

LAWS3112: LAW OF PROPERTY B – PERSONAL PROPERTY

SEMESTER 2 2015

TOPIC 1: POSSESSION 2

1. PRINCIPLES OF PERSONAL PROPERTY 2
2. TYPES OF POSSESSION 2
3. FINDING LOST PROPERTY 3
4. TRUE OWNER OF PROPERTY 4
5. FINDER OF PROPERTY 5
6. OCCUPIER 6
7. POLICY CONSIDERATIONS 7

TOPIC 2: BAILMENT 8

1. WHAT IS BAILMENT?..... 8
2. ELEMENTS OF BAILMENT..... 9
3. BAILMENT AND OTHER RELATIONSHIPS..... 10
4. BAILOR DUTIES 11
5. BAILEE DUTIES 12
6. LIMITATION OF LIABILITY 14
7. TERMINATION OF BAILMENT 15
8. SUB-BAILMENT 15
9. REMEDIES 16

TOPIC 3: SALE OF GOODS ACT.....17

1. APPLICATION OF SOGA 17
2. CLASSIFICATION OF GOODS..... 17

3. WHEN CAN PROPERTY PASS? 19
4. TRANSFER OF RISK 24
5. ROMALPA (RETENTION OF TITLE) CLAUSES..... 25
6. NEMO DAT QOUD NON HABET 25
7. CONDITIONS AND WARRANTIES IMPLIED IN CONTRACTS OF SALE 31

TOPIC 4: SECURITY INTERESTS32

1. TYPES OF SECURITY INTERESTS 32
2. PERSONAL PROPERTY SECURITIES ACT (PPSA) GENERALLY..... 32
3. BUYING PERSONAL PROPERTY TO WHICH SECURITY INTERESTS ARE ATTACHED 33
4. A. WAS A SECURITY INTEREST CREATED? 34
5. B. IS SECURITY INTEREST ENFORCEABLE AGAINST THE GRANTOR? 35
6. C. IS SECURITY INTEREST ENFORCEABLE AGAINST THIRD PARTIES? 35
7. D. IS SECURITY INTEREST PERFECTED? 37
8. E. PRIORITY RULES 38
9. F. EXTINGUISHMENT RULES 39
10. G. REMEDIES 40

TOPIC 1: POSSESSION

1. PRINCIPLES OF PERSONAL PROPERTY

- Personal property is comprised of three interrelated concepts:

1. Ownership
2. Title
3. Possession

Ownership

- Ownership is clear-cut: a person either owns something or does not own something
- ‘The general right of ownership embraces subsidiary rights, such as exclusive employment, to destroy, to alienate, or to alter, and of course the right to maintain and to resume and recover possession from other persons’: *Knapp v Knapp* [1944]

Title

- A practical and relative concept – title often synonymous with ownership.

Possession

- Possession of a chattel is regarded as generating a **rebuttable presumption of ownership: *Russell v Wilson (per Isaacs and Rich JJ)***.
 - o “Possession in the relevant sense is not merely evidence of absolute title, it confers a title of its own, which is sometimes called a possessory title. This possessory title is as good as the absolute title, as against it is usually said every person except the absolute owner”: *Russell v Wilson (1923) 33 CLR 538 at [59]*.

Russell v Wilson (1923) – Wilson ran an illegal sweep operation and had proceeds of that in his house (cash, cheques and postal orders). He also had money coming from a legal business. Police took all of it under warrant and he was charged. There was no forfeiture order made for the money and after the conviction Wilson sought return of the property.

Held: The fact that Wilson had possession of his property immediately before it was seized granted him title to property. When police had warrant, it trumped his title. Once the statutory title ran out, Wilson had better title.

2. TYPES OF POSSESSION

- Possession is comprised of two elements (*Button v Cooper*):
 1. Physical control; and
 2. An intention to possess the property as a whole.

Physical Control

- Physical element, requires some degree of power over goods.
- Question of fact and degree: *Knapp v Knapp (1944)*; *Parker v BA (1982)*; *The Tubantia [1924]*

Intention to Possess

- Mental element, intent to possess: **Parker v BA; Button v Cooper (1947)**

3. FINDING LOST PROPERTY

Hierarchy of Priority Disputes

1. True Owner
2. Finder: prior possessor
3. Subsequent possessor
4. Finder’s employer
5. Owner/occupier of land or chattel (containing the found item)
6. The State (law of treasure trove beyond course)

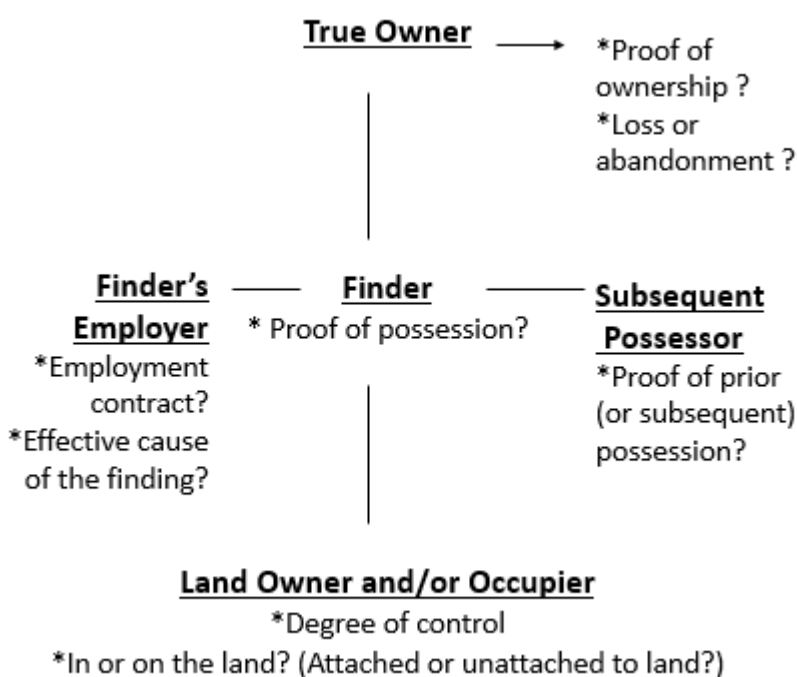
Process for each claimant

1. Position in chain claimed
2. Proof/test: to establish position
3. Proof/test they have lost entitlement

Policy Considerations

Tamworth Industries v Attorney-General (1991)

“The ultimate object of the law in this area must be to enhance the prospects that **the lost article will be reunited with its true owner**, an objective more likely to be achieved if primacy is given to the rights of the occupier, since the true owner is likely to find his way back to the occupier rather than to some casual licensee who happened to make the find. On the other hand, if the rules are weighted too heavily against the finder, they will encourage dishonesty.” (at 623-624)



4. TRUE OWNER OF PROPERTY

- Title to personal property is **absolute** – not of the Crown as in real property: *Knapp v Knapp*
- The objective is to reunite with their true owner: *Tamworth Industries v Attorney-General (1991)*
- It is **very rare for true owner to lose title** unless abandonment. Goods can only be found if they have been lost or abandonment: *Parker v British Airways*.

4.1. WERE GOODS ABANDONED?

- True owner abandons the item if he/she intends to **relinquish** his/her proprietary interests in the item: *Simpson v Gowers*. Items that have not been abandoned may be lost, misplaced, stolen or converted etc. It is a **high threshold**.
- Two elements from *Munday v ACT*:
 1. Unilateral physical act of abandonment; and
 2. Intention to give up rights of ownership and possession of goods.

4.1.1. ELEMENT 1: ACT OF ABANDONMENT

- The best evidence of abandonment is for the owner to **throw goods away**: *Re Jigrose*
- Throwing goods into a tip was *prima facie* abandonment: *Munday v ACT*
- Beyond that, it can be difficult to establish abandonment: *Moorhouse v Angus & Robertson*

Re Jigrose [1994] – Sale of property with contract stipulating that items left behind would be considered to be abandoned. Therefore true owners lost title to farming equipment left on property.

Held: ‘As a general proposition, if I throw something away I truly abandon it. I intend to no longer retain possession. I do not seek it out and I have no further interest in ownership. If however I lose something, I have not those intention. I could not be said to have abandoned it.’

Moorhouse v Angus Robertson [1981] – Manuscript for book and left with publisher for 6 years and sought to publish book under their own property interest.

Held: Inactivity is not abandonment. There needs to be an **intention to relinquish rights**.

4.1.2. ELEMENT 2: INTENTION TO GIVE UP RIGHTS

- To establish abandonment, the owner must no longer intend to retain possession: *Re Jigrose*
- This distinguishes abandonment from **losing something**: *Keene*
- The party asserting abandonment has the onus to demonstrate intention: *Moorhouse*
- Contractual provisions may deem or negative intention to relinquish: *Re Jigrose*

4.1.3. APPROPRIATION

- The title to abandoned goods is **not transferred automatically to finder**.

- The finder must appropriate the goods: **Re Jigrose**. This requires a manifest intention to exercise control over the goods: **Parker v British Airways**

Result of Abandonment

- If abandoned goods are found, the finder may, upon appropriation, acquire ownership of them: **Parker v British Airways**
- If lost goods are found, the finder acquires a possessory title against **all but true owner: Parker v British Airways**

5. FINDER OF PROPERTY

- A finder is a possessor by virtue of finding.
- To be a possessor they must have proof of possession:

1. Physical control (usually actual possession)

2. Intention to exclude others.

Armory v Delamirie (1722) – Chimneysweep found ring and obtained possession of it (possessory title) and got it valued. Jeweller took gems off it and tried to keep it.

Held: Armory (chimneysweep) found ring and got possession so gave him possessory title and even when possession was given to someone else, his possessory title persisted and he got to take it back.

Parker v British Airways Board – First class passenger was in lounge at Heathrow and found gold bracelet and took it to the desk – if nobody claims it he said he'd like it back. BA sold the bracelet and Parker took issue with it. Question for court was who had greater right to possession?

Held: "...a finder of a chattel, whilst not acquiring any absolute property or ownership in the chattel, **acquires a right to keep it against all but the true owner** or those in a position to claim through the true owner or one who can assert a prior right to keep the chattel which was subsisting at the time when the finder took the chattel 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.**"

5.1. FINDER OF PROPERTY AND SUBSEQUENT POSSESSOR

- The same test applies for the subsequent possessor as the first finder.
- In a priority dispute, the prior possessor wins: **Armory v Delamirie**

5.2. FINDER OF PROPERTY'S EMPLOYER

General Rule: "The possession or custody of a servant or employee is that of his master or employer so that any control exercised by a corporate officer over property of a corporation **would be considered the control of the corporation itself**": **Director of Public Prosecutions (Cth) v Hart (No. 2) [2005]**

- The finder's employer will have a better claim where:
 1. Employment contract between finder and finder's employer provides so; **or**
 2. Finder's employment provides the **'effective cause'** of his/her finding → need to be both on duty & performing the duty.

- If not, **finder has better title** than employer.

Byrne v Hoare – On duty policeman found a gold ingot while walking towards where he was to supervise traffic

Held: Policeman's right prevailed over the Crown (employer) because his employment merely provided the **incidental occasion for the finding** rather than the **effective cause**.

City of London v Appleyard – Employer had better right than employee to bank notes found in safe built into the wall of a demolished building because the safe was found during the employee's employment.

6. OCCUPIER

- Where an occupier is involved the occupier of the building has rights superior to those of a finder over chattels upon or in, **but not attached to**, that building if, but only if, before the chattel is found, **he has manifested an intention to exercise control over the building** and the **things which may be upon it or in it**: *Parker v British Airways Board*.

6.1. DEGREE OF CONTROL OCCUPIER EXERCISED

- The issue of control is a **spectrum** with private home at one end (kept locked in occupier's absence) and at other end, the public park: *Tamworth Industries v Attorney-General*

No Control

Bridges v Hawkesworth – Customer found a roll of banknotes on floor of shop. They were entitled to notes over shop owner who did not know they existed.

Hannah v Peel – brooch found on window frame in house which had never been occupied.

Tamworth Industries v Attorney-General – drugs and cash found in dilapidated, disused building.

Limited Control

Parker v BA – Finder succeeded in suing for value of bracelet because the airline did not manifest any control over the lounge, and so the finder had a better right than the airline.

Substantial Control

Chairperson, National Crime Authority v Flack – Tenant lived alone but gave keys to children who entered regularly. Police search found a locked briefcase containing \$430K in back of high cupboard. Tenant did not know of bag or money but **as occupier of private home** she manifested **control of all things in the home** and had a better right than the police.

Corporation of London v Appleyard – Bank notes found in wall safe built into wall building. Land occupier prevailed over the finder.

6.2. PROPERTY ON LAND OR IN LAND

Donaldson LJ's principles in *Parker v British Airways*:

1. Occupier has better right than finder for goods found **in or attached to** the land or building;
2. It is irrelevant if the occupier does not know the goods are there.

Waverley Borough Council v Fletcher:

1. 'a chattel buried in or attached to land is an integral part of the land, although it retains its identity and the original owner may detach and repossess it'.
2. 'removal of such a chattel will interfere with, and probably damage, the land.'
3. The original owner of such things is unlikely to claim so the law treats the land owner/possessor as the "substitute owner".

On Land – Finder

Bridges v Hawkesworth – parcel of money found **on shop floor. Finder prevailed.**

In Land - Occupier

South Staffordshire Water Co v Sharman – Owner of land engaged defendant to clean the pool; defendant **found rings in mud in pool**. Owner had better right due to the fact the rings were found "in" the land

Elwes v Briggs – Tenant under 99 year lease excavated and found prehistoric boat 6 feet below surface. Landlord had no knowledge of the boat but had a better right because **the boat was buried in the land**

Waverley Borough Council v Fletcher – Finder found medieval brooch below surface of Local Park using metal detector. Park owned by local authority who therefore had a better right to the brooch

City of London v Appleyard – Bank notes found in an old safe built into the wall of a demolished building. Owner of the demolished building had a better right to the bank notes

Tamworth Industries Ltd. v Attorney General: cash found in boxes **under** floor. Police took cash, failed to make case due to lack of control by Tamworth. Later Tamworth won claim to cash as occupier.

7. POLICY CONSIDERATIONS

- ***Tamworth Industries v Attorney-General (1991)***
- "The ultimate object of the law in this area must be to enhance the prospects that the lost article will be reunited with its true owner, an objective more likely to be achieved if primacy is given to the rights of the occupier, since the true owner is likely to find his way back to the occupier rather than to some casual licensee who happened to make the find. On the other hand, if the rules are weighted too heavily against the finder, they will encourage dishonesty." (at 623-624)

TOPIC 2: BAILMENT

1. WHAT IS BAILMENT?

- Bailment involves a separation of ownership and possession: bailor is owner of the bailed goods (reversionary interest) and the bailee is the possessor of the bailed goods (possessory interest)
- It arises where 'one person (the bailee) voluntarily and knowingly takes possession of the goods of another (the bailor): *Hobbs v Petersham*
- Bailment can only arise **in respect of tangible goods**: *FCT v United Aircraft Corporation*

1.1. BAILMENT EXAMPLES

- An agreement to return goods in an altered form: *Caltex Oil v "Willemstad"*
- Retention of title agreements: *Associated Alloys v MEF*
 - o Not where commingling occurs: *Border v Scottish Timber Products*
- Hire-purchase agreements: *Quartel v Parkways Motors*
- Transfer of money by security company: *Brambles Security Services*

1.2. NOT BAILMENT

- Agistment was not a bailment: *Big Top Hereford v Gavin Thomas*
- Debt of money: *SAI v Randell*
- Trusts and agency are not bailment: *Brambles Security Services v Bi-Lo*

1.3. NATURE OF BAILMENT

- "In many respects, bailment stands at the point at which contract, property and tort converge. In its standard form, it **represents a conveyance of personal property**, created by contract **and enforceable in tort**...But it retains a **separate legal personality** with much to distinguish it from other concepts": Palmer, *Bailment* (2nd ed, 1991) at 1.

Papathanasopoulos v Vapopoulos [2007] NSWSC 501 – Man got engaged to woman and gave her ring. Man showed family and said ring was hers. Their relationship soured but he told her to keep ring. Woman was annoyed and told father to get rid of all the stuff from relationship including ring.

Held: Analogous to contract where ring was a promise. Once she had decided not to get married she did not have ownership and was bailee with an obligation to return it.

1.4. TYPES OF BAILMENT

- Six types of bailment (*Coggs v Bernard*) per Holt CJ (one added subsequently)
1. Gratuitous deposit for safekeeping → e.g. look after laptop while I go away
 2. Deposit for safekeeping for reward → e.g. coat in coatroom with payment
 3. Gratuitous loan → e.g. borrow phone for no reward
 4. Delivery for use by bailee for reward (i.e. hire) → e.g. hire/lease

5. Delivery of goods without reward to do something with them → e.g. carriage/repair (no payment)

6. Delivery of goods as security for loan (pawn) → e.g. cash converters.

Duration

- Bailment for term (lasting a definite period) → confers *actual possession* – no immediate right to possession unless permanent damage or destruction of goods: ***Penfolds Wines v Elliott***
- Bailment at will (until I want it back) → confers *actual possession*, but bailor has constructive possession.

Consideration

- Gratuitous bailment – no consideration (e.g. loan of goods)
- Commercial bailment – consideration paid (e.g. hire-purchase agreement)

2. ELEMENTS OF BAILMENT

- Bailment can only occur in tangible chattels: ***FCT v United Aircraft Corp***
- There are four elements to a bailment (*Hobbs v Petersham Transport*):
 1. **Actual (or constructive) delivery** of the bailed goods by bailor to bailee;
 2. **Voluntary assumption** of possession by bailee
 3. A (possibly deemed) assumption by the bailee of **responsibility for its safe-keeping**
 4. (Possibly) an obligation to **return** the goods bailed *in specie*

2.1. DELIVERY OF GOODS

- Can be actual, or constructive delivery (or finding)
- Delivery assessed on facts of each case: ***Ashby v Tolhurst***
- Control must be relinquished by the owner: ***Hancock v Cunnain***
 - o In *Hancock v Cunnain*, no bailment when passenger left luggage on back seat of taxi because control was not relinquished by the owner.

Examples of delivery

Matthew Short v Riviera – Riviera manufactured and sold motor cruiser to 3rd party. Short was the forwarding agent and arranged for a mobile crane operator to lift cruiser on to low loader and driver of low loader was to transport cruiser to wharf and freighter. Driver of the low loader drove under a bridge which was too low and damaged the boat

Held: Short was not a bailee because even though he was in the parking area overseeing the arrangements (and he gave the delivery docket to the driver), this didn't amount to possession. The truck driver, Campbell, was the bailee.

Young v Hitchens – Fisherman had drawn his net part way around a school of fish. Person on nearby canoe stole some fish from the net.

Held: No complete possession.

Balmoral Supermarket v Bank of NZ – Customer emptied change onto counter at bank and a robber stole it

Held: bank never in full possession of the change.

Car park cases

Shorters Parking Station v Johnson – Respondent parked car in appellant's garage and left keys in the ignition so the appellant could move the car if it was in an inconvenient place. Car was stolen.

Held: Possession was established and there was a bailment

Ashby v Tolhurst – Owner parked car in a locked garage. He locked the car and took keys but car was stolen.

Held: No evidence of delivery to any attendant, therefore no possession and no bailment.

2.2. VOLUNTARY ASSUMPTION OF POSSESSION

- No bailment if a person receives the goods as a servant: **Brambles Security Services Ltd v Bi-Lo**
- **Bailment can occur without the bailor's knowledge or consent: Pioneer Container**
- There must be knowledge of the goods and consent to hold them: **WD & HO Wills v Rail NSW**

2.3. PROMISE TO REDELIVER

- There must be a promise to redeliver goods or deal with them in a particular way: **Hobbs v Petersham**

3. BAILMENT AND OTHER RELATIONSHIPS

Bailment & Sale

- Bailment does not involve the passing of title – bailor remains owner throughout.
- Sale – title passes

Bailment & Trusts

- There is no legal/equitable division of property
- Bailments are for **tangible personal property only**

Bailment & Licence

- Bailments require the passing of possession from bailor to bailee

Greenwood v Council of Municipality of Waverley – Left items in locker and on return were not there. Argued council were bailees.

Held: Not a bailment because possession had not passed therefore merely a licence.

Car Parking

Sydney City Council v West – Car left in car park, that was determined to be a bailment because possession had passed from operator of car to carpark.

Walsh (Referee of the Small Claims Tribunal) v Palladium Car Park – Same decision, but not much judicial consideration of it.

4. BAILOR DUTIES

- Four key duties for bailors:

1. Authority to bail;
2. Not interfere with possession of bailee in breach of bailment terms;
3. Communicate to borrower **defects**;
4. Reasonably fit for purpose

4.1. AUTHORITY TO BAIL

- It is fundamental that the bailor has the right to bail goods: **Gemmel Power Farming**

4.2. DISTURB POSSESSION (UNLESS BAILMENT AT WILL)

- Bailor must not disturb possession of a bailee unless it is a bailment at will: **City Motors v Southern Aerial**

4.3. COMMUNICATE DEFECTS: GRATUITOUS BAILMENT

- The bailor must **communicate to the borrower defects in the article** of which he is aware, and if either deliberately or by negligence does not discharge this duty, will be liable for injury resulting to the borrower: **Coughlin v Gillison [1899]**

Pivovaraoff v Chernabaeff (1978) – Lent onion sorting machine and warned not to use with children. Bailee used with 13 year old who was injured.

Held: Duty to communicate defects but was discharged here.

4.4. REASONABLY FIT FOR PURPOSE: BAILMENT FOR REWARD (HIRES)

- **Gemmel Power Farming Co Ltd v Nies (1935)**: “When one person, for value, supplies a chattel to **another to be used for an agreed or stated purpose**, or for a purpose indicated by the nature of the chattel, **he impliedly promises**, in the absence of some provision to the contrary, **that it is reasonably fit for such use.**”

Cottee v Franklins Self-Serve Pty Ltd [1997] – Woman injured due to defective shopping trolley. Supermarket were unaware of the defect → negligence therefore was unsuccessful. Court then considered the bailment relationship.

Held: “On the facts as they appear and taking into account the implications arising from them, it should be held that the respondent was injured due to the breach of an **implied term of fitness of the trolley for the particular purpose which was obvious to both parties as being intended**. The trolley came out of the possession of the appellant’s agents and it was obvious that the respondent was in the relevant sense relying on them. The appellant should be held to be in breach of its obligation in respect of the supply of the chattel.”

Not a gratuitous relationship → you pay for it in the act of spending money in store. Bailment for reward = fitness for purpose. If gratuitous – **would not be liable as no ‘fit for purpose’ test**

5. BAILEE DUTIES

- Five key duties for bailees:

1. Take care of bailed goods;
2. Retain possession of bailed goods;
3. Return or redeliver bailed goods;
4. Not to convert or misuse bailed goods;
5. Not to dispute bailor's title to bailed goods.

5.1. TAKE CARE

- The traditional view was that a **gratuitous** bailee does not breach duty of take care unless there is **gross negligence**, on the premise that the more benefit received the higher the standard of care owed: **Coggs v Bernard (1703)**
- The current view, however, is that a duty to take reasonable care is **owed in all circumstances** but what constitutes a breach will depend on the nature of the **circumstances and nature of bailment**: **WGH Nominees v Tomblin (1985)**

5.1.1. ONUS OF PROOF

- Bailor to prove: **Bowden v Lo** → onus then shifts to bailee to prove that loss/damage was not caused by failure to take reasonable care.
 - Existence of bailment; **AND**
 - Goods lost or damaged during the course of bailment (i.e. loss or damage suffered)
- Bailee to disprove breach of duty:
 - All reasonable care taken (i.e. lack of negligence); **OR**
 - Loss or damage would have occurred despite all reasonable care taken (i.e. lack of causation)

5.1.2. STANDARD OF CARE

- Standard of care is a 'reasonable standard of care': **Houghland v RR**
- Relevant factors include: **Houghland v RR**
 - Whether bailee obtains a benefit;
 - Whether consideration was paid to bailee;
 - The degree of expertise claimed by the bailee;
 - The purpose of the bailment.
- Also necessary to consider the factors in **WGH Nominees v Tomblin**
 - Nature, value and quality of thing bailed;
 - Its liability to loss and injury (fragile);

- The circumstances under which bailment occurred;
- Character and confidence and particular dealings of the parties, if relevant.

INEXPENSIVE PRECAUTIONS = BREACH

Pitt Son v Badgery Ltd v Proulefc – D bought wool at auction and had obligation to pay within 28 days. In meantime wool was stored at appellant’s premises. Under contract, the respondent was not entitled to take possession of wool until it was paid for. Day after wool paid for, it was destroyed in a fire. Appellant was bailee as title had passed to purchaser → bailment at law. Storehouse was made of timber, forty years old, and surrounded only by a paling fence with several palings missing. Would have been easy to repair/build a proper fence.

Held: Wool broker was negligent in not building a proper fence

“The provision of a secure fence is so obvious a precaution and so comparatively inexpensive to provide, that failure to provide it was negligent.”

Tottenham Investments – P delivered motor vehicle to D for repair. D left key in ignition overnight and thieves broke in through skylight and drove it away. After the break-in, D added security bars under the skylight, an alarm system and signs warning of alarms – **relatively inexpensive precautions available.**

Held: High value of the vehicle and the amount of theft in the area imposed a high standard of care on the bailee.

DUTY TO PRESERVE BY BAILEE?

China Pacific SA v Food Corporation of India “The Winson” – Ship carrying wheat from USA to India stranded on reef in South China Sea. Shipowner and cargo owner had an agreement with the salvors. Salvors off-loaded wheat to lighten ship and shipped it to Manila. They incurred charter, stevedoring and storage charges to preserve wheat. Cargo owner was aware of arrival of wheat in Manila but failed to give instructions and failed to arrange for payment of expenses.

Held: Salvors had a duty to preserve wheat (in the absence of instructions from the owner) and a correlative right to charge bailor for the expenses incurred in doing so.

5.2. RETAIN POSSESSION

- There is a duty to retain possession for the duration of the bailment.

5.3. RETURN OR REDELIVER

- There is a duty to return goods *in specie* or to redeliver the goods. The identity of the goods must be preserved: ***Chapman Bros v Verco Bros (1933)***
- This duty varies depending on the nature and terms of bailment:
 - If bailment is **bailment at will**, on **demand of bailor**;
 - If term of bailment has expired, **at expiration of term**;
 - If purpose of bailment has been satisfied, **at time of satisfaction**;
 - If bailment has been **terminated**, at time of **termination**

5.3.1. NON-DELIVERY/MIS-DELIVERY

- There is a duty to redeliver the chattel bailed to the bailor or an authorised party: **Jackson v Cochrane**
- Duty is not breached where the bailee cannot redeliver goods which have been destroyed, without fault of the bailee: **John F Goulding Pty Ltd v Victorian Railway Commissioners**
- The liability for misdelivery is strict: **Sydney City Council v West**

Jackson v Cochrane – Caravan given to seller and three people convinced seller to give them the caravan. If you **deliver to unauthorised/wrong person, you are liable for misdelivery.**

Held: “Expressed simply, a **bailee is liable for loss or damage resulting from his dealing with the goods bailed in a manner not authorised by the bailor**” (per McPherson J).

5.3.2. AGENCY?

- A bailee for reward is liable when an article is lost owing to the negligence of an employee who has actual custody of the article: **Makower, McBeath & Co Pty Ltd v Dalgety & Co Ltd [1921]**

5.4. NOT TO CONVERT OR MISUSE

- There is a duty not to steal or convert goods: **Morris v CW Martin & Sons**
 - o Conversion = to appropriate another’s property for one’s own use.

Morris v CW Martin & Sons – Owner (bailor) delivered fur to furrier for cleaning and the furrier sub-bailed to a specialist fur cleaner. An employee of the specialist stole the fur.

Held: Furrier breached duty not to steal goods themselves **because they employed thief.**

5.5. NOT TO DISPUTE BAILOR’S TITLE

- The bailee has a duty not to dispute the bailor’s title.

6. LIMITATION OF LIABILITY

- Bailees can limit liability through contractual exclusion clauses: **Sydney City Council v West; Thomas National Transport v May & Baker**
- Note that statutory obligations cannot be excluded

1. Was exemption clause part of contract?

- Before a bailee or sub-bailee can rely on an exemption clause **they must show it formed part of the contract: Toll (FCGT) v Alphapharm**
- A party will be bound by terms of contract if they signed, unless any vitiating factors were present: **Toll v Alphapharm**

2. Does exemption clause cover particular damage suffered?

- The interpretation of an exclusion clause is determined by construing the clause according to its **natural and ordinary meaning**, in light of contract as a whole: **Darlington Futures v Delco**

- To resolve ambiguity, a clause is construed **against the person for whose benefit it was inserted** (*contra preferentum*): **Thomas National Transport v May**

7. TERMINATION OF BAILMENT

- A bailment can be terminated by:
 - o Expiry of the term (bailment for term)
 - o Demand of the bailor (bailment at will)
 - o Repudiation of bailment by **wrongful act of bailee**
 - o By destruction of subject matter

Termination by Repudiation

- To constitute repudiation there needs to be an 'act inconsistent with or repugnant to the bailment': **Anderson Group Pty Ltd v Tynan Motors; Hill v Reglon Pty Ltd**
- Effective repudiation **brings bailment to an end**, and right to immediate possession reverts to bailor in case of a term bailment.

Anderson Group Pty Ltd v Tynan Motors [2006] – Hire-purchase agreement entered into to pay \$150K off car. Called Esanda Finance to find out remaining cost and tried to sell it at Tynan Motors to clear debt. Car was stolen from car yard. Tynan argued he could not sue him as he was bailee and breached bailment by trying to sell car.

Held: Acts were not enough to repudiate the bailment

'Any act which is inconsistent with or repugnant to the bailment, constitutes a repudiation of it. If the bailment is created by contract, the extent to which the common law applies depends upon the construction of the contract.' per Young CJ in Eq. at [60]

'**An act necessary to terminate a bailment must be a very serious one**...which is virtually a disclaimer of the contract of bailment. A deviation from the terms of the bailment, short of repugnancy or disclaimer of the bailment, does (not) amount to the bailee losing ...all right to possession' per Young CJ in Equity

Hill v Reglon Pty Ltd [2007] – reasoning in *Anderson* (above) was applied. Repudiation of a bailment involves 'an act inconsistent with or repugnant to the bailment': [41].

8. SUB-BAILMENT

- A sub-bailment occurs where there is a bailment by the good's owner to the bailee, followed by a sub-bailment by the bailee to the sub-bailee. Bailor can sue the sub-bailee directly: **The Pioneer Container**
- Must firstly apply the elements of bailment to show there was a sub-bailment: **Hobbs v Petersham**
 1. Voluntary or consensual assumption of possession of the goods on the bailee's part
 2. Delivery of possession, actual or constructive, to the bailee
 3. A promise, express or implied, to redeliver the goods or deal with them in a special way

- A sub-bailee will owe the same duties as the original bailor where: **Morris v Martin & Sons**
- 4. The bailee sub-bailed with authority of the owner; and
- 5. The sub-bailee is aware that the goods are property of someone other than the bailee, though not necessarily who exactly the owner is.

Gilchrist Watt v York Products – Owners (bailor) imported 2 cases of clocks from Germany and the shipowner (bailee) arranged for stevedores (sub-bailee) to unload and store the clocks in a shed. One case went missing.

Held: The owner was able to sue the stevedores directly because they had failed to exercise reasonable care. They knew the clocks didn't belong to the bailee: didn't matter that they didn't know who the bailor/true owner was.

9. REMEDIES

9.1. TRESPASS

- Wrongful **interference** with property rights in chattels

Elements:

1. Wrong or unauthorised;
2. Intentional;
3. Direct;
4. Interference with a chattel in the possession of another.

9.2. DETINUE

- Wrongful **retention** of personal property

Elements:

1. Possession by D;
2. Lawful demand for return of goods;
3. Continuing wrongful retention by D **after demand made**

9.3. CONVERSION

- Acts inconsistent with dominion/title – inconsistent with/impair a person's right to immediate possession of personal property

Elements:

1. Possession by the defendant;
2. Lawful demand for return of the goods;
3. Continuing wrongful detention by the defendant after the demand has been made

TOPIC 3: SALE OF GOODS ACT

1. APPLICATION OF SOGA

- In order for the *Sale of Goods Act 1896* (Qld) to apply, there must be a contract of sale or an agreement to sell.

Contract of Sale: s 4(1) SOGA

1. A contract;
2. Whereby the seller transfers property in the goods;
3. To buyer for monetary consideration.

Agreement to sell: ss 4(3) & 4(4) SOGA

- An agreement to sell is a contract where transfer in property of goods takes place at some future time, or subject to conditions: **s 4(3) SOGA**
- An agreement to sell becomes a contract of sale when the time has elapsed or the conditions have been fulfilled: **s 4(4) SOGA**

Characteristics of Sales/Agreement to Sell

Sale	Agreement to Sell
Executed contract	Executory contract
Ownership of goods transferred to buyer at time of contract	Ownership to be transferred at a future time, or subject to some condition
Seller can sue buyer for price of goods	Seller can sue buyer for damages on default
Buyer can sue seller for damages if seller defaults or conversion if seller wrongfully disposes of goods	Buyer can sue seller for damages on default
Risk passes to buyer with ownership	Risk remains with seller until ownership passes to buyer

2. CLASSIFICATION OF GOODS

- **Goods** are defined in section 3 SOGA as: goods includes all chattels personal other than things in action and money, and also 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.
 - o Do not include land or any interest in land.

2.1. EXISTING GOODS

- Existing goods: owned or possessed by the seller at the time of the contract : **s 8 SOGA** (e.g. a particular car)

2.2. FUTURE GOODS

- Future goods: mean goods to be manufactured or acquired by the seller after the making of the contract of sale: **s 3(1) SOGA**

2.3. SPECIFIC GOODS

- Specific goods: are goods identified and agreed upon when a contract of sale is made: **s 3(1) SOGA** (e.g. 2006 Holden Commodore)

2.4. UNASCERTAINED GOODS

- Unascertained goods are goods which have not been identified or agreed upon at the time of the making of the contract: **Re Goldcorp** (e.g. 100 tonnes of best quality wheat)

2.5. ASCERTAINED GOODS

- Ascertained goods are goods which have been identified in accordance with the contract after a contract of sale is made: **Re Wait**

ASCERTAINED AND UNASCERTAINED GOODS

- Ascertained and unascertained goods are not defined in the SOGA – need to look at the common law.
- If item is not specified exactly, it cannot be ascertained.

Re London Wine Co (Shippers) [1986] – Purchased wine and received certificate of title stating the specific wine they purchased. Contract and certificate were specific – showed precise bottles they purchased. However, did not always have wine in stock and could be supplied from any source. **Not specificable.**

Held: Unascertained goods, therefore purchasers were creditors and could not get their wine.

Re Staplyton Fletcher Ltd [1995] – wine seller sold customers and gave them details of wine they were purchasing. The company went into administration. When the wine was ordered, they were **moved to a separate part of warehouse.**

Held: This was identified enough to be ascertained and therefore **title passed to the goods.** Not just ordinary creditors.

Re Goldcorp [1994] – Investment in gold which was assured to be insured and audited monthly. Investors believed they were getting actual ownership of gold and that it was being stored for them. Company had floating charge with bank which crystallised over assets and put them first in line as secured creditors. Customers needed to show that the gold was not an asset of the company and was **owned by them.**

Held: No apportionment in the gold stocks – there was just a pile of gold which never had enough to match people's investment in them. 'Option of delivery' therefore had not been identified at time of contract.

THC Holdings v CMA Recycling – THC entered into purchase agreement with CMA to buy 5,800 tonnes of scrap metal for delivery to Vietnam. CMA informed THC it could not meet metal required and shortfall was sourced from another company (SIMS) by cargo swap. CMA subsequently accumulated shortfall and it was in one pile, not comingled with other types of scrap and had been inspected and approved by a SIMS representative.

Held: Goods were ascertained.

[83] “Unlike the seller in *Gillogly* (which placed the grain it had sourced to meet its obligation to the purchaser in a Graincorp silo where it was mixed with grain belonging to others, and without any intention that that particular grain would be that destined to the purchaser), CMA **placed the scrap metal in a separate pile**, distinct from all other scrap in its yard, for the specific purpose of satisfying its remaining obligations under the Purchase Agreement.”

3. WHEN CAN PROPERTY PASS?

- SOGA requires transfer in *ownership*.

3.1. UNASCERTAINED GOODS

- Property cannot pass unless and until goods are ascertained: **s 19 SOGA**
- Section 19 defines the earliest time property can pass. Once goods are *ascertained*, turn to parties' intention, or s 21 **in absence of intention**, to determine when property actually passes.
- Section 19 overrides any contrary intention of the parties or contrary agreement: **Jansz**

3.2. ASCERTAINED GOODS

- When there is a contract for the sale of specific or ascertained goods, the property is transferred in them **when the parties intend it to be transferred: s 20(1) SOGA**
- In determining intention, court looks to the terms of the contract, the conduct of the parties, and the circumstances of the case: **s 20(2) SOGA**
- If there is **NO CLEAR INTENTION**, the rules in **s 21 SOGA** apply: **McEntire v Crossley Bros**

3.2.1. RULES IN S 21 SOGA

RULE 1 – SPECIFIC GOODS IN DELIVERABLE STATE:

Where there is:

1. an unconditional contract;
2. for the sale of specific goods;
3. in a deliverable state

Property passes:

1. **when the contract is made;**
2. irrespective of the time for payment or delivery
 - i.e. bailment between time contract made and delivery...

Unconditional contract

Unconditional means that the sale contract is not subject to any condition which would prevent property passing: *McPherson, Thom, Kettle & Co v Dench*

- In *McPherson*, a term in a contract for the auction of a heifer that “all lots not settled in accordance with these conditions shall be resold...” did not make the sale conditional because the word ‘resale’ assumed an original sale had been made.

Specific goods

Specific goods are goods identified and agreed upon when a contract of sale is made: **s 3(1) SOGA**

Deliverable state

Goods are in a deliverable state when they are in such a state that the buyer would be bound to take delivery of them: **s 3(4) SOGA**

- In **Underwood Ltd v Burgh Castle Brick**, work needed to be done on the goods prior to delivery so the goods were not in a deliverable state until the work was done.

RULE 2 – SPECIFIC BUT NOT DELIVERABLE

Where there is:

1. a contract for the sale of specific goods; and
2. the seller is bound to do something to the goods for the purpose of putting them in a deliverable state

Property does not pass until:

1. the thing is done; and
2. the buyer has notice that the thing is done

Specific goods

- Specific goods are goods identified and agreed upon when a contract of sale is made: **s 3(1) SOGA**

Undeliverable goods

- If it is the buyer (and not the seller) who is bound to do something, rule 2 will not apply.
- In **Underwood Ltd v Burgh Castle Brick**, work needed to be done on the goods prior to delivery so the goods were not in a deliverable state until the work was done.

The buyer has notice

- The parties may intend property to pass without notification to the buyer, in which case property will pass once goods achieve that condition: **Joseph Reid v Schultz**
- “Buyer has notice” (as opposed to “seller must give notice”) means that knowledge is required but constructive knowledge is probably insufficient: **Worcester Works Finance v Cooden Eng.**

Wallace v Safeway Caravan Mart – A caravan was purchased on the condition that the seller install a shower and the caravan be delivered. The caravan was stolen before the work was completed.

Held:

Because the caravan was not in a deliverable state at the time of the theft, neither property nor risk had passed to the buyer and he was entitled to a refund. The caravan would not have been in a ‘deliverable state’ until it was delivered in accordance with the contract.

RULE 3 – SPECIFIC AND DELIVERABLE, BUT PRICE NOT DETERMINED

Where there is a contract:

1. for the sale of specific goods;
2. in a deliverable state; but
3. the seller is bound to weigh, measure, test or do some other act with reference to the goods for the purpose of ascertaining the price

Property does not pass:

1. until such act is done; and
2. the buyer has notice thereof

Specific goods

- Specific goods are goods identified and agreed upon when a contract of sale is made: **s 3(1) SOGA**
- This rule covers specific goods which are unascertained in extent or quality and the price cannot be determined until the extent or quality is ascertained: *National Coal Board v Gamble*

In a deliverable state

Goods are in a deliverable state when they are in such a state that the buyer would be bound to take delivery of them: s 3(4) SOGA

The seller is bound to weigh, measure, test, etc.

The obligation to weigh, measure or test the goods must be required to be done by the seller and not the buyer or a third party: *Nanka-Bruce v Cth Trust*

The obligation must be to ascertain the price and not just for the buyer's satisfaction:

1. In *Nanka-Bruce*, an option to weigh the bags of cocoa to see whether they corresponded with the weight as represented by the seller, the price having been fixed, was not a condition precedent to property passing within the ambit of rule 3.

Buyer has notice

Probably requires the buyer to have knowledge of the process having been completed and the price ascertained, rather than formal notification

RULE 4 – 'SALE ON APPROVAL' OR 'SALE ON RETURN'

When goods are delivered to buyer on approval or on sale or return or other similar terms:

Property passes when buyer –

1. Indicates approval/acceptance; or
2. Does any other act adopting transaction; or
3. Retains goods without giving notice of rejection after time fixed for their return; or, if there is no fixed time, retains goods without giving notice of rejection after a reasonable time

"Sale on approval"

- A sale on approval exists where the parties intend that the goods delivered to the buyer shall be bought by the buyer if they approve them, but not if they disapprove:
London Jewellers v Attenborough

"Sale on return"

- A sale on return exists where the goods are taken to be sold at the option of the recipient, unless returned to the seller within the time fixed by the contract or within a reasonable time:
Kirkham v Attenborough
- Irrelevant whether the recipient intends to buy them and keep them, or on-sell to a third party:
Poole v Smith's Car Sales
- Necessary to distinguish a situation where the recipient merely acts as agent for the seller, in which case the rule won't apply: ***Weiner v Harris***

“On similar terms”

- A sale on similar terms would include, for example, where goods are sent on trial: **Beverley v Lincoln Gas Light & Coke**

Indicates approval/acceptance

- Property passes when a buyer indicates approval to the seller: **Rule 4(1)(a) SOGA**
- A buyer may indicate their approval by writing, words or conduct.

Does any other act adopting transaction

- Property passes when a buyer does any other act adopting the transaction: **Rule 4(1)(a) SOGA**
- An act adopting the transaction is any act which is inconsistent with the ownership of the seller: **Kirkham v Attenborough**
 - o In **Kirkham v Attenborough**, selling or pledging goods (jewellery) amounted to adoption
- In **Astley Industrial Trust v Miller**, accepting a motor vehicle log book from the local authority on his application was an act adopting the transaction
- If a buyer offers to sell goods to someone else, unless the third party does an act adopting that transaction, this will not constitute an act adopting the transaction by the buyer: **Genn v Winkel**

Retains goods without giving notice of rejection after time fixed for their return or retains goods after a reasonable time (if there is no fixed time)

- Property passes when a buyer retains goods without giving notice of rejection after the time fixed for their return or, if there is no fixed time, after a reasonable time: **Rule 4(1)(b) SOGA**
- What is a **reasonable time** is a **question of fact**: **Rule 4(2) SOGA**
- The seller’s conduct is relevant in determining what a reasonable time is: **Poole v Smith’s Cars**
- If the recipient has given notice of rejection but has omitted to return the goods, they are not liable for the price (but may be liable for wrongful interference): **Price v Fraser; Mitchell v ELBC**
- The parties may choose to make return of the goods necessary for rejection to occur: **Ornstein v Alexandra Furnishing Co**

If the goods are damaged or destroyed without fault of the buyer

- If the goods are damaged or destroyed without fault of the buyer and the time fixed for their return, or a reasonable time, has passed, the buyer will not be liable for the price of the goods or for damages: **Elphick v Barnes**
 - o In **Elphick v Barnes**, a horse was delivered on trial for 8 days and died after 3. The horse was at the seller’s risk and the seller could not maintain an action for the price of the horse.
- If the buyer is regarded as a bailee, the buyer has the onus of proving that any damaged caused was not through the fault of the buyer: **Houghland v RR Low**
 - o If the goods were sent to the buyer without consent, he would not be a bailee and would therefore only be liable for intentional damage: **Howard v Harris**

RULE 5 – UNASCERTAINED GOODS

Where there is a contract:

1. For the sale of unascertained or future goods by description; and
2. goods of that description and in a deliverable state;
3. are unconditionally appropriated to the contract;
4. either by the seller with the buyer's assent, or the buyer with the seller's assent; and
5. The property thereupon passes to the buyer.

Unascertained or future goods

- Unascertained goods are goods which have not been identified or agreed upon at the time of the making of the contract: **Re Goldcorp**
- Future goods means goods to be manufactured or acquired by the seller after the making of the contract of sale: **s 3(1) SOGA**

Goods of that description and in a deliverable state

- Goods must comply with the description given.
- Goods are in a deliverable state when they are in such a state that the buyer would be bound to take delivery of them: **s 3(4) SOGA**

Unconditional appropriation

- Unless the parties otherwise agree, property passes when there is unconditional appropriation by one party with the assent of the other.
- Appropriation is not merely setting apart goods which they expect to use in the contract:

Carlos Federspiel – Defendant was a bike manufacturer and agreed to sell bikes to the plaintiff buyers which had yet to be manufactured. The buyers paid the price and the manufacturers manufactured the bikes in the correct quantity and type; packed and marked them according to the contract; and asked the agents to book shipping space. Appropriation is usually the last act of the seller and always involves an act of actual or constructive delivery.

Held: Here, that act would be placing the goods onto the ship so merely boxing them wasn't sufficient because the bikes weren't beyond recall of the seller.

- Appropriation can occur by exhaustion: **Karlshamns Oljefabriker v Eastport Navigation**
 - o CIF (cost, insurance and freight) contract for sale of 6000 tonnes of copra out of shipment of 22,000. Shipping documents were delivered during the voyage. 16,000 tonnes were off-loaded at intermediate ports. Only 6000 tonnes remained, therefore appropriation by exhaustion.

Examples of appropriation:

- Setting aside goods followed by branding or marking them and advising the buyer: **Tasmanian Producers Selling Agency v Cumming**
- Posting goods: **Badische Anilin v Basle Chemical Works**

- Selection of goods by the seller and notification of this to the buyer who assents to collecting them: ***Rohde v Thwaites***
- Buyer hands sacks to seller who fills them with wheat: ***Aldridge v Johnson***
- Placing fuel in a tank where it is mixed with other fuel: ***Badische v Basle Chem***

With assent

- The buyer or seller must assent to the appropriation made by the other party: ***Rule 5(1) SOGA***
- Assent can be express or implied, before or after appropriation is made: ***Rule 5(1A) SOGA***

Examples of assent:

- Buyer inspecting the seller's barley then forwarding bags to be filled: ***Aldridge v Johnson***
- Buyer insures goods are being informed of the appropriation: ***Sparkes v Marshall***
- Buyer retains goods for some time without objection: ***Pignataro v Gilroy***

4. TRANSFER OF RISK

- When goods are damaged, destroyed or perished without fault of either party, the person who bore the risk in the goods at that time is liable for the loss.

4.1. RISK PASSES WITH PROPERTY

- Unless otherwise agreed, risk passes with property: ***s 23(1) SOGA***

Free on board (FoB) or Cost, insurance, freight (CIF) contracts

- In FOB or CIF contracts, the parties usually agree that risk passes to the buyer upon shipment, despite the fact that the property remains with the seller: ***NSW Leather v Vanguard Insurance***

4.2. DELAY CAUSED BY PARTICULAR PARTY

- When delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault: ***s 23(2) SOGA***
- Fault means "wrongful act or default": ***s 3 SOGA***
- The liability of the party in fault extends to any damage which might not have occurred but for the fault: ***s 23(2) SOGA***

Case examples

Sharp v Batt: Applies to delay in delivery whether or not property is to pass upon delivery

Demby Hamilton v Barden – The buyer's failure to take delivery of part of 30 tons of apple juice rendered the remainder of the juice putrid. Although property had not yet passed to the buyer, he bore the risk of deterioration and the loss was attributable to the failure of the buyer to take delivery on time.

Allied Mills v Gwydir Valley Oilseeds – Gwydir agreed to buy 130 tonnes of linseed meal which would be stored at the seller's place of business. Agreed that property would pass when the goods were

delivered in February. Allied deliberately did not deliver 100 tonnes as planned and the meal was subsequently destroyed by fire in March. Gwydir was forced to buy elsewhere for \$30/tonne extra.

Held: Sale of goods in a deliverable state: property passed when contract made (rule 1)

Seller caused the delay so the risk was with the seller: buyer didn't have to pay for the destroyed meal. Seller was liable for failure to take reasonable care as a bailee: damages were awarded to the buyer for the \$30/tonne extra it had to pay.

Sterns v Vickers – Defendants sold plaintiffs 120,000 gallons of white spirit. Plaintiffs took a long time to collect and before it was severed from the bulk, the spirit in the tank deteriorated.

Held: Property didn't pass because there was no severance from the bulk so the goods weren't ascertained: s 19.

The buyer caused the delay so even though property remained with the seller, the buyer had the risk and still had to pay the agreed price even though the goods had deteriorated.

4.3. OBLIGATIONS AS BAILEE

- Nothing in s 23 affects the duties or liabilities of either seller or buyer as bailee of goods: **s 23(3) SOGA**
- If **property and risk have passed to the buyer** but the **seller maintains possession**, the seller, as bailee, **must take reasonable care of the goods: *Houghland v RR Low (Luxury Coaches)***
- The seller is strictly liable for breach of express terms of bailment, even in respect of accidental loss or damage, unless the damage would have occurred even without the breach: ***Edwards v Newland***

5. ROMALPA (RETENTION OF TITLE) CLAUSES

- Used for sellers of valuable items where paid in instalments. Under normal rules of contract, if you have made some payment, title has passed – puts seller at risk (parted with title but not received all their money).
- The seller can make special provisions in the contract by **using a retention of title clause** (Romalpa Clause). This clause specifically reserves the title on the seller and allows him to trace the goods to **recover payment**.
- *Personal Property Securities Act* introduced a national regime for registration of **security interests** over personal property.
- Therefore, a seller who supplies goods subject to a Romalpa Clause, should register his interest under the Register. If he does not, then his interest could be defeated by a registered security interest.

6. NEMO DAT QUID NON HABET

- The general principal that no-one can transfer a better title to goods than he possesses is reflected in **s 24(1) SGA; *Hollins v Fowler***
 - o “Subject to the provisions of this Act, when goods are sold by a person who is not the owner and does not have the consent of the owner, the buyer acquires no better title to goods than the seller had, unless the owner’s conduct precludes him from denying the seller’s authority to sell”

- The exceptions to this rule are useful as they ensure business can go on uninterrupted by allowing title to pass.
- The exceptions are:
 1. Estoppel: s 24(1)
 2. Mercantile agent: s 24(2)
 3. Voidable title: s 25
 4. Seller in possession: s 27(1)
 5. Buyer in possession: s 27(2)

6.1. EXCEPTION 1: ESTOPPEL: s 24(1)

- The closing words of s 24(1) SOGA: unless the owner's conduct precludes him from denying the seller's authority to sell", create an exception to the *nemo dat* rule founded in estoppel: ***Associated Midland Corporation v Saunderson Motors***
- This exception doesn't merely prevent the owner of the goods asserting their ownership, but confers good title to the buyer against the entire world: ***Eastern Distributors v Goldring***

Big Rock Pty Ltd v Esanda Finance (1992) – Esanda sent letter saying he had repaid car (only made 2/48 payments). Tried to sell on to car yard with letter. Car yard purchased it and took money. Esanda could not do anything about it because they had equipped him with tool to pass title.

1) Estoppel by Representation

- If the owner represents that the seller is owner or has authority to sell on any terms, than the owner will be estopped from denying the seller's authority to sell: *Eastern Distributors*
- Representation may be by words or conduct but must be clear and unequivocal: *Eastern Distributors*
- Representation must have been reasonably relied upon to the detriment of the buyer: *Eastern Distributors*
- Representation must have been made by the owner or by someone authorised by the owner to make the representation: *Moorgate Mercantile Co v Twitchings*

Examples of representations

- Entrusting possession of goods to another is not a representation to a third party that the seller owns the goods: ***Central Newbury Car Auctions v Unity Finance***
- The mere possession of documents of title does not convey a representation that the holder of the documents is entitled to dispose of the goods: ***Motor Credits v PMA***
 - o An estoppel may arise where goods and documents of title are given to an agent such as *Eastern Distributors* where the owner of a van was estopped from denying the authority of a car dealer to sell his van after he had given the dealer a signed hire-purchase agreement in blank and a delivery note in respect of the van in order to mislead a finance company into financing the owner's acquisition of another car.
 - o Documents of title include (s 2(1) *Factors Act*): a bill of lading, dock warrant, warehouse keeper's certificate, warrant or order for delivery of goods, and any other document ordinarily used as proof of possession

- A car registration book is not a document of title: **Pearson v Rose**

2) Estoppel by negligence

- Estoppel by negligence occurs where the true owner permits the seller to create an appearance of ownership.
- Requires that the owner owed the buyer a duty of care; breached that duty; which caused the buyer to purchase the relevant goods from the seller: **Johnson Matthey v Dascorp**
- It is difficult to establish an owner owed a duty of care to a third-party buyer: **Mercantile Bank of India v Central Bank of India**
- A mere lack of prudence on the part of the owner (such as allowing the goods to be lost or stolen) will be insufficient: **Central Newbury Car Auctions**
- A finance company's failure to register a hire-purchase agreement where registration was not compulsory was insufficient to preclude them asserting their rights: **Moorgant Mercantile**

6.2. EXCEPTION 2: MERCANTILE AGENT: s 24(2)

- s 24 SGA does not affect the operation of the *Factors Act*: s 24(2)(a) SGA
- s 3(1) *Factors Act* extends the operation of the estoppel exception so that all dispositions by a mercantile agent in the ordinary course of business to a bona fide purchaser for value are valid.
- There are five elements:
 1. when a mercantile agent;
 2. is in possession of goods with the owner's consent;
 3. any sale, pledge, or other disposition;
 4. in the ordinary course of business of the mercantile agent;
 5. if the buyer bought in good faith without notice of the agent's lack of authority;

...is as valid as if expressly authorised by the owner.

Onus of Proof

- The onus is on the third-party buyer to establish the elements of the exception: **Oppenheimer v Attenborough & Son**

What is Mercantile Agent?

- Mercantile agent means "a mercantile agent having in the customary course of business as such agent authority either to sell goods or to consign goods for sale, or to buy goods, or to raise money on the security of goods" (s 2 Factors Act)
- Mercantile agent is construed widely and it may be the only time the agent has acted in such a capacity: **Weiner v Harris**
- **Examples:** motor vehicle dealer, auctioneer, etc.

In Possession of Goods?

- A mercantile agent is deemed to be in possession where the agent has actual custody or control of the goods or documents of title: **s 2(2) Factors Act**

- Documents of title (s 2(1) Factors Act): a bill of lading, dock warrant, warehouse keeper's certificate, warrant or order for delivery of goods, and any other document ordinarily used as proof of possession.
- A car registration book is not a document of title: **Pearson v Rose**

-

Owner's Consent

- Consent must be to possession in the capacity of a mercantile agent: **Astley Industrial Trust v Miller**
- Requirement is not satisfied if owner leaves a car with dealer for the purpose of repair: **Pearson v Rose**
- In the absence of contrary evidence, consent is presumed: **s 3(4) Factors Act**

Good Faith without Notice

- Good faith means something is done honestly, whether negligently or not: **s 3(2) SOGA**
- Notice means actual notice or wilfully closing one's eyes; does not extend to constructive notice
 - Will have notice if a reasonable person would have made further enquiry before taking the goods: **Robinson Motors v Fowler**
 - Will have notice if there is something obviously suspicious about the seller's title to which the third party turned a blind eye: **Worcester Works Finance v Cooden Engineering**
 - Does not extend to constructive notice ("knowledge of facts which would put a reasonable person on enquiry"): **Manchester Trust v Furness**

6.3. EXCEPTION 3: VOIDABLE TITLE: s 25

- A seller with voidable title to goods can transfer good title to a *bona fide* purchaser for value: **s 25 SOGA**
- **Need two sales:** voidable title sold but before rescission made by wrong party, that first party loses out.
- Three elements:
 1. Seller has voidable title;
 2. Seller's title has not been avoided;
 3. Buyer makes purchase in good faith without notice of seller's defective title

Voidable Title

- If a contract for sale is vitiated by fraud, misrepresentation or mistake (which doesn't go to the root of the contract), the sale is not void, but voidable at the option of the innocent party: **Ingram v Little**
- A mistake as to the buyer's identity renders the contract voidable: **Lewis v Avery**

Good Faith without Notice?

- Notice means actual notice or wilfully closing one's eyes; does not extend to constructive notice

- Good faith means something is done honestly, whether negligently or not: **s 3(2) SOGA**

6.4. EXCEPTION 4: SELLER IN POSSESSION AFTER SALE: s 27(1)

- Two purchasers have bought property in good faith. Second party loses out. If seller first sells something to someone who becomes true owner, but seller remains in possession, then sells to someone else (third party). Despite passing title to first party, third party also bought property in good faith. Second party will get title.
- The codification of the nemo dat principal in s 24(1) is “subject to the provisions of the SGA.”
- The seller in possession exception is one such provision: **s 27(1) SOGA**

Continued Possession

- The seller must have continuous possession of the goods: **Pacific Motor Auctions v Motor Credits**
- Requires only physical possession, doesn't matter that the character of the possession has changed: **Pacific Motor Auctions**
 - o In **Pacific Motor Auctions**, motor vehicle dealer sold cars to a finance company and continued to hold them as bailee. Even though the character of the possession changed, the dealer was always in physical possession which was sufficient for s 27(1) SOGA.
- Can also be **continuous possession of the documents of title**:
 - o Documents of title (s 2(1) Factors Act): a bill of lading, dock warrant, warehouse keeper's certificate, warrant or order for delivery of goods, and any other document ordinarily used as proof of possession.
- A car registration book is not a document of title: **Pearson**

Seller Delivered goods to Third Party Purchaser

- It is sufficient for the seller in possession to give constructive delivery of the goods to the third-party purchaser: **Michael Gerson v Wilkinson**
 - o Such as handing over documents of title: **Michael Gerson v Wilkinson**

Bona Fide Third Party buyer in Good Faith?

- Good faith means something is done honestly, whether negligently or not: **s 3(2) SOGA**
- Notice means actual notice or wilfully closing one's eyes; does not extend to constructive notice
 - o Will have notice if a reasonable person would have made further enquiry before taking the goods: **Robinson Motors v Fowler**
 - o Will have notice if there is something obviously suspicious about the seller's title to which the third party turned a blind eye: **Worcester Works Finance v Cooden Engineering**
 - o Does not extend to constructive notice (“knowledge of facts which would put a reasonable person on enquiry”): **Manchester Trust v Furness**

Case Example

Pacific Motor Auctions v Motor Credits – Motor vehicle dealer sold vehicle to finance company but finance company allowed dealer to keep possession of the cars on floor plan. This was either:

- Mortgage to finance company (Security Interest); or
- Sale followed by consignment to dealer (Security Interest)

Held: Dealer had continuous possession that a later sale by the dealer to a third party passed good title to the third party. If the third-party was also a dealer, probably no good faith.

6.5. EXCEPTION 5: BUYER IN POSSESSION AFTER SALE: s 27(2)

- Purchaser buys property, takes delivery, but title has not yet passed to that party. If that buyer then sells property to third party (*bona fide* for value). Innocent third party will gain good title relying on possession. Seller penalised for allowing buyer to have possession before ownership.
- The codification of the nemo dat principle in s 24(1) is “subject to the provisions of the SGA.”
- The buyer in possession exception is one such provision and applies to conditional sales and reservation of title clauses: **s 27(2) SOGA**
- The buyer in possession exception applies in the following circumstances:
 1. Where a person having agreed to buy goods;
 2. Obtains possession of the goods (or documents of title) with consent of the owner; and
 3. Delivers the goods or documents of title under any sale, pledge or other disposition;
 4. To a third party in good faith without notice of rights of owner
- **Example:** Buyer agrees to buy computer from owner. Buyer has not paid but is given possession. Buyer wrongfully on sells computer to a third party and delivers goods or documents of title. The third party will take free.

Bought or Agreed to Buy

- If the contract between the owner and the seller contains a retention of title clause, the contract is an agreement for sale and the ‘buyer in possession’ exception applies: ***Four Point Garage v Carter***
- A person who is merely given goods to sell by the owner is not a buyer in possession: ***Shaw v Commission of Police (thought the***

Possession by Buyer

- English law indicated that constructive possession of the goods is sufficient: ***Four Point Garage***
- Exception does not apply where goods are stolen: ***National Employers’ Mutual General Insurance Association***

Delivery of Goods

- Delivery is defined as ‘voluntary transfer of possession from one person to another’: **s 3 SOGA**
- Actual delivery is not required, constructive delivery suffices:
 - o In ***Four Point Garage***, it was sufficient that the buyer in possession instructed the owner to deliver the goods directly to the third-party

- In **Gamer's Motor Centre**, delivery of receipts signed by the car dealer (buyer in possession) pursuant to the finance agreement was a voluntary transfer of possession
- The delivery must be voluntary (not merely a change of possession with no act or acquiescence on the part of the buyer in possession):
 - In **The Saetta**, the buyers in possession chartered a vessel. The owners terminated the charter-party which gave them possession of the boat and oil bunkers onboard. The charterers had not transferred possession of the oil bunkers for the purposes of this section because the transfer of possession was involuntary: the owner's act in terminating the charter-party resulted in the transfer.

Buyer in Good Faith Without Notice of Rights of the Owner

- Good faith means something is done honestly, whether negligently or not: **s 3(2) SOGA**
- Notice means actual notice or wilfully closing one's eyes; does not extend to constructive notice
 - Will have notice if a reasonable person would have made further enquiry before taking the goods: **Robinson Motors v Fowler**
 - Will have notice if there is something obviously suspicious about the seller's title to which the third party turned a blind eye: **Worcester Works Finance v Cooden Engineering**
 - Does not extend to constructive notice ("knowledge of facts which would put a reasonable person on enquiry"): **Manchester Trust v Furness**

7. CONDITIONS AND WARRANTIES IMPLIED IN CONTRACTS OF SALE

- Stipulations as to time: **s13(1) SOGA**
- Implied undertaking as to title: **s 15 SOGA**
- Sale by description: **s 16 SOGA**
- Merchantable quality: **s 17 SOGA**
- Fitness for purpose: **s 17 SOGA**
- Sale by sample: **s 18 SOGA**

TOPIC 4: SECURITY INTERESTS

1. TYPES OF SECURITY INTERESTS

- Purpose of a security interest is a way to guarantee one party serving an obligation to another party.
- 1. **Pledge:** Pledge arises by way of contract and involves the debtor delivering the property to the creditor as security for an obligation or debt. In the event the debtor's default, the creditor is expressly or impliedly authorised to sell the goods: *Osborne Computer v Air-road*
- 2. **Lien:** A lien arises by **implication of the law** and vests in the creditor a right to retain possession of the debtor's property until their pecuniary demands are met. Similar to pledge where creditor's security is possessing the item. But **liens are passive** and don't give a right to sell item to recoup debt: *Palgo Holdings v Gowans*
 - Car left at a garage for repair may be kept **until payment is given**.
- 3. **Charge:** A charge is created by way of trust, or by contract. The debtor charges specific property to the creditor as security for repayment. It does not involve a transfer of ownership, not possession.
 - Upon debtor's default, the charge is entitled to have a receiver appointed, or to an order for sale: *Palgo Holdings v Gowans*
 - Where a specific **asset is charged**, it is called a fixed charge. Where the assets are constantly changing, it is a **floating charge** which **crystallises** on debtor's default.
- 4. **Mortgage:** A common law mortgage is the **transfer of title to the mortgagee (creditor)** as security for repayment of a loan, on an express or implied condition that the property is reconveyed upon repayment. Chattel mortgage is security interest in personal property involving **transfer of title to mortgagee** → mortgagor makes repayments and when repaid title transferred back.
 - The debtor usually remains in possession during the mortgage. If the debtor defaults, the creditor is entitled to sell the property or if not in possession, **retake and sale: Palgo Holdings**
- 5. **Hire/Purchase:** Arrangement whereby you hire the chattel off a company (usually finance) make lease payments. If you make all the payments, ownership is transferred to you. Chattel mortgage and hire/purchase are **very similar**.
- 6. **Conditional sale/retention of title:** Ownership does not pass until the buyer/borrower can pay for the goods. Buyer has possession of the goods but original owner retains ownership.

2. PERSONAL PROPERTY SECURITIES ACT (PPSA) GENERALLY

2.1. PURPOSE OF THE PPSA

- The *Personal Properties Securities Act 2009* (Cth) has some key benefits:
 - Unifies **70 pieces of legislation** (over 30 different government departments/registers in 9 jurisdictions)
 - Creates a single national law governing all security interests → online & readily accessible
 - Alleviates problems associated with having to register **in multiple states**

- Alleviates problems associated with fraud where it was unclear to financiers whether stock was owned or merely on consignment etc.
- Personal property is defined as 'everything except land and certain statutory rights': **s 10 PPSA** (shares, unit trusts interests, IP, goods)

2.2. EFFECT OF PPSA ON OTHER LAW

- The *PPSA* is not intended to exclude or limit the operation of a commonwealth law, a state/territory law, or the general law **to the extent that they operate concurrently: s 254 PPSA**

2.3. PPSA TERMINOLOGY

- **Grantor:** grants the security interest (granting security interest in ring = grantor)
- **Secured party:** receives the security (pawnbroker is the secured party)
- **Collateral:** property to which the security relates (ring is the collateral)
- **Attachment:** process of creating interest in the specific property (interest attaching to the ring)
- **Perfection:** perfection is required for PPSA to protect property interest – usually by registration.
- **PMSI (Purchase Money Security Interest):** money advanced on basis of security is used to purchase that item (e.g. mortgage – money advanced on mortgage is used to buy the thing that is mortgaged).

3. BUYING PERSONAL PROPERTY TO WHICH SECURITY INTERESTS ARE ATTACHED

- Answer guideline:
 - A. Was a security interest created?
 - B. Is security interest enforceable against the grantor? **ATTACHMENT**
 - C. Is the security interest enforceable against third parties?
 - D. Is the security interest perfected?
 - E. Priority rules.
- Section 19 focuses on the underlying collateral and whether or not a security interest attaches (which affects the rights between the secured party and the grantor), s 20 focuses specifically on the particulars of the security agreement (which affects the rights in the collateral as between the secured party and third parties) and s 21 focuses on the methods of perfection (with perfection being necessary to achieve priority between PPSA security interests). Where a secured party can satisfy the required elements of ss 19, 20 and 21 it can be said to have a perfected security interest in the collateral.

4. A. WAS A SECURITY INTEREST CREATED?

4.1. DEFINITION OF A SECURITY INTEREST

- A security interest is defined in section 12 *PPSA*:

(1) An interest in relation to personal property provided for by a transaction that, **in substance**, secures payment or performance of an obligation: **s 12(1) PPSA – FUNCTIONAL DEFINITION – SUBSTANCE NOT FORM!**

(2) For example, a security interest includes any of the flowing transaction (if they, **in substance**, secure payment or performance of an obligation): **s 12(2) PPSA**:

- (a) a fixed charge;
- (b) a floating charge;
- (c) A chattel mortgage;
- (d) A conditional sale agreement (including an agreement to sell with retention of title);
- (e) A hire-purchase agreement;
- (f) A pledge;
- (g) A trust receipt;
- (h) A consignment (whether or not a commercial consignment);
- (i) A lease of goods (whether or not a PPS lease);
- (j) An assignment; or
- (k) A transfer of title.

- The **form of transaction is irrelevant – title is irrelevant** to security interests.

Re Bluenergy Group Ltd [2015]: [47] “It does not seem to me that the concept is different in substance[...] from the concept of ‘security’ at general law as a security is a **right to resort to a property or fund to assure payment.**”

4.2. DEFINITION OF A DEEMED SECURITY INTEREST

(3) The following transactions are also deemed to be security interests: **s 12(3) PPSA**

- (a) A transfer of an account or chattel paper;
- (b) A commercial consignment;
- (c) A PPS lease.**

4.3. DEFINITION OF PPSA LEASE

- A PPSA lease applies irrespective of the form of the transaction.

- The term ‘bailment’ is not defined in the *PPSA* but was defined in the *Personal Property Securities Bill 2008 Revised Commentary* December 2008 (at p. 11) as: ‘A bailment involves the delivery of tangible personal property to another party who holds possession of it. A bailment does not transfer ownership rights in the property and the bailor has the right to take possession of the property at any time or in accordance with the terms of the bailment.’

- A PPS lease is defined in s 13 *PPSA* as a lease or bailment:

- (a) for more than one year: **s 13(1)(a) PPSA**
- (b) for an indefinite term (even if determinable earlier than a year): **s 13(1)(b) PPSA**
- (c) which is automatically renewable and might exceed one year in total: **s 13(1)(c) PPSA**

(d) for up to one year, where the lessee has uninterrupted possession for more than one year with consent of the lessor or bailor: **s 13(1)(d) PPSA**

(e) Where goods are describable by serial number, a PPS lease is a lease or bailment :

(i) for 90 days or more: **s 13(1)(e)(i) PPSA**

(ii) which is automatically renewable and might exceed 90 days in total: **s 13(1)(e)(ii) PPSA**

(iii) for up to 90 days, where the lessee has uninterrupted possession for more than 90 days with consent of the lessor or bailor: **s 13(1)(e)(iii) PPSA**

- The bailor or lessor:

Must regularly engage in the business of leasing (a) or bailing (b): **s 13(2) PPSA**

4.4. EXCLUDED INTERESTS UNDER PPSA

- The PPSA does not apply to any of the following interests: **s 8(1) PPSA**

o lien, charge, or other interest created or arising by operation of the general law: **s 8(1)(c) PPSA**

o creation or transfer of land interests; interests in fixtures: **s 8(1)(f) PPSA**

5. B. IS SECURITY INTEREST ENFORCEABLE AGAINST THE GRANTOR?

5.1. ENFORCEABILITY AGAINST THE GRANTOR

- A security interest is enforceable against a grantor in respect of particular collateral only if the security interest **has attached** to the collateral: **s 19(1) PPSA**

5.2. ATTACHMENT: s 19

- Under **section 19(2) PPSA**, a security interest attaches when:

(a) the grantor has rights in the collateral; or the power to transfer rights to the secured party;

(b) and; either:

(i) value is given for the security interest; or

(ii) the grantor does an act by which the security interest arises.

Grantor has Rights

This means that a **thief couldn't create a security interest** because he does **not have a right**.

Only a **possessory right is required** not ownership.

Value is given for security interest

Means that consideration **sufficient to support a contract**: **s 10** (definition) **PPSA**

5.3. CONCLUSION

- If section 19(2) is satisfied, the property attaches and the security interest will be **enforceable against the grantor** under s 19(1) PPSA.

6. C. IS SECURITY INTEREST ENFORCEABLE AGAINST THIRD PARTIES?

6.1. ENFORCEABILITY AGAINST THIRD PARTIES

- A security interest is enforceable against a third party in respect of particular collateral only if (**s 20 (1) PPSA**):

Section 20 (1)

(a) the security interest is attached to the collateral; and

(b) one of the following applies:

(i) the secured party possesses the collateral;

(ii) the secured party has perfected the security interest by control;

(iii) a security agreement that provides for the security interest covers the collateral in accordance with subsection (2)

(2) (A security agreement covers collateral in accordance with this subsection if:

(a) the security agreement is evidenced by writing that is:

(i) signed by the grantor (see subsection (3)); or

(ii) adopted or accepted by the grantor by an act, or omission, that reasonably appears to be done with the intention of adopting or accepting the writing; and

(b) the writing evidencing the agreement contains:

(i) a description of the particular collateral, subject to subsections (4) and (5); or

(ii) a statement that a security interest is taken in all of the grantor's present and after-acquired property; or

(iii) a statement that a security interest is taken in all of the grantor's present and after-acquired property except specified items or classes of personal property.

6.2. ATTACHMENT

- Refer to conclusion made above.

6.3. POSSESSION, PERFECTION OR SECURITY AGREEMENT

- Often grantor has possession so must have security agreement. Also most practical.

Possession of Collateral by SECURED PARTY: s 20(1)(b)(i)

Possession is defined, and the requirements enunciated, by s 24: 'actual or apparent possession by the secured party' of the underlying collateral. Possession by enforcement does not constitute possession for perfection purposes under the PPSA.

The later this occurs, the later the priority period afforded to the secured party and any interest perfected before possession is taken would take priority to the repossessing party in any event: **s 55 PPSA**.

Sometimes not practical: e.g. bank accounts can't be possessed.

Perfection by Control by SECURED PARTY: s 20(1)(b)(ii)

Perfection by control is limited to specific types of collateral as set out in s 21(2)(c) PPSA

Control is clarified in the *PPS Bill 2009 Explanatory Memorandum* (at para 2.30): ‘...Perfection by control would occur when a creditor takes all steps necessary to be in a position to sell the collateral without further action by the grantor...’

E.g. secured party has right over bank account so no transactions can happen without their permission.

Security Agreement in writing? s 20(1)(b)(iii)

In satisfying s 20(1)(b)(iii) by reducing the security agreement to writing, the parties do no more than arm the secured party **with the potential to register a financing statement and achieve perfection by registration**. Whilst perfection is ultimately unnecessary regarding the enforceability of the underlying agreement between the parties (s 19), it is critical to the enforceability of the security interest against third parties.

Perfection by registration is the most practical approach because it avoids ambiguity of intention as between the parties and allows both the grantor and the secured party to include terms which best reflect their intentions. In addition, whilst possession and control is temporary and subject generally to the vicissitudes of life a valid contract in writing can be duplicated and presents a sense of permanency not otherwise enjoyed.

Written Security Agreement covers Collateral: s 20(1)(b)(2)(a)

Section 20(2) expressly prescribes the requirement that enforceable security agreements must be evidenced in writing. The agreement must be signed by the grantor, demonstrate a consensual adoption or acceptance by the grantor of the security interest and the writing must contain a description of the collateral or a statement which covers either ‘all present and after-acquired property’ of the grantor or ‘all present and after-acquired property except’ of the grantor and any exceptions.

Signed by grantor: s 20(2)(a)(i)

Adopted or Accepted by Grantor: s 20(2)(a)(ii)

Description of the Security Interest: s 20(2)(b)(i)

6.4. CONCLUSION

- If the collateral is possessed by the secured party, controlled by the secured party or covered by a security agreement, the security interest will be enforceable against third parties: **s 20(1) PPSA**.

7. D. IS SECURITY INTEREST PERFECTED?

- A security interest in particular collateral is **perfected** if (**s 21(1) PPSA**):

(a) the security interest is temporarily perfected, or otherwise perfected, by force of this Act; or

(b) all of the following apply:

- (i) the security interest is **attached to the collateral**;
- (ii) the security interest is **enforceable against a third party**;
- (iii) subsection (2) applies

(2) This subsection applies if:

(a) registration is effective

(b) secured party has possession of the collateral → **SEE ABOVE**

(c) secured party has control of the collateral: (i) ADI Account (ii) intermediate security (iii) an investment instrument (iv) a negotiable instrument (v) right evidenced by letter of credit (vi) satellites and other space objects → **SEE ABOVE**

- Order of attachment and steps to perfect are irrelevant: **s 21(3) PPSA**
- Single registration may perfect multiple security interests: **s 21(4) PPSA**

7.1. ATTACHMENT

- See analysis above.

7.2. ENFORCEABILITY AGAINST A THIRD PARTY

- See analysis above.

7.3. REGISTRATION IS EFFECTIVE

- Section 21(2)(a) PPSA provides for perfection by registration and this means the registering of a financing statement on the PPS Register.
- A financing statement is defined by s 10 and is distinct from a security agreement:
 - o **Security agreement:** document providing written evidence of the underlying security agreement between the secured creditor and grantor.
 - o **Financing statement:** document used to register security interest.
- The registration option is available for any collateral class.
- Section 885FL *Corporations Act 2001* (Cth) – in general case of corporate grantors, secured parties have **until the end of 20 business days to register their relevant security interest.**

8. E. PRIORITY RULES

- Priority extends to the perfected security interest in a document of title over a security interest in the underlying collateral which can be rendered unperfected by **s 22(3) PPSA**.
1. A perfected security interest **has priority over an unperfected security interest** (e.g. deemed): **s 55(3) PPSA**
 2. Priority between unperfected security interests is determined by order (in time) of attachment: **s 55(2) PPSA**
 3. Perfection by control has priority over perfection by other means: **s 57(1) PPSA**
 4. If two interests are perfected by control, priority is determined by the order of perfection: **s 57(2) PPSA**
 5. Purchase money security interests (PMSIs) have a '**super-priority**': **s 62 PPSA**
 - Security interests held by sellers for purchase price.
 - Security interests where lender provides funding for the grantor's acquisition of an asset over which security is taken.

Rabobank New Zealand Ltd v McAnulty [2011] – Horse (St Reims) won NZ derby. At end of racing career had opportunity to go to stud. Owned by a syndicate. Syndicate maintained ownership and entered into commercial relationship with stud farm: **bailment**. Arranged sharing of fees. Bank had a charge over the stud's assets and the stud failed to make repayment so bank put it into liquidation. Bank claimed all of the property in possession of stud including the horses (St Reims). Stud had perfected their interest by having it in writing. Racing syndicate did not have registered perfected interest – only one of ownership, bailed to study farm and did not presume anything else was necessary. Bank argued it was a **PPS Lease** – if successful, arrangement is just another personal property security and hadn't perfected = bank takes priority.

Held: In **substance** is it a bailment/security agreement?

It is in substance a bailment. Not a PPSA lease. Interest protected by ownership.

[40]: 'In our view, the words "in the business of leasing goods" should be read as importing a requirement that the owner actually be intending to profit from the bailment or lease.'

[46]: '...we do consider that it requires some straining of the concept "regular" to say it includes a single, isolated transaction.'

9. F. EXTINGUISHMENT RULES

- Unperfected security interests: **s 43 PPSA**
 - o A buyer of personal property, for value, takes the personal property free of an unperfected security interest in the property: **s 43(1) PPSA**
- Property that may, or must, be described by serial number and serial number is incorrect or misleading: **s 44 PPSA**
 - o Section 44(1) provides that a buyer of personal property takes free of a security interest if: (a) Property of that kind may, or must, be described by serial number in registration; and (b) Searching by serial number immediately before the sale would not disclose a registration
 - o Section 44(1) does not apply if: the buyer holds the personal property as inventory: **s 44(2)(a)(i) PPSA**; the buyer was a party to a transaction which created or provided for the unperfected security interest: **s 44(2)(b) PPSA**
- Sale or lease in the ordinary course of the seller or lessor's business of dealing with the property of the kind transferred, but not if the buyer knows that the sale constitutes a breach: **s 46 PPSA**
 - o A buyer takes free of a security interest given by the seller if the personal property was sold or leased in the ordinary course of the seller or lessor's business of selling or leasing personal property of that kind: **s 46(1) PPSA**
 - o Section 46(1) does not apply if:
 - If property of that kind may, or must, be described by serial number in registration; and the buyer takes the property as inventory: **s 46(2)(a) PPSA**
 - In any case, if the buyer or lessee buys or leases the property with actual knowledge that the sale or lease constitutes a breach of the security agreement: **s 46(2)(b) PPSA**

10. G. REMEDIES

- Remedies do not apply to deemed interests.
- Set out in Chapter 4 – depends on type of interest
- ‘All rights, duties and obligations that arise under this Chapter must be exercised or discharged honestly and in a commercially reasonable manner’: **s 111 PPSA**