



New South Wales

Pawnbrokers and Second-hand Dealers Amendment Bill 2005

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Pawnbrokers and Second-hand Dealers Act 1996* (**the Act**) to reverse the effect of the decision of the High Court in *Palgo Holdings Pty Ltd v Gowans* [2005] HCA 28.

In that case, a majority of the High Court decided that certain loans of money that gave rise to chattel mortgages were not loans on the security of pawned goods (with the result that the lender was not required to hold a licence under the Act) even though the goods were taken into the possession of the lender and the borrowers thought that they were pawning their goods.

The loans concerned were structured as chattel mortgages and the lender's taking possession of the goods was made to appear to be at the request of borrowers. In practice no such requests were ever made and the borrowers had no option but to hand over possession of the goods as security for their loans. This type of transaction should be regarded as a pawning of goods.

The Bill makes it clear that goods are pawned when possession of the goods is taken by a lender of money for the purpose of the lender relying on possession of the goods as security for the repayment of the loan. The Bill also introduces certain interpretative principles to be applied in determining whether goods are pawned,

including the principle that regard is to be had to the substance of the loan transaction (rather than its form or legal technicalities), that particular regard is to be had to the ordinary understanding of the borrower as to the nature of the transaction, and that a loan can be both on the security of pawned goods and a chattel mortgage.

The Bill also includes a regulation-making power to prescribe cases or circumstances in which the taking of possession of goods in connection with a loan of money is or is not a pawning of the goods for the purposes of the Act, or in which goods in the possession of a person on behalf of or as an associate of a lender are taken to be in the possession of the lender.

The Bill affirms the approach to the interpretation of the Act adopted in the minority judgment of Kirby J, in the *Palgo* case, and by the Supreme Court and Court of Appeal on earlier appeals in the case.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent.

Clause 3 is a formal provision that gives effect to the amendments to the *Pawnbrokers and Second-hand Dealers Act 1996* set out in Schedule 1.

Schedule 1 Amendments

Schedule 1 [1] and [2] make the amendments described in the Overview.

Schedule 1 [3] makes a consequential amendment.

Schedule 1 [4] inserts a power to make consequential savings and transitional regulations.

First print



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Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Pawnbrokers and Second-hand Dealers Act 1996 No 13	2
Schedule 1 Amendments	3

Pawnbrokers and Second-hand Dealers Amendment Bill 2005

Contents

Page



New South Wales

Pawnbrokers and Second-hand Dealers Amendment Bill 2005

No. , 2005

A Bill for

An Act to amend the *Pawnbrokers and Second-hand Dealers Act 1996* to clarify the application of the Act in respect of loans on the security of the possession of goods.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Pawnbrokers and Second-hand Dealers Amendment Act 2005</i> .	3 4
2 Commencement	5
This Act commences on the date of assent.	6
3 Amendment of Pawnbrokers and Second-hand Dealers Act 1996 No 13	7
The <i>Pawnbrokers and Second-hand Dealers Act 1996</i> is amended as set out in Schedule 1.	8 9

Schedule 1	Amendments	1
	(Section 3)	2
[1]	Section 3 Definitions	3
	Omit the definition of <i>pawnbroker</i> from section 3 (1). Insert instead:	4
	<i>pawnbroker</i> —see section 3A.	5
[2]	Section 3A	6
	Insert after section 3:	7
	3A Definition of “pawnbroker”	8
	(1) In this Act, <i>pawnbroker</i> means a person who carries on a business of lending money on the security of pawned goods.	9 10
	(2) For the purposes of this Act, goods are <i>pawned</i> if the goods are taken into the possession of a lender of money for the purpose of the lender relying on possession of the goods as security for the repayment of the loan.	11 12 13 14
	(3) In determining for the purposes of this Act whether goods are pawned and whether money is lent on the security of pawned goods, the following principles are to apply:	15 16 17
	(a) regard is to be had to the substance of the loan transaction rather than its form or other legal technicalities,	18 19
	(b) particular regard is to be had to the ordinary understanding of the borrower as to the nature of the loan transaction and the reason or basis on which possession of goods is given to the lender,	20 21 22 23
	(c) it does not matter that the terms of the loan transaction provide that the lender has taken possession of the goods at the request of or on behalf of the borrower or otherwise so as to give the appearance that the lender does not rely on possession of the goods as security for the repayment of the loan,	24 25 26 27 28 29
	(d) goods can be considered pawned and money can be considered lent on the security of pawned goods even if the loan also gives rise to a mortgage of the goods.	30 31 32
	(4) The regulations may specify cases or circumstances in which, for the purposes of this Act:	33 34
	(a) the taking of goods into the possession of a lender of money in connection with the loan is a pawning of the goods (whether or not that taking into possession is for the	35 36 37

Schedule 1 Amendments

	purpose of the lender relying on possession of the goods as security for the repayment of the loan), or	1 2
(b)	the taking of goods into the possession of a lender of money in connection with the loan is not a pawning of the goods (despite that taking into possession being for the purpose of the lender relying on possession of the goods as security for the repayment of the loan), or	3 4 5 6 7
(c)	the taking of goods into the possession of a person acting on behalf of a lender or associated with a lender is taken to be the taking of goods into the possession of the lender.	8 9 10
[3]	Section 5 Buy-back contracts regarded as pledge and loan	11
	Insert “as pawned goods” after “security of the goods” in section 5 (a).	12
[4]	Schedule 2 Savings and transitional provisions	13
	Insert at the end of clause 2 (1):	14
	<i>the Pawnbrokers and Second-hand Dealers Amendment Act 2005</i>	15 16