

Property and Commercial Law Notes

Concepts of Property	5
Real Property	5
Personal Property	6
Ownership	6
Possession	6
Transfer of Possession	7
Delivery	7
Finders Rights	8
Acquisition of Ownership	9
Transfer of Ownership	9
Sale of Goods Act 1923 (NSW)	10
Implied Terms	13
Implied Undertaking as to Title	13
Sale by Description	14
Fitness for Purpose	15
Merchantable Quality	16
Sale by Sample	17
Exclusion of Implied Terms and Conditions	18
Remedies	19
Remedies of the Seller	19
Action for Price	19
Damages for Non-Acceptance	19
Available Market Rule	20
Remedies of the Buyer	21
Rescission for Misrepresentation	21
Rejection of the Goods	21
Damages for Non-Delivery	21
Remedies for Breach of Warranty	22
Transfer of Property	23
Property and Risk	23
Rules for Ascertaining Property	23
Unascertained Goods	23
Ascertained Goods	23
Unclear Intention Rules	24
Rule 1 - Unconditional Contract	24
Rule 2 - Specific Goods not in a Deliverable State	24
Rule 3 - Specific Goods with Undetermined Price	25
Rule 4 - Sale or Return Goods	26
Rule 5 - Unascertained or Future Goods	27
Transfer of Title	29
Nemo Dat Rule	29

Nemo Dat Rule Exceptions	29
Statutory exceptions apply which can result in the title being transferred to an innocent third party even if the original seller did not have title	29
Sale By Person Not the Owner (S26(1))	29
Sale Under a Voidable Title (S27)	29
Sale By Mercantile Agent (S26(2))	30
Seller in Possession (S28(1))	31
Buyer in Possession (S28(2))	31
Australian Consumer Law	32
Definitions	33
Unconscionable Conduct	38
Unconscionable Conduct under the 'unwritten law' (S20)	38
Unconscionable Conduct in connection with goods or services (S21)	40
Remedies	42
Unfair Contract Terms	43
Consumer Guarantees	48
Consumer Guarantees in the Supply of Goods	48
Guarantee as to Title (S51)	48
Guarantee as to Undisturbed Possession (S52)	49
Guarantee as to Undisclosed Securities (S53)	49
Guarantee as to Acceptable Quality (S54)	50
Fitness for Any Disclosed Purpose (S55)	52
Guarantee Relating to the Supply of Goods by Description (S56)	53
Guarantees Relating to the Supply of Goods by Sample or Demonstration Model (S57)	53
Guarantee as to Repairs and Spare Parts (S58)	54
Guarantees as to Express Warranties (S59)	55
Consumer Guarantees for Services	56
Guarantee as to Due Care and Skill (S60)	56
Guarantee as to Fitness for a Particular Purpose (S61)	57
Guarantee as to Reasonable Time for Supply (S62)	58
Excluding Liability	59
Enforcement and Remedies	60
Actions for Damages	60
Action Against Suppliers	60
Action Against Suppliers of Goods (S259)	61
What is a major failure? (S260)	61
How can a supplier remedy a failure to comply? (S261)	62
Rights to Rejection of Goods (S262)	62
Effect of Rejecting Goods (S263)	62
Rights of Gift Recipients (S266)	62
Action Against Suppliers of Services (S267)	63
Termination of Contracts for the Supply of Services (S269)	64
Termination of Contracts for the Supply of Goods that are Connected with Terminated Services (S270)	64

Action Against Manufacturers	65
Action for Damages Against Manufacturers of Goods (S271)	65
Damages that may be recovered (S272)	65
Time limit for actions against manufacturers of goods (S273)	65
Indemnification of Suppliers by Manufacturers	65
Product Liability under the Australian Consumer Law	66
Liability for Personal Injury (S138)	67
Dependants (S139)	68
Liability for Destroyed or Damaged Goods (S140)	69
Liability for Destroyed or Damaged Real Property (S141)	69
Defences to Defective Good Actions (S142)	70
Bailment	71
Types of Bailment	71
Essential Elements of Bailment	72
Duties of Bailee	73
Duties of Bailor	74
Duties Common to Specific Bailments	75
Sub-Bailment	76
Joint Bailment	77
Termination of Bailment	77
Enforcement	78
Action in Contract	78
Action in Detinue	78
Action for Damages	78
Personal Property Securities Act	79
Security Interests under the PPSA	80
Types of Security Interests	82
In Substance Security Interests	82
Deemed Security Interest	84
PPS Lease	85
Purchase Money Security Interests	86
Exceptions to PMSI Definition	87
Excluded Arrangements	88
Creating a Security Interest under the PPSA	89
Attachment	89
Enforceability Against Third Parties	91
Perfection	92
Perfection by Registration	92
Perfection by Possession	93
Perfection by Control	93
Taking Free under the PPSA	94
Priority of Security Interests under the PPSA	95
Enforcement under the PPSA	96

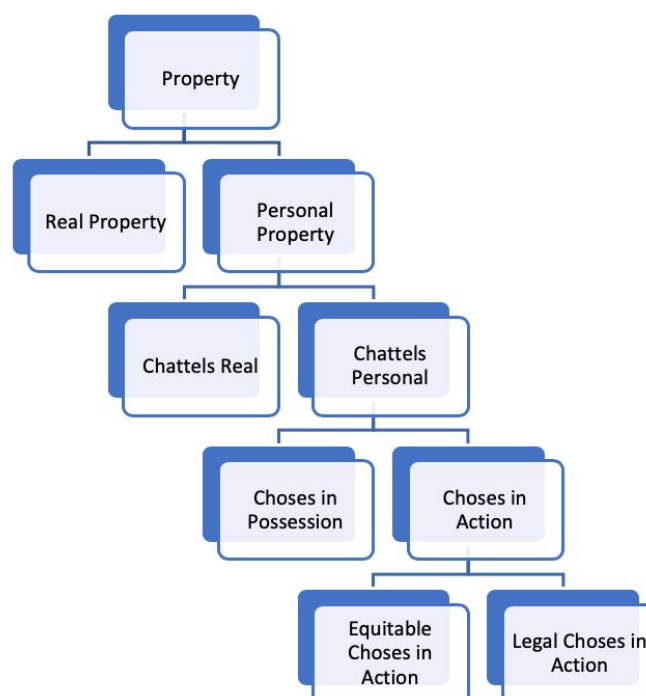
Seizure of Collateral	96
Disposal of Collateral	96
Retention of Collateral	97
Distribution of Proceeds	97
Redeeming Collateral	97
Reinstatement of the Security Agreement	97
International Aspects of Commercial Law	98
Proper Law of Contracts in International Commercial Law	98
Determining the Proper Law of Contract	98
Jurisdiction Clauses	99
The Vienna Sales Convention (CISG)	100
Application	102
Contract Formation and Formalities under the CISG	102
Seller's Obligations under the CISG	103
Remedies for Sellers	103
Buyers Obligations under the CISG	104
Remedies for Buyers	104
Damages	104
INCOTERMS	105

Concepts of Property

- *Yanner v Eaton* (1999)
 - Property does not refer to a thing alone; it refers to the description of a legal relationship with a thing
- Property denotes two concepts:
 - 1. Things
 - The object itself which can be owned and dealt with
 - 2. Rights in things
 - The relationship between the persons in respect of a thing
 - Rights enforceable against the world at large - *in rem*
 - Rights enforceable against a specific person - *in personam*

Real Property

Real Property	
Land	Land, including interests in land.
Fixtures	Things attached to land with an intention of remaining fixed. <ul style="list-style-type: none"> - Indestructible, immovable, unique, affixed with the intention to remain affixed to the land
Incorporeal Hereditaments	An intangible item of property which can be inherited e.g. easement.
Fructus Naturales	Natural fruits of the land.



Personal Property

Personal Property			
- Personal property is all that is not real property, it includes chattels real and chattels personal.			
Chattels Real	Chattels Personal		
Real chattels are interests issuing out of or annexed to real estates. Includes leasehold and other interests in land which are less than freehold. - Interest of a leaseholder (<i>AMP Society v Gregory</i> [1908]) - Interest of a judgement creditor in land belonging to the judgement debtor upon the enforcement of a writ (<i>Johns v Pink</i> [1900])	Chose in Possession	Chose in Action	
	TANGIBLE	INTANGIBLE	
	Choses in possession is a thing which a person may have not only ownership but also physical existence. - Book - Car - Jewelry - Furniture	Personal right of property which can only be enforced by action, and not by taking physical possession (<i>Torkington v Magee</i> [1902]).	
		Equitable Chose in Action	Legal Chose in Action
	Rights recoverable by a suit in equity. - Share in a partnership - Interest in a trust fund	Enforceable by an action at law. - Debts - Bills of exchange - Intellectual property	

Ownership

- Ownership is the right to exclusive enjoyment of a thing (*Austin*)
 - Right to use, right to sell, right to security etc.
- Ownership is the highest possible right / interest in a thing that a person can have

Possession

- If one has exclusive control over the object and intends to exclude all others from that control; they have possession
- Possession does not necessarily concur with title

Elements of Possession		
Control	The exercise of factual control or power over the chattel.	<i>Button v Cooper</i> [1947]
Exclusion	The concomitant intention to exclude others from the exercise of control.	

Forms of Possession	
Actual or De Facto Possession	<p>Actual possession occurs when a person is presently in control of property.</p> <p>A person with actual or de facto possession has title against all but the person with a better title (<i>Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2003]</i>).</p> <p>To demonstrate actual or de facto possession → must evidence effective occupation or control over the property.</p>
Custody	<p>Custody does not of itself amount to possession at law (<i>FCT v ANZ Banking Group Ltd (1979)</i>), it exists where there is a physical holding of goods. E.g. by an employer.</p>
Legal Possession	<p>Legal possession can exist without actual possession (e.g. owner's employee, agent, licensee or bailee at will has physical possession).</p> <p>Person in possession of the tangible goods has exclusive control over the goods and are entitled to use them free from interference by any other person except the owner (<i>Knapp v Knapp [1944]</i>).</p>
Constructive Possession	<p>Occurs when an individual has actual control over chattels but does not have physical control over them.</p> <p>At law, a person with constructive possession stands in the same legal position as a person with actual possession.</p>

Transfer of Possession

- Possession can be transferred by; delivery, loss or abandonment, finding

Delivery

- Where delivery occurs there is a change of possession (*Re Cole, a Bankrupt [1964]*)
- Delivery must result in control of the goods passing from the transferor to the transferee
 - If the transferor retains the same control over the goods after the putative transfer of possession, then there is, in law, no delivery (*Young v Cockman (1943)*)

Forms of Delivery	
Actual Delivery	<p>Requires the deliverer to hand over the goods physically to the deliverer (<i>Olsson v Dyson (1969)</i>).</p>
Constructive Delivery	<p>Takes place without any change in their physical possession → symbolic delivery (<i>Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd (1987)</i>).</p> <ul style="list-style-type: none"> - Example: handing over keys to a car

Finders Rights

- Finding a chattel is a way of acquiring possession (*Parker v British Airways (1982)*)
- Generally, the rights acquired by a finder of a chattel will be superior to any other person other than the true owner (*Armory v Delamirie (1722)*)

Parker v British Airways:

- Rights and obligations of the finder:
 - The finder of a chattel acquires no rights over it unless (a) it has been abandoned or lost and (b) he takes it into his care and control
 - The finder of a chattel acquires very limited rights over it if he takes it into his care and control with dishonest intent or in the course of trespassing
 - A finder of a chattel, whilst not acquiring any absolute property or ownership in the chattel, acquires a right to keep it against all except for:
 - The true owner
 - One who can assert a prior right to keep the chattel which existed at the time when the finder took the chattel into their control
 - Finders who finds a chattel in the course of their employment or agency does so on behalf of their employer or principal
 - Finders have an obligation to take measures to determine the true owner
- Rights and liabilities of the occupier:
 - An occupier as rights superior to those of a finder over chattels in or attached to that land / building if they are aware of the presence of the chattel
 - An occupier of a building has rights superior to a finder if they had manifested an intention to exercise control over the building and the things which may be upon or in it
 - An occupier who manifests an intention over a building and the things which may be upon or in it has an obligation to take measures to find the true owner
 - An occupier of a chattel (e.g. car) is to be treated as if they are the occupier of a building

Articles found in, or attached to the land

- Owner / possessor of land has a better title than the finder (*Elwes v Brigg Gas Co (1886)*)

Articles found on land

- Where the chattel is found on land occupied by another, the question will be whether there is evidence that the occupier has manifested a prior intention to exercise control over the premises and chattels found on the premises
 - If the occupier has not manifested such an intention, the finder will acquire possession of and possessory rights in the chattel (*Parker v British Airways (1982)*)
- Exclusive possession of residential premises will suffice to establish the required manifest intention of the occupier to possess all chattels found on those premises (*Chairman, National Crime Authority v Flack (1998)*)

Articles found in the course of employment

- Articles found in the course of employment belong to the employer (*City of London Corp v Appleyard (1963)*)
- Where employment isn't the cause of finding but merely incidental to it → the employee is entitled to the goods (*Bryne v Hoare (1965)*)

Acquisition of Ownership

Acquisition of Ownership	
Acquisition by purchase	Contract for sale of tangible goods (<i>Sale of Goods Act 1923 (NSW)</i>)
Acquisition by gift	<p>A gift is the gratuitous transfer of the ownership of property from one person (the donor) to another person (the donee).</p> <ul style="list-style-type: none"> - Can be a chose in possession (<i>Cochrane v Moore (1890)</i>) - Can be a chose in action (<i>Norman v FCT (1963)</i>) <p>Elements</p> <ol style="list-style-type: none"> 1. Donative intention <ul style="list-style-type: none"> - Must be an intention to make an unconditional transfer of rights to property to the donee (<i>Nolan v Nolan (2003)</i>) 2. Acceptance by donee (<i>Knapp v Knapp [1944]</i>) 3. Delivery <ul style="list-style-type: none"> - Doner must part with possession (<i>Nolan v Nolan (2003)</i>)
Acquisition by will or intestacy	Personal property may pass to a person in accordance with the rules of intestacy where a person died leaving property but without having made a will.
Acquisition by taking possession of abandoned property	<p>Abandonment occurs when possession and ownership is intentionally diverted and then acquired by someone else.</p> <p>Occupation occurs when a person takes appropriate steps to possess a chattel following their abandonment by another, coupled with the intention to exercise control over it</p>

Transfer of Ownership

- Assignment is the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee (*Norman v FCT (1963)*)
- Only way in which a chose in action can be alienated is by assignment
- Elements of an assignment:
 - 1. The assignment must be in writing under the hand of the assignor
 - 2. The assignment must be absolute and not purport to be by way of charge
 - Must be unconditional and must give the assignee the sole right to the debt as against the debtor (not possible to assign part of a debt (*Norman*))
 - 3. Notice in writing of the assignment must be given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or thing in action
 - Assignment takes effect from the date of receipt of the notice by the debtor (*International Leasing Corp (Vic) v Aiken (1966)*)
 - 4. Consideration is not necessary

Sale of Goods Act 1923 (NSW)

- The SGA governs the contracts for sale of goods
- Will always apply to sale of goods in NSW **UNLESS** contracting parties specifically exclude the operation of the SGA in their contract

<i>When will the Sale of Goods Act apply?</i>	
1. Contract	There must be a contract for a sale.
2. Goods	The contract must be in relation to a good.
3. Property is passed	The contract must result in the property in the goods passing.
4. Price	The contract must be for a monetary consideration, known as the price.

1. Contract for sale

- Ordinary elements of contract must be present → offer, acceptance, consideration, intention and capacity (e.g. in an auction an offer is made by a bidder and accepted when the hammer falls)
- Defined in s5 as including the **agreement to sell** as well as an actual sale

***Contract of sale* includes an agreement to sell as well as a sale.**

- Sale → when ownership of goods are transferred to the buyer at the time of contract (S6(3))
 - Risk of loss to goods is now with the buyer as ownership has passed
- Agreement to sell → when ownership of goods is to be transferred at a future time or subject to a condition being fulfilled (S6(3))
 - Becomes a sale once the time elapses or conditions are fulfilled
 - Risk of loss is still with the seller as ownership has not passed
- DOES NOT INCLUDE contract of sale which is intended to operate by way of mortgage, pledge, charge or other security (SGA S4(4))
- S6 definition has elements → ordinary elements of contract, goods within S5(1) definition, money consideration and transfer of property

6 Sale and agreement to sell

- (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. There may be a contract of sale between one part owner and another.
- (2) A contract of sale may be absolute or conditional.
- (3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.
- (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled, subject to which the property in the goods is to be transferred.

2. Goods

- Goods are chattels personal OTHER than choses in action (i.e. choses in possession only)
- Defined in s5(1)

Goods include all chattels personal other than things in action and money. The term includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

What is a 'good'?	What is NOT a 'good'?
<ul style="list-style-type: none"> - Clothes - Food - Cars - Machinery - Growing crops - Furniture - Contract for removal of house in its entirety from original site to another location (<i>Symes v Laurie</i> (1985)) - Combined sale of computer system and software goods (<i>Toby Constructions v Computa Bar Sales</i> [1983]) 	<ul style="list-style-type: none"> - Choses in action - debentures, shares - Land or interests in land - Money - Contracts for work and materials (<i>Robinson v Graves</i> [1935]) - Fixtures - Software package (<i>St Albans City and District Council v Int. Computers</i> [1996]) - Pay TV signals (<i>Telstra v Hurstville City Council</i> (2000))

Classification of Goods	
Existing Goods	Goods owned and possessed by the seller at the time of contract.
Future Goods	Goods to be manufactured or acquired by the seller after the making of the contract of sale (S5). <ul style="list-style-type: none"> - E.g. furniture made to order
Specific Goods	<p>Goods identified and agreed upon at the time a contract of sale is made (S5).</p> <ul style="list-style-type: none"> - Property passes to the buyer as parties intend it to be transferred - E.g. yellow mazda rego no. ABC321 → not just any yellow mazda <p>If the specific goods perish without the seller's knowledge at the time the contract is made, the contract is void (S11).</p> <p>If goods perish before risk passes to the buyer without the buyers/sellers knowledge, the contract is avoided (S12).</p>
Unascertained Goods	<p>Goods which at the time of contract have not been identified and agreed upon as the goods in which title is to pass → OPPOSITE to specific.</p> <ul style="list-style-type: none"> - Property does not pass until the goods become ascertained and in a deliverable state either by seller with buyer assent or by buyer with seller assent. - E.g. blue 2012 model honda jazz → not a specific rego <p>Goods become ascertained after the contract is formed when the actual goods are identified as the seller as the goods to be delivered.</p>

3. Money consideration

- Goods must be exchanged for a money consideration → the price (S6(1))
- If goods are given away for free then SGA does not apply to transaction
- Price of goods may be fixed by contract or agreed upon by dealings with parties
- If the contract is complete but no price is stated → the buyer must pay 'reasonable price' (S13)
 - What is a reasonable price is a question of fact dependent on the circumstances of each particular case (S13(2))
- In an agreement to sell goods based on a price that is fixed by a 3rd party valuation → if the price does not end up being fixed, it is voided
 - If the third party is prevented from making the evaluation due to buyer/seller default, the innocent party may maintain an action in damages (S14)
- Unless otherwise agreed → delivery of the goods and payment of the price are concurrent conditions (S31)
 - At time of delivery, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the good

4. Transfer of property

- Each case must be decided on its own merits but generally → if main substance of agreement is the transfer of title then it is a contract for the sale of a good and SGA applies