods were stated to be "In storage at mortgagors [sic] request".

47 To this single page document is attached a second printed form. This is the "Schedule of Terms" appearing under the heading "Bill of Sale or Goods Mortgage". The "Schedule" comprises a document of two pages, with provision for the signature of the "mortgagor" on the first page. There is a second space for execution also by the "mortgagor". It is unclear if this was meant to read "mortgagee". In the recorded sample, only the mortgagor (the Borrower) had signed the document.

48 In the second form, there appears in fine print in par 2, under the subheading "What are you mortgaging to us?", the following words:

> "If the Mortgaged Property is situated in Queensland, New South Wales, the Australian Capital Territory, Tasmania, South Australia or the Northern Territory, you transfer title in the Mortgaged Property to us as security for the repayment of the Secured Moneys."

49 In par 4, titled "Default", it is stated:

> "4.1 When are you in default?
>
> You are in default under this Goods Mortgage if:
>
> (a) as a Borrower ... you do not repay any of the Secured Moneys to us when due ...
>
> (e) the insurer terminates any insurance policy we require;
>
> (f) you fail to renew on terms that satisfy us any mortgage property insurance that we require;
>
> ...
>
> 4.3 Failure to comply with default notice
>
> If you do not comply with the default notice:
>
> (a) you become liable to pay us immediately the Secured Moneys; and
>
> (b) we may repossess and sell the Mortgaged Property; and
>
> (c) we will apply the proceeds of sale towards repayment of the Secured Moneys."

50 In par 5, "Undertakings Regarding the Mortgaged Property", it is provided:

> "5.1 Maintenance of Mortgaged Property
>
> You must keep the Mortgaged Property in good condition and repair.
>
> 5.2 Keeping Mortgaged Property in your possession
>
> You must keep the Mortgage [sic] Property in your possession and custody.

…

5.5 We may have access to the Mortgaged Property

(a) if we give you reasonable notice, you must give us access to the Mortgaged Property to inspect or test the Mortgaged Property;

(b) upon giving you reasonable notice, you permit us to enter any premises where the Mortgaged Property is located for this purpose."

51 There then follow, in par 6, a number of provisions concerning insurance. These include:

"6.3 You must take out comprehensive insurance

(a) you must maintain insurance in connection with the Mortgaged Property against loss, theft, damage, accident, fire, storm, tempest and any other risk that a prudent owner would insurance [sic] against;

(b) you must insure the Mortgaged Property for any value that we may reasonably require;

(c) you must insure our interest as well as your interest in the Mortgaged Property and you must note our interest on any insurance policy.

6.4 You must provide evidence of any insurance

Upon request, you must show us evidence that satisfies us of any invoice and its currency in connection with the Mortgaged Property."

52 *The contradictory facts*: On the face of the foregoing documentation, a knowledgeable reader would infer that this was an agreement for that form of interest in personal property known as a chattel mortgage. In such an interest, the security for the lender (mortgagee) ordinarily involves the passing of title in the property to the mortgagee from the borrower (mortgagor). The language of the "Schedule of Terms" in the appellant's document is consistent with that type of security. Hence, the references to the transfer of title (cl 2.1(a)); the requirement that the mortgagor keep the property in good condition and repair in its possession and custody (cl 5.2); and the requirement that the mortgagor take out and maintain insurance to protect the mortgagee's interest (cl 6.3). This representation of the legal interest of the mortgagee is reinforced by the provision, on failure to comply with a default notice, that the mortgagee "may

repossess and sell the Mortgaged Property" (cl 4.3(b)). Such provisions are consistent with a mortgagee out of possession of the subject property in circumstances in which possession remains with the mortgagor (borrower).

53 Yet as disclosed by the evidence, uncontradicted in the trial of the appellant, the facts could not have been more different from those represented in the documents. With only one material exception, the evidence showed that the appellant took possession of the subject property from the borrower; did so as of course; retained and stored the property on its premises; gave the borrower no option to depart with the property; and did not pay over the "short term loan" until possession of the property had been surrendered to it. In no case was the borrower informed orally of the necessity to secure insurance; nor was any such insurance checked by the appellant at any stage; nor was insurance ever taken out by a borrower for the purpose of securing the advance. None of the borrowers requested the appellant to store their goods for them, either generally or in lieu of insurance. According to the evidence, they simply handed over the property because that was required by the appellant and because they assumed that this was the usual and ordinary course involved in transactions of the kind that the appellant offered.

54 According to the magistrate who first heard the prosecution of the appellant[67]:

> "The civilian witnesses gave evidence to the effect that goods were taken to the defendants [sic] premises with the expectation that a cash advance would be provided as security for the goods and that the sum borrowed plus interest would be repaid in a time frame failing which the goods would be sold by the defendant. Exhibit 2 before me contained notices in this form:-
>
> 'CUSTOMERS NOTE!
>
> If loans are not paid by the due date the items left as security will be sold.'
>
> Evidence was given that goods not the subject of repayment were shipped to Brisbane and disposed of by auction or such other method as the defendant determined."

55 When an appeal from the decision of the magistrate was taken to the Supreme Court of New South Wales[68], the primary judge in that Court (Sperling J) set out in greater detail the course which the transactions between the

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67 Reasons of Mr Linden LCM, 18 December 2001 at 2.

68 Under the *Justices Act* 1902 (NSW), s 104.

appellant and its borrowers took. It is necessary to mention the further facts recorded by his Honour.

56 The primary judge began by describing the evidence of Ms J Rafter, a borrower, who had been involved in three of the subject transactions. In the first of these, she had pooled goods with two other persons, although the transaction "went through in her name"[69]. Her evidence was that there was no suggestion that she and her friends had an option of taking the goods away with them. Nor was there a request for the appellant to store the goods during the currency of the loan. At no stage was the borrower asked whether she had insurance. Similar evidence was given by Mr Z S Jacobs[70] and Mr R M Ferris who had also borrowed money from the appellant. A statement by the latter recounted the borrowing of $80 on the security of a portable radio and mobile phone. Mr Ferris stated that he assumed he had to leave the goods with the appellant "because that is the way a pawnbroker normally works"[71].

57 The statement by Ms K A Vagne, described by the primary judge, recorded that she had borrowed $60 on the security of a microwave and set of speakers deposited with the appellant. She had asked where the goods were kept and was told by the appellant's manager that they were kept "out the back … until the loan was paid off"[72]. The statement by Ms M C Boyne was to similar effect. She said that at no stage was she aware that she did not have to leave her ring with the appellant as security in order to get a loan of $40. She took the surrender of possession in the ring to be "the usual thing"[73]. Mr M S Hunt, who deposited a guitar when he borrowed $60, stated that he was not told that he was not required to leave the guitar. He did not make any request to have it kept in storage by the appellant[74]. A summary of a taped interview with Mr G N Bampling described his deposit of a radio/CD player and video player as security. He had left the goods with the appellant "because he believed that was part of a normal hock transaction". He too made no request to have the goods stored by the appellant[75].

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69 *Palgo Holdings Pty Ltd v Gowans* [2002] NSWSC 894 at [14].

70 [2002] NSWSC 894 at [15].

71 [2002] NSWSC 894 at [16].

72 [2002] NSWSC 894 at [17].

73 [2002] NSWSC 894 at [18].

74 [2002] NSWSC 894 at [19].

75 [2002] NSWSC 894 at [20].

58 The sole exception to this consistent pattern of transactions occurred in the case of Mr P R Farrell. He borrowed $100 on the security of his motor car. He was not required to leave the car as security. However, in this case the documentation used the usual words "in storage at mortgagor's request"[76].

59 The foregoing evidence was not objected to or disputed by the appellant. If some of the statements describing the impression and understandings of the borrowers were not strictly admissible, no contest was raised to their reception at the trial. In a sense, they simply stated the obvious.

60 In its case, the appellant called Mr M C White, an administration officer of Cash Counters Pty Ltd (of which the appellant was a licensee). He stated that the appellant was acting on legal advice in using the subject documentation. Questioned about the insurance purportedly required, he acknowledged that borrowers did not have insurance. He asserted that "[a]ccordingly, the company, at the borrower's request, performed the borrower's obligations in that regard by keeping the goods on the premises where they were covered by the appellant's insurance policy"[77]. Mr White claimed that, in this way, the appellant was "acting as agent for the borrower in relation to the borrower's obligation to keep the goods insured".

61 *Prosecution of the appellant*: The respondent prosecuted the appellant under s 6 of the 1996 Act. That section states:

> "A person must not carry on a business of lending money on the security of pawned goods except in accordance with a licence held by the person."

A monetary fine is provided where a breach of this provision is proved.

62 There was no contest in the trial that the appellant was carrying on a business. Nor was it disputed that such business was one of lending money on the security of goods. It was not denied that the appellant held no licence under the 1996 Act. In this way the issue in the courts below became whether the foregoing facts enlivened a requirement that the appellant should hold a licence, exposing the appellant to a fine for its failure to do so.

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76 [2002] NSWSC 894 at [21].

77 [2002] NSWSC 894 at [24].

The decisional history

63 *Decision of the magistrate*: In the Local Court of New South Wales, the proceedings were determined in December 2001 by Mr Linden LCM. He convicted the appellant of the offence against s 6 of the 1996 Act and fined it $6,000. That fine was below the maximum provided upon conviction of the offence[78].

64 The magistrate recorded the appellant's submissions that "the goods theoretically remain[ed] in the possession of the borrower" in accordance with par 2 of the loan agreement and that the lender had been "requested" to store the goods on the borrower's behalf. He recorded the prosecution's submission that the documents did not reflect "the reality of the arrangement" and indeed that the "purported transactions were a sham".

65 By reference to dictionary meanings of the expression "pawned" and legal authority, the magistrate reached the conclusion that "the two essential elements [of pawn or pledge were] the possession by the defendant and its right to sell"[79]. On this basis, he decided that the "reality of the transactions" reflected the fact that the borrowers' goods had been pawned or pledged. He therefore found the offence proved[80]. He rejected the submission that this conclusion was incompatible with the documents created for the appellant. He expressed the opinion that the documents had been "worded with the express intent to circumvent the [1996 Act]"[81].

66 *Decision of the primary judge*: The appellant appealed to the Supreme Court, claiming error of law on the part of the magistrate in finding that the transactions proved by the prosecution "were pawns"[82]. The primary judge permitted the respondent to support the decision of the magistrate on the additional footing that, having regard to the evidence, he was bound to find that the appellant was carrying on the *business* of lending money on the security of pawned goods, contrary to s 6 of the 1996 Act.

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78 [2002] NSWSC 894 at [45]. At the time the maximum fine was $11,000.

79 Reasons of Mr Linden LCM at 3, citing *Osborne Computer Corporation Pty Ltd v Airroad Distribution Pty Ltd* (1995) 37 NSWLR 382 at 389.

80 Reasons of Mr Linden LCM at 3.

81 Reasons of Mr Linden LCM at 3.

82 [2002] NSWSC 894 at [7].

67 The primary judge rejected the appellant's contention that it was impossible, in law, for transactions to be both chattel mortgages and pledges or pawns[83]. In support of this conclusion, and by reference to the 1996 Act, his Honour remarked[84]:

> "It would be extraordinary if the legislature had intended that a transaction having all of the features of a pawnbroking transaction would not be covered by the legislation if the transaction contained the additional element that title in the goods passed to the lender. That would mean that ordinary pawnbroking transactions could be removed from the purview of the Act at the stroke of the pen, which cannot have been intended."

68 The primary judge noted that "[t]he only contentious element in the present case" was whether possession had passed to the appellant as security for the repayment of the loan[85]. In the state of the evidence, he confirmed the magistrate's finding. He described the suggestion that the borrowers had "requested" the appellant to keep the goods in its custody as their agent, in lieu of procuring insurance, as "implausible and … inconsistent with the evidence"[86]. He went on[87]:

> "The standard formula that the goods were stored by the appellant at the borrower's request was a sham. It did not record the true situation. That the same formula was used in Mr Farrell's transaction [involving a loan on a car that was not deposited] … shows that the formula was utilised automatically and without regard to the reality of the situation."

69 On this footing, the primary judge dismissed the appeal and confirmed the appellant's conviction and sentence.

70 *Decision of the Court of Appeal*: In the Court of Appeal, Handley JA, like the primary judge, rejected the appellant's submission that the conferral by the documentation of "additional rights" as a mortgagee rendered it impossible in law for the appellant's transaction also to constitute one of pledge[88]. By reference

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83 [2002] NSWSC 894 at [37].

84 [2002] NSWSC 894 at [38].

85 [2002] NSWSC 894 at [39].

86 [2002] NSWSC 894 at [41].

87 [2002] NSWSC 894 at [42].

88 [2003] NSWCA 204 at [3].

to authority[89], Handley JA concluded that what was essential for a pledge of personal chattels was the "delivery of possession. It is out of the possession given him under the contract that the pledgee's rights spring … A mortgage of personal chattels involves in its essence, not the delivery of possession, but a conveyance of title as a security for the debt."[90] On the basis of authority, which has held that a mortgagee of personal chattels "which are in his possession is not in a worse position than a pledgee"[91], Handley JA concluded that it was possible to combine a chattel mortgage with a pledge, such combined transactions being within the purview of the 1996 Act.

71 Beazley JA agreed with this opinion[92] and also with Hodgson JA, who gave the principal reasons of the Court of Appeal.

72 Hodgson JA recorded the appellant's submission that a pawn or pledge is a bailment where the *only* security is possession of the goods[93]. Hodgson JA proceeded to deal with the case upon the three levels presented by the submissions for the respondent in response to this submission. These were:

(1) That the written agreements presented by the appellant constituted "shams"[94];

(2) That, even if they were not "shams", the reality of the transactions showed that they were those of pawn or pledge[95]; and

(3) That even if, individually, and "on a technical legal analysis"[96], the transactions were not pawns or pledges strictly so called, the focus of the 1996 Act was upon the character of "the *business* of lending money" and, so viewed, the character of the appellant's *business* was, within the Act, "lending money on the security of pawned goods", whatever the character of particular transactions.

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89 *Ex parte Hubbard; In re Hardwick* (1886) 17 QBD 690 at 698.

90 *Ex parte Official Receiver; In re Morritt* (1886) 18 QBD 222 at 232.

91 *Ex parte Official Receiver; In re Morritt* (1886) 18 QBD 222 at 233.

92 [2003] NSWCA 204 at [9].

93 [2003] NSWCA 204 at [23].

94 [2003] NSWCA 204 at [28].

95 [2003] NSWCA 204 at [34].

96 [2003] NSWCA 204 at [37].

73 Addressing the first argument, Hodgson JA accepted that the transactions would not be "shams" simply because they were designed to circumvent the 1996 Act. Nevertheless, he expressed the view that "the document does not negative the reality that the [appellant] was relying on possession as security"[97]. In this respect, his Honour upheld the primary judge's conclusion that the formula that the goods were stored by the appellant at the borrower's request was indeed "a sham" and that the same applied to the terms relating to possession, maintenance, access and insurance[98].

74 Because the appellant had been found to rely on possession of the goods as a crucial attribute of its security, this, for Hodgson JA, rendered the transaction one of pawn or pledge. It was no less so because the lender had also secured the passing of title to it as mortgagee[99]. This conclusion likewise permitted a characterisation of the appellant's *business* as one which, under s 6 of the 1996 Act, required a licence[100]. In default of such licence, it sustained the conviction and sentence entered in the case. The appeal to the Court of Appeal was therefore dismissed.

75 *Conclusion: unanimous decisions*: Each of the judicial officers who heard these proceedings in the courts below was therefore of the opinion that the 1996 Act applied to the conduct of the appellant's business proved in the evidence.

76 On the face of things, that was an unsurprising conclusion given the testimony of the borrowers who had handed over possession of their goods. If the essence of the transaction of "pawn" is the taking of possession by the pawnee of personal property as a security for a loan and the entitlement to sell the property in case of default, this was the substance of the way in which the appellant conducted its business. The conclusion that the Act was intended to apply to such a case is reinforced when regard is had to the history of the legislation and to the speech of the Minister, introducing the Bill that became the 1996 Act[101].

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97 [2003] NSWCA 204 at [32].

98 [2003] NSWCA 204 at [33].

99 [2003] NSWCA 204 at [34].

100 [2003] NSWCA 204 at [37].

101 *Interpretation Act* 1987 (NSW), s 34(2)(f).

The legislation, its history and purpose

77 *Position in Roman and common law*: The controversy in this appeal turns principally on the construction of the phrase "pawned goods" appearing in s 6 of the 1996 Act. Both the concept of a pawn or pledge, and legislative attempts to regulate businesses involving pawned goods, have a long history.

78 A pawn or pledge is a bailment of personal property as a security for a debt or other promise[102]. In Roman law, *pignus* (pawn) was one of four contracts (*mutuum*, *commodatum*, *depositum* and *pignus*) classified by Justinian as "obligations contracted *re*"[103]. Each of these contracts was "real", in the sense that, for their formation, there was needed, in addition to the agreement of the parties, the handing over by one party to the other of the thing that was the object of the contract. The main duty that arose under the contracts of *commodatum*, *depositum* and *pignus* was that of the recipient to return the thing (in the case of *pignus*, if and when the debt was repaid[104]).

79 A feature of the obligation of the pawnee or pledgee in Roman law was that, because it did not become the owner, it had to return the identical thing received when the conditions were fulfilled. However, even in ancient times, the overlap between the case of *fiducia* (where the recipient became an owner) and that of *pignus* (where it did not) led to uncertainty, having regard to the development of special actions[105]. As Professor Jolowicz explained[106]:

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102 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 913 [92 ER 107 at 109]; cf Story, *Commentaries on the Law of Bailments*, 7th ed (1863), §286 at 240.

103 *Institutes of Justinian* 3.14. See Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed (1972) at 286.

104 Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed (1972) at 286-287.

105 Burdick, *The Principles of Roman Law and Their Relation to Modern Law*, (1938) at 379-380: in Roman law the borrower obtained his loan at great risk in a fiduciary sale. This led the praetors, in time, to change the law to develop a new transaction known as *pignus* or pledge. The possession of the property pledged as security was in the creditor; but the debtor had all the rights and remedies of ownership. See also Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed (1972) at 287.

106 Jolowicz and Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed (1972) at 287.

> "from the point of view of the layman both *pignus* and *fiducia cum creditore* are ways of raising money on security, and both *depositum* and *fiducia cum amico* are ways of getting someone to look after property".

80 The flexibility of various forms of *pignus* according to Roman law is noted by many writers[107]. This flexibility also came to be reflected in the common law of England. Thus Coke in his *Institutes* sometimes treated goods delivered to a bailee as a "gage", as alternative to goods delivered as a "pledge"[108].

81 *Possession as the essential feature*: The essential feature of pawn or pledge in Roman law, and later in civil law in the states of modern Europe and also in the common law, was that "possession is necessary to complete the title by pledge"[109]. Thus, Sir William Jones defined a pledge to be "a bailment of goods by a debtor to his creditor, to be kept till the debt is discharged"[110]. Holt CJ defined a pledge thus[111]: "[W]hen goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin vadium, and in English a pawn or a pledge." As Story put it in his *Commentaries on the Law of Bailments*[112], in Roman law a pawn or pledge "is properly called *pignus*". Transfer of possession of the borrower's property was the essence of it.

82 *Pawn and chattel mortgage*: While the essential feature of a "pawn" is the transfer of possession, it may be conceded that on the existing authorities a distinction is drawn between a chattel mortgage (where title passes to the creditor) and a pawn[113]. At common law, if a security is a chattel mortgage it

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107 eg Story, *Commentaries on the Law of Bailments*, 7th ed (1863), §290 at 243-244.

108 See eg 1 Inst 89a; 4 Rep 83B noted in Story, *Commentaries on the Law of Bailments*, 7th ed (1863), §334 at 276.

109 Story, *Commentaries on the Law of Bailments*, 7th ed (1863), §299 at 249.

110 *Jones on Bailment*, (1791) at 117 cited in Story, *Commentaries on the Law of Bailments*, 7th ed (1863), §286 at 239.

111 *Coggs v Bernard* (1703) 2 Ld Raym 909 at 913 [92 ER 107 at 109].

112 7th ed (1863), §286 at 239.

113 At common law a chattel mortgage is usually a form of non-possessory security: see *Ex parte Hubbard; In re Hardwick* (1886) 17 QBD 690 at 698. In such a mortgage there is "no delivery of the chattels to the mortgagee, but the general property in them passes to him by the mortgage deed". Similarly, in *Ex parte Official Receiver; In re Morritt* (1886) 18 QBD 222, Cotton LJ, at 232, described

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cannot also be a pawn[114]. However, the common law meaning of "pawn" and any rigid distinction between a pawn and a chattel mortgage cannot be determinative of the issue in this case, which concerns the construction of an Act of the New South Wales Parliament. The joint reasons assume that the common law definitions of "pawn" or "pledge", as expressed in the cited cases and commentaries, are determinative of the statutory construction question. As explained above, this is an error. The statute must be interpreted so as to give effect to the purpose of the legislature as expressed in the natural and ordinary meaning of the terms used in the particular context; and not by uncritical importation of a technical legal meaning, disjoined from the context.

83 The appellant was carrying on a business the essential feature of which was lending money on the security of *possession* of goods, as the appellant held possession of the chattels confided to it as security for a loan or debt. Prima facie this constituted carrying on a business of lending money on the security of pawned goods. This is so unless the appellant is right that the printed provision in its document to the effect that title in the security should pass to the lender – so that a chattel mortgage was created – disqualified any transfer of possession of the security from engaging the provisions as to a pawn of the 1996 Act.

84 *Early pawnbrokers legislation*: Unsurprisingly, the transaction of pawn or pledge became the subject of legislation in England designed to regulate its incidents and to respond to demonstrated problems. In the nineteenth century, that legislation was ultimately consolidated in the *Pawnbrokers Act* 1872 (UK)[115].

85 Even before the enactment of that Act, legislation had been passed in the Australian colonies. Thus, in New South Wales, the *Pawnbrokers Act* 1849

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the mortgage as involving "in its essence, not the delivery of possession, but a conveyance of title as a security for the debt". See also *Donald v Suckling* (1866) LR 1 QB 585 at 608 per Mellor J. In *In re Morritt*, Cotton LJ continued (at 232-233) by stating: "A mortgage of personal chattels may, however, be accompanied with a transfer of possession ... There is very little, if any, authority on the point." However, the fact that a chattel mortgage may sometimes involve the transfer of possession does not negate the proposition that the essential feature of such a security is the transfer of title.

114 *Ryall v Rolle* (1749) 1 Atk 165 at 167 [26 ER 107 at 108-109]; *The Odessa; The Woolston* [1916] 1 AC 145 at 158; *Ex parte Hubbard; In re Hardwick* (1886) 17 QBD 690 at 698; *Ex parte Official Receiver; In re Morritt* (1886) 18 QBD 222 at 232. See joint reasons at [17]-[19].

115 35 & 36 Vict c 93.

(NSW) ("the 1849 Act")[116] was enacted. It remained in force until the enactment of the *Pawnbrokers Act* 1902 (NSW) ("the 1902 Act")[117]. The 1902 Act did not contain a definition of "pawn" or "pledge". It imposed the obligation to obtain a "license" upon anyone who "carries on the trade or business of a pawnbroker without having previously obtained a license"[118]. The word "pawnbroker" was defined for the purposes of the 1902 Act[119] to mean:

> "a person who carries on business or seeks his livelihood in or by advancing upon interest, or for or in expectation of profit, gain, or reward, any sum of money upon security, whether collateral or otherwise, of any article taken by such person by way of pawn, pledge, or security".

86 *The 1996 Act*: The 1996 Act repealed the 1902 Act. It combines the regulation of pawnbrokers with that of second-hand dealers. It identifies restrictions on the operation of its provisions so as to exclude them where other named Acts apply[120]. Designated businesses[121] and persons and circumstances are also excluded[122]. Save for these express restrictions, the 1996 Act is intended to apply to the carrying on of any "business" that fairly answers to the description of "pawnbroker"[123]. There is no express exclusion of persons carrying on a "business" involving conduct authorised or regulated by the *Bills of Sale Act* 1898 (NSW). Nor is the business of mortgaging chattels expressly excluded from the 1996 Act.

87 By s 5 of the 1996 Act, specific provision is made, that did not appear in the 1902 Act, to cover the case of buy-back contracts[124]. The heading to the

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116 13 Vict No 37.

117 1902 Act, s 2(1).

118 1902 Act, s 5.

119 1902 Act, s 3.

120 The terms of s 4 of the 1996 Act appear in the joint reasons at [11] referring to various named Acts providing for licences of various dealers.

121 Of auctioneers. See 1996 Act, s 4(2)(b).

122 As prescribed by regulation: 1996 Act, s 4(2)(c). See Pawnbrokers and Second-hand Dealers Regulation 2003 (NSW), reg 6.

123 As defined in the 1996 Act, s 3(1). See also s 6.

124 The terms of s 5 of the 1996 Act appear in the joint reasons at [11]. Legislation in other Australian jurisdictions contains provisions similar to s 5 of the 1996 Act.

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section, "Buy-back contracts regarded as pledge and loan", is not, it is true, taken to be part of the 1996 Act[125]. However, the heading is not incompatible with the terms of s 5. The 1996 Act is, relevantly, an Act dealing with pawnbrokers. Section 5 is a provision designed to address attempted circumventions of the Act. Specifically, it is a provision addressed to a variant of the documentation used by the appellant in the present case. Read in context, and in its place in Pt 1 ("Preliminary") of the 1996 Act, s 5 is intended to be definitional and overarching. Its content, and not just its heading, indicates plainly that the purpose of the New South Wales Parliament was to expand the notion of "pledge", and hence of "pawn", when used in the 1996 Act. It also indicates that Parliament was concerned with the substance, and not the form, of the transactions to be regulated by the Act. This Court should not ignore but should give effect to these purposes.

88 *The Minister's speech*: Any doubt about the interpretation of the 1996 Act is set at rest by a consideration of the Second Reading Speech given in support of the Bill that became the 1996 Act. The speech by the Minister for Fair Trading[126] explained the mischief that Parliament was addressing. It was a mischief inherent in the kinds of activity in which the appellant was engaged.

89 The Minister described the purpose of the Bill as being to "establish a new regulatory scheme for pawnbrokers and second-hand dealers". As described, it was not intended to reduce the ambit of the businesses subject to the obligations of licensing under the Act. In so far as the joint reasons in this Court suggest any such purpose (eg by the omission of the words "or security" that appeared in the definition of "pawnbroker" in the 1849 Act and the 1902 Act[127]) this is contrary to what the Minister said, consistent with the terms of the 1996 Act.

90 Three purposes for the 1996 Act were disclosed in the Minister's speech. These were, first, to consolidate licensing provisions formerly appearing in the 1902 Act and in the *Second-hand Dealers and Collectors Act* 1906 (NSW) and the *Hawkers Act* 1974 (NSW), replacing them "with a single statute targeted to

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See *Second-hand Dealers and Pawnbrokers Act* 1996 (SA), s 3; *Pawnbrokers and Second-hand Dealers Act* 1994 (WA), s 3; *Consumer Affairs and Fair Trading Act* (NT), s 244(1); contra *Second-hand Dealers and Pawnbrokers Act* 1994 (Tas); *Second-Hand Dealers and Pawnbrokers Act* 1989 (Vic).

125 See joint reasons at [11].

126 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 April 1996 at 438.

127 1849 Act, s 2; 1902 Act, s 3. See joint reasons at [21].

prevent and remedy problems in the current marketplace"[128]. Secondly, the 1996 Act was intended to "streamline" licensing of pawnbrokers and second-hand dealers who deal in "high-risk-of-theft goods". Thirdly, the 1996 Act was designed to provide for the keeping of records in electronic form as a condition of a licence[129], so as to assist in and expedite the return of such goods deposited (relevantly) with a pawnbroker where it could be shown that the goods had been stolen from their true owner[130].

91 In her speech, the Minister laid emphasis upon the importance of these objects[131]:

> "A provision for the keeping of computerised records has been made explicit in the new bill. This change reflects the Government's recognition that rapid provision to police of up-to-date information on stolen property will enhance the enforcement capability of the police to combat property theft. It is my intention to require all licensed pawnbrokers and second-hand dealers to keep computerised records as a condition of licence. … The Government is committed to assisting the police and working together with the community to stamp out home burglary.
>
> … [A]uthorised officers, who are usually police officers, will be authorised to assist the claimant of allegedly stolen property to the greatest practical extent. This includes the power to act on their behalf in actions before the court to recover the goods.
>
> … Under the proposed legislation the vendor will have to provide proof of identity and that proof will be recorded. Traders must not accept any goods offered for sale or pawn if they have reasonable grounds to believe that the goods concerned are not the property of the person by whom they are offered. Such grounds would include the frequent offering of high-value goods by the same person, or a person offering goods such as computers about which that person appears to have little knowledge."

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128 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 April 1996 at 438.

129 1996 Act, ss 16(7), 28(3), (5A).

130 1996 Act, s 22.

131 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 April 1996 at 438-439.

92 The Minister also explained that a "secondary purpose" of the Act was[132]:

> "regulation of pawnbrokers in the consumer interest. This is seen as necessary in order to protect the interest of borrowers who pawn goods. With respect to the disclosure of the cost of borrowing, the bill provides comparable protection to that afforded to other classes of borrower whose transactions are regulated by consumer credit legislation."

93 *The resulting issue*: Against the provisions of what is now the 1996 Act, so described, can it seriously be suggested that it was the purpose and object of the New South Wales Parliament to exempt a person, such as the appellant, carrying on the business of lending money on deposited goods, from the obligation to secure and comply with a licence as a pawnbroker under the Act?

94 Unless this Court is to return to the narrow reading of words taken in isolation, holding that this Act has missed its target (although the target was perfectly clear), the answer to this question is in the negative. But is the opposite result required by an indisputable legal meaning of the phrase "pawned goods", appearing in the 1996 Act? Does that phrase, without more, exclude a case, as here, where the documentation prepared by the alleged pawnbroker purports temporarily to transfer title in deposited goods? Does such an expedient take the appellant outside the 1996 Act? Is this Court obliged to hold that that Act has misfired in such circumstances?

95 *Technical and common words*: The term "pawned goods" used in the 1996 Act has two possible meanings: the technical meaning attributed to those words at common law, discussed above; and the common meaning in use in everyday speech in Australia. According to *The Macquarie Dictionary*[133] "pawn", as a verb, has as its primary meaning "to deposit as security; as for money borrowed: to pawn a watch". This understanding of the term conforms to that of the several borrowers whose evidence was received at trial and who said that providing the goods to the appellant, as they did, as security for the loan of money that the appellant made to them, was their understanding of "the way a pawnbroker normally works". It was "part of a normal hock transaction".

96 The traditional common law approach to interpreting a basic legal term with an established legal meaning used in a statute was that it should be

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132 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 24 April 1996 at 438. See also 1996 Act, ss 28-32.

133 *The Macquarie Dictionary*, Federation Edition (2001), vol 2 at 1404. Specialist legal dictionaries note that "sometimes pawn is used as the general word". See eg *Bouvier's Law Dictionary*, Rawle rev (1984), vol 3 at 2539.

understood in its legal sense unless the context indicated a contrary intention[134]. Thus, there was commonly a presumption in favour of observing a technical legal meaning. In loan transactions, where technical words are used in documents intended to have legal effect, adherence to technical meanings as between the parties to such transactions may be supported by considerations of business certainty. However, in the present case the issue raised is not confined to one *inter partes*. It involves the implementation of social legislation that affects third party interests – such as those of consumers, the police, victims of theft of pawnable goods and the public generally. A strict technical meaning of "pawned goods" would thwart the achievements of the objects of the Act as discerned from the statutory context. This consideration militates against such an interpretation.

97 Furthermore, where a word that has a legal meaning is defined in a statute to include activities not normally falling within that legal meaning, this supports a conclusion that Parliament intended the word to be used in its wider, non-technical sense[135]. Section 5 of the 1996 Act, which effectively widens the meaning of pawned goods, thus supports the adoption of the non-technical meaning of "pawned goods".

98 In any event, the unqualified observance of the traditional common law test relating to the interpretation of technical words appearing in a statute may no longer be appropriate given the adoption of the purposive approach and the enactment of s 33 of the *Interpretation Act* 1987 (NSW). Rules of thumb developed in earlier times for consistent interpretation must bend to the express instruction of Parliament.

99 Thus while an understanding of the common law meaning of a particular word or phrase may be a useful part of the interpretation process, it cannot be determinative. I have previously warned against the danger of the "encrustation" of the statute which may result from the uncritical importation of the strict legal meaning of a statutory word or phrase[136]. The danger is apparent in this case.

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134 *Webb v McCracken* (1906) 3 CLR 1018 at 1027-1028; *Attorney-General (NSW) v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 531; *Barker v The Queen* (1983) 153 CLR 338 at 341, 356.

135 See Pearce and Geddes, *Statutory Interpretation in Australia*, 5th ed (2001) at 98 [4.12] citing *Sun World International Inc v Registrar, Plant Breeders' Rights* (1998) 87 FCR 405.

136 *Thomas Australia Wholesale Vehicle Trading Co Pty Ltd v Marac Finance Australia Ltd* (1985) 3 NSWLR 452 at 460; *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1985) 3 NSWLR 475 at 478 (in dissent) (majority decision was affirmed in *Gamer's Motor Centre (Newcastle) Pty*

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The strict legal meaning of "pawned goods" as excluding goods over which there also exists a chattel mortgage should not be used to assist those who use devices to circumvent the operation of the 1996 Act in frustration of the important social purposes it reveals.

The 1996 Act applies

100 *Findings of sham transactions*: It is not entirely correct to say that "[n]one of the courts below found the transactions which the lender made with borrowers to be shams"[137]. As I have demonstrated, the magistrate, at trial, noted the submission to that effect and concluded that there was a disparity between the appellant's documents and "the reality of the transactions"[138]. The primary judge also found that, in so far as the "transactions" involved the assertion that the goods were stored by the appellant "at the borrower's request", this was a "sham". It "did not record the true situation"[139]. In the Court of Appeal Hodgson JA (with whom Beazley JA agreed) recorded this finding by the primary judge. His Honour concluded that it was fully justified[140].

101 This did not mean that the documentation proffered by the appellant to the borrowers was a total falsehood. Certainly, it was not a "sham" in the sense that, to the knowledge of *both* parties, it mis-stated their relationship. However, it is clear that the documentation did not express the truth, still less the entirety, of their relationship. In some important respects, it mis-stated it by pretending (as was not typically the case) that, upon the loan, possession of the subject property was to remain with the borrower, not with the appellant as in fact it did.

102 The respondent filed no notice of contention in this Court. Thus, he did not seek to defend the appellant's conviction on the basis that, consistent with the findings below, the documents were a "sham" and should be disregarded. Had he done so, much could have been said for such a conclusion. However, because I can reach my orders without making a finding about the alleged "sham" (or deciphering what was meant below by the judicial descriptions of the parties' transactions) I will pass on.

Ltd v Natwest Wholesale Australia Pty Ltd (1987) 163 CLR 236). But see Pearce and Geddes, *Statutory Interpretation in Australia*, 5th ed (2001) at 99 [4.12].

137 Joint reasons at [26].

138 Reasons of Mr Linden LCM at 3.

139 [2002] NSWSC 894 at [42] per Sperling J.

140 [2003] NSWCA 204 at [33] per Hodgson JA.

103 *Character of the transactions*: Was the appellant correctly found to have been engaged in lending money on the security of "pawned goods"[141]? On the face of the evidence, the essential elements of a "pawn" were there, at least in every case except that of Mr Farrell who drove his motor car away after borrowing $100 on its security. The exception in his case proved the rule. To establish the offence, it would be sufficient for the respondent to prove the other cases, if they amounted to contracts of "pawn" or "pledge", as I think they do. This is because the essence of the transactions, as found below, was not any security that the appellant took as mortgagee or that the borrowers conveyed as mortgagors under documents creating a chattel mortgage. The real security which the appellant relied and insisted on, in all but one case, was the transfer to it of possession of the goods.

104 Moreover, those goods were of a type (microwave ovens, speakers, rings, a guitar, CD and video players) typical of a pawnshop and of the business of a pawnbroker. Any who might be uncertain about that assertion could readily relieve their doubts by glancing in the window of the next Australian pawnshop which they pass.

105 Once the courts below rejected (as they were entitled, indeed virtually bound to do) the *falsehood* that the borrowers had "requested" the appellant to accept their goods for safe keeping and the *fiction* that they should have been taken to have done so instead of securing insurance as required by the loan documents, the disparity between the documentation and the reality of the transactions entered between the appellant and the borrowers is shown in sharp relief.

106 Against the background of the Minister's explanation of the purposes and objects of the 1996 Act, any suggestion that it was intended, somehow, to narrow the definition of a "pawnbroker", and thus of "pawned goods", must be rejected. The omission of the word "security" from that definition does not have such an effect. Ultimately, the issue in this case is whether the "security" taken by the appellant was the "security" ordinary to a chattel mortgage (namely the security of the transfer of title) or the security normal to a pawn or pledge (namely the transfer of possession of the chattels upon condition of forfeiture and sale in the event of default).

107 Once the essential character of the transactions is classified, as demanded by the findings of fact made below, and is seen as reliant upon (and defined by) transfer of possession of the goods, the inclusion in the documents proffered by the appellant of a provision for title to pass cannot alter the existence of a contract of "pawn". No decision of a court says so in relation to the 1996 Act or

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141 Within s 6 of the 1996 Act.

any of its predecessors. To reach the conclusion now expressed by the majority of this Court requires the imposition on that Act of a definition of the notion of "pawned goods" that is narrow and artificial, unwarranted by the Act itself, and destructive of the attainment of its expressed objects.

108 The test posed by the Act requires identification of the security actually relied on. If that security is the transfer of *title* (usually with precautions necessary to protect that title) the case is indeed only one of a chattel mortgage. If, as here, the real security lies in the transfer of *possession* of the goods, the transaction may be classified as one of pawn or pledge. It will be so whatever the nominated alteration in the title of the goods. Were it otherwise, at a "stroke of the pen" (as the primary judge observed) the large social purposes of the Act would be defeated.

109 *Character of the business*: There is one further way, noted by Hodgson JA[142], to arrive at the same conclusion. This is to focus attention on the character of the "business" of the alleged pawnbroker and the adjectival clause describing that business by its character. This has been an approach taken in the past to determining whether persons so accused are "really carrying on the business of money-lending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship"[143].

110 Under the 1996 Act, attention is upon the type of *business* concerned. The reference in the definition, to the kind of business that is subject to the requirement of a licence (namely "lending money on the security of pawned goods"), appears in a statutory description which a court is bound to carry into effect so as to fulfil the purposes of the statute[144]. In such a case, even where judges have concluded that the statutory provision "is not very happily worded"[145], according to their understanding of the common law distinction between a pawn and a mortgage, the words will be afforded a meaning that gives effect to the purpose of Parliament. In the case of the 1996 Act, that purpose was to require the licensing of those who take goods (typically of the domestic kind disclosed in the evidence in this case) under conditions that the passing of possession is the true security for a money loan on condition that the goods will

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142 [2003] NSWCA 204 at [37].

143 *Litchfield v Dreyfus* [1906] 1 KB 584 at 590; cf *Newman v Oughton* [1911] 1 KB 792 at 794.

144 See *Dublin City Distillery Ltd v Doherty* [1914] AC 823 at 854 per Lord Parker of Waddington (Earl of Halsbury concurring). See also *R v Inland Revenue Commissioners; Ex parte Silvester* [1907] 1 KB 108 at 114, 115.

145 *Dublin City Distillery Ltd v Doherty* [1914] AC 823 at 853-854.

be returned when the loan and interest are repaid but forfeited in case of default. All the normal incidents of a pawn or pledge were established. Possession in the goods passed to the appellant. The right to redeem was implied (see cl 4.1). The right to sell on default was provided (cl 4.3(b)). These elements fixed the "business" with its statutory character.

111 I see no reason why today, ninety years after this approach was taken by the House of Lords, this Court should adopt a contrary, literalistic, approach, thereby defeating the object of the 1996 Act, as revealed in its terms and as described by the Minister. If their Lordships could reach their conclusion ninety years ago, in the heyday of interpretive literalism, how much easier should it be for us to give effect to contemporary social legislation designed to achieve important, and stated, objects protective of the public?

Conclusions: an erroneous outcome

112 The most that can be said for the appellant's argument is that Parliament, in enacting the 1996 Act, could have defined "pawned", and failed to do so. Yet it is possible that the word "pawned" was not defined because the drafter in the 1996 Act took this Court at its word when, as it has repeatedly done, it proclaimed that the purposive and not the literal approach is the method of statutory construction that now prevails in Australia[146]. This Court has not hitherto withdrawn the purposive approach from the interpretation of penal legislation[147]. It is an approach harmonious with general movements in the law, and elsewhere, that seek to give meaning to contested language and to terminate the misfiring of texts that was the main legacy of the era of literalism.

113 To the extent that the present decision represents a turning back to literalism, I disagree. No clear judicial authority requires it. The 1996 Act obviously did not intend it. The ordinary use of language denies it. The important social purposes of the legislation are frustrated by it. Supposedly clever legal drafting of the appellant's document is rewarded. The interests of

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146 *Mills v Meeking* (1990) 169 CLR 214 at 235; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78]; *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 78 ALJR 585 at 588 [11]; 205 ALR 1 at 4.

147 *Waugh v Kippen* (1986) 160 CLR 156 at 164-165; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 109; *Thompson v Judge Byrne* (1999) 196 CLR 141 at 151 [24]; *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 328-329 [22], 368 [140] fn 99.

borrowers and the victims of household thefts of pawnable goods and police are defeated. The result is undesirable. In my opinion, it is unnecessary and legally wrong.

Orders

114 The appeal should be dismissed with costs.