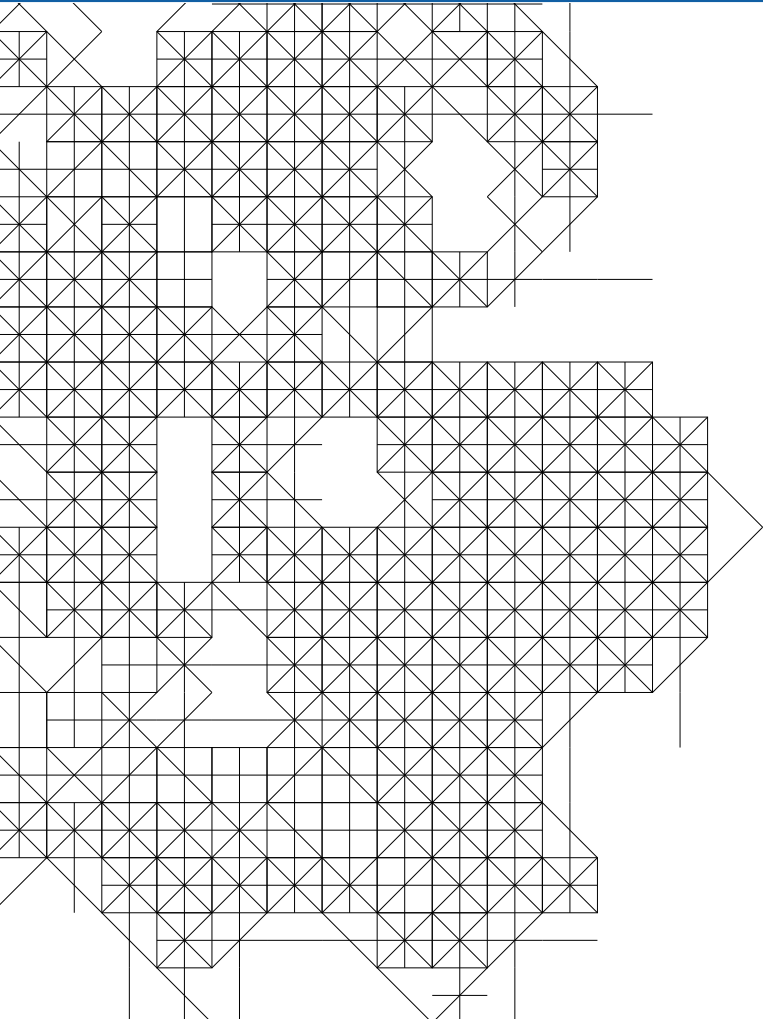


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INTRODUCTION

Dilan Thampapillai

Commercial law is a staple subject in Australian legal education. Many law schools badge themselves as commercial law schools, though the subject itself does not always gain the attention that it deserves. Arguably, all Australian law students should study commercial law at some point in their legal education. Even though comparatively few law students will go on to be commercial lawyers, the concepts raised within the subject of commercial law have utility in many other areas of law. Indeed, a commercial law perspective might deepen our understanding of the world around us. For example, so much of contract law and intellectual property law is driven by commercial law imperatives. Even subjects as seemingly far flung as international law are not immune. How might Australia's dealings with Nauru over refugee processing look if viewed through the prism of agency law? If Australia is cast as the principal and Nauru as the agent, then the former cannot escape responsibility for the treatment of refugees. In this sense, a core commercial law topic has a life well beyond the immediate needs of industry.

Commercial law exists even in the more mundane aspects of urban life. How many law students would be aware that they have created a bailment every time that they have borrowed a DVD from their local video store? Perhaps a few would be aware that their purchases from iTunes are covered by consumer laws. The scope and reach of commercial law is quite wide. To have a knowledge of commercial law is to be better informed about your rights and obligations in society.

Thematic concerns in commercial law

The various doctrines of contract law are organised around the notions of obligation and bargain. These concepts give a structure to contract law. The key doctrinal groupings: formation, terms and interpretation, vitiating factors and termination and breach; all come together at the behest of these concepts. In stark contrast, commercial law has no central organising idea. Commercial law is an unstructured body of law in which different sets of law converge only on the basis of their relevance to commercial life. Nonetheless, there are recurrent thematic ideas and concepts within commercial law that give some semblance of coherency to a fairly diverse area of law.

One such theme is the proscription on bad faith conduct. By 'bad faith' we mean conduct that is calculated to deceive or which otherwise goes against conscience. Such conduct is unreasonable and beyond the boundaries of acceptable commercial conduct. Section 18 of the Australian Consumer Law ('ACL'), which prohibits misleading and deceptive conduct, is entirely designed to combat such conduct. So too are ss 20–22 of the ACL which deal with unconscionable conduct. Sections 20–22 of the ACL are

concerned with providing redress against commercial conduct that attracts a high degree of moral opprobrium.

Another idea which carries across various fields of commercial law is that the one who makes the representation bears the risks associated with reliance. This idea defines the doctrine of ostensible authority within agency law. Yet the idea also recurs within insurance law where a representation by the insured which misleads the insurer can have serious repercussions in the insurance contract.

The structure of the book

Chapter 1 deals with personal property. This chapter articulates the nature and boundaries of personal property. As one of the most frequently traded commodities in commercial life, personal property is an essential building block in commercial law.

Chapter 2 deals with the sale of goods. This chapter looks at the fundamental requirements of a sale of goods contract and the ways of distinguishing a sale of goods contract from other contracts. Chapter 2 also explores those terms that are implied into sale of goods contracts by the *Goods Act 1958* (Vic) ('Goods Act').

Chapter 3 deals with the transfer of property. It provides a brief overview of the categories of goods. The chapter also examines the five statutory presumptions that apply under the Goods Act and the exceptions to the *nemo dat* principle. It also provides a brief overview of the common law relating to retention of title.

Chapter 4 deals with price and delivery. It considers the centrality of price to the contract for the sale of goods. In particular this chapter examines the role of the price in the contract's certainty of terms, the exceptions to this requirement, and the operation of those exceptions.

Chapter 5 deals with agency law. It deals with the definition of an agent, the law pertaining to the formation of an agency relationship, the duties of agents and principal and the liability of agents and principals to third parties.

Chapter 6 deals with the law of bailment. It sets out the basic concept of a bailment and the required factors that must be in place for a bailment relationship to exist. The chapter then examines sub-bailments, the categories of bailment, the duties common to all bailments and the relationship between bailment and other legal categories

Chapter 7 deals with the *Personal Properties Securities Act 2009* (Cth) ('PPSA'). It considers the operation of the PPSA. The chapter examines the PPSA's overall design, the definition of security interests, the kinds of security interests it governs, and what constitutes the taking of good security.

Chapter 8 deals with contracts of guarantee. It deals with the nature of a contract of guarantee. The chapter also deals with the formation and enforcement of a contract of

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guarantee. The chapter also deals with the performance and termination of a contract of guarantee.

Chapter 9 deals with insurance law. It considers the governance of the relationship of insurance by the statutory regime contained in the *Insurance Contracts Act 1984* (Cth), and relevant amendment under the *Insurance Contracts Amendment Act 2013* (Cth). The chapter addresses the formation and interpretation of the contract of insurance, and the duty of utmost good faith as it applies to both insureds and insurers. The construction of insurance contracts will also be examined by reference to principles of construction applicable to commercial contracts broadly, and insurance contracts in particular. This chapter also addresses the type of breaches commonly encountered in insurance cases.

Chapter 10 deals with product liability law. It sets out the basic parameters of the product liability scheme under the ACL. This chapter also sets out the cause of action in relation to defective goods and the relevant remedies.

Chapter 11 introduces the ACL. It first examines the rationale for the ACL and then looks at the operation of the ACL.

Chapter 12 deals with the unfair contract terms regime of the ACL. It sets out the rationales for consumer protection and then details the operation of the unfair contract terms regime.

Chapter 13 deals with consumer guarantees. It examines the pre-conditions that must be satisfied in order for the ACL's consumer guarantees to be applicable to a given contract for the sale of consumer goods. The chapter then sets out the various consumer guarantees.

Chapter 14 deals with unconscionable conduct. It examines the equitable doctrine of unconscionable conduct, from which all the statutory regimes are derived, before considering ss 20–22 of the ACL.

Chapter 15 deals with misleading and deceptive conduct. It examines misleading and deceptive conduct under s 18 of the ACL. The chapter looks at the requirements of s 18 and examines the case law under the previous s 52 of the *Trade Practices Act 1974* (Cth).

Chapter 16 deals with public and private remedies under the ACL.

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1

PERSONAL
PROPERTY

Anne Matthew

1.0 Introduction

This chapter will address the topic of personal property. It will first address the fundamental notion of property. It will then explore how the scope of personal property has become more expansive as novel challenges to existing notions of property have arisen over time. This chapter will consider the important distinction between real property and personal property. Sub-classifications of personal property will be considered, including the distinction between chattels real and personal, choses in action and choses in possession. It will explore various types of possession and interference with possession giving rise to actions for trespass, conversion and detinue. The chapter will conclude with a discussion of how the nature of personal property rights can be lost through intermixture, accession or by becoming a fixture.

1.1 Defining personal property

The definition of personal property is informed by the broader concept of property itself. In *Moore v Regents University of California*¹ Mosk J defined property as being ‘sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another’.² The concept of property refers not simply to the idea that an object or thing may become the subject of ownership, but also to the rights that stem from that ownership. In *Commonwealth v Western Australia*,³ Kirby J stated:

The concept of ‘property’ has been applied most broadly. It extends beyond conventional estates and interests recognised at law and in equity whether in realty or in personality. It includes ‘innominate and anomalous interests’.⁴

Property is thus not just an object, but also a relationship and the source of rights. This may include such vital rights as the right to exclude others from the property.⁵ Most importantly, property ownership provides the basis for the owner’s ‘bundle of rights’. In *Moore*, Mosk J stated:

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1 (1990) 51 Ca.3d 120.
 2 *Yuba River Power Company v Nevada Irrigation District* (1929) 207 Cal 521, 523.
 3 (1999) 196 CLR 392.
 4 (1999) 196 CLR 392, 455.
 5 See Thomas Merrill, ‘Property and the Right to Exclude’ (1998) 77 *Nebraska Law Review* 730.

Being broad, the concept of property is also abstract: rather than referring directly to a material object such as a parcel of land or the tractor that cultivates it, the concept of property is often said to refer to a ‘bundle of rights’ that may be exercised with respect to that object – principally the right to possess the property, to use the property, to exclude others from that property, and to dispose of the property by sale or gift. . . . But the same bundle of rights does not attach to all forms of property.⁶

Recognition of property rights is relevant in a wide range of areas of law including succession, crime, insolvency, trusts, taxation, marriage, and the right to compensation or other relief. For example, considering whether something is property for the purposes of taxation may involve different considerations to whether property is capable of being stolen. The breadth of the concept of property may vary in each of these contexts.

1.1.1 Real and personal property

In the immediate context of commercial law, the word ‘property’ is used both to refer to the thing that is capable of being owned and to describe the nature of the rights of ownership in relation to the thing. There are two types of property: personal property and real property. Within the category of personal property there are two further categories: choses in action and choses in possession. In *Barton v Australian Consolidated Press Ltd*,⁷ Isaac J set out these basic categories of property:

The description real and personal property describes and embraces every type and class of property known to law. There is no ‘property’ of any sort which does not fall under one or other of the words ‘real’ and ‘personal’. True enough each has categories: real property comprises corporeal and incorporeal hereditaments, and ‘chattels real’ and ‘chattels personal’ may be convenient subdivisions of ‘personal property’; but once you exclude from that phrase real estate and interests therein and chattels real, then every other kind of property of whatever description falls within the classification of ‘personal property’ especially that which is visible or tangible.⁸

Real property includes land and buildings on the soil.⁹ Land is defined at common law as ‘any ground, soil or earth whatsoever’.¹⁰ In *Wade v New South Wales Rutile Mining*

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6 (1990) 51 Ca.3d 120, 165.
7 [1970] 3 NSW 141.
8 [1970] 3 NSW 141, 143.
9 *Re Leber and the Real Property Act 1900–1956* [1960] NSW 570.
10 *Re Leber and the Real Property Act 1900–1956* [1960] NSW 570, 575.

Co Pty Ltd,¹¹ Windeyer J noted that land includes the soil and ‘everything naturally contained within the land’,¹² aside from deposits reserved to the Crown, such as minerals or petroleum. Real property also includes things attached to the land in such a way that they have become fixtures,¹³ and intangible rights that attach to the land including, for example, easements.¹⁴

Personal property is often identified or defined by reference to what it is not; personal property is not real property.¹⁵ Personal property is classified as chattels real or chattels personal.¹⁶ Chattels real are confined to interests closely concerned with real property, and traditionally included leasehold interests.¹⁷ Chattels personal may be choses in action or choses in possession. Distinguishing ‘choses in possession’ from ‘choses in action’ is apropos of personal property;¹⁸ both are personal property, yet the distinction is a significant one.

‘Choses in action’ are rights enforceable by legal action.¹⁹ In *Loxton v Moir*, Rich J explained:

The phrase ‘chose in action’ is used in different senses but its primary sense is that of a right enforceable by an action. It may also be used to describe the right of action itself when considered as part of the property of the person entitled to sue. A right to sue for a sum of money is a chose in action and it is a proprietary right.²⁰

A chose in action can have significant economic value and include, for example, shares in a company²¹ and debts.²² The right of action itself covers a spectrum of possibilities

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11 (1969) 121 CLR 177.
12 (1969) 121 CLR 177, 185.
13 *Holland v Hodgson* (1872) LR 7 CP 328.
14 *Municipal District of Concord v Coles* (1905) 3 CLR 96; *Re Leber and the Real Property Act 1900–1956* [1960] NSW 570, 575. Leasehold interests have traditionally been considered to be chattels real, a form of personal property discussed below. See *AMP Society v Gregory* (1908) 5 CLR 615, 629.
15 *The North Shore Gas Company Limited v The Commissioner of Stamp Duties (New South Wales)* (1940) 63 CLR 52.
16 *Barton v Australian Consolidated Press Ltd* [1970] 3 NSW 141; *The North Shore Gas Company Limited v The Commissioner of Stamp Duties (New South Wales)* (1940) 63 CLR 52.
17 *AMP Society v Gregory* (1908) 5 CLR 615.
18 *Colonial Bank v Whinney* (1886) 11 App Cas 426, applied in *Sydney Futures Exchange Limited v Australian Stock Exchange Limited* (1995) 56 FCR 236; *Your Response Limited v Datastream Business Media Limited* [2014] EWCA Civ 281.
19 *Torkington v Magee* [1902] 2 KB 427, 430.
20 *Loxton v Moir* (1914) 18 CLR 360, 379.
21 *Pilmer v The Duke Group* (2001) 207 CLR 165; *Sydney Future Exchange Ltd v Australian Stock Exchange Ltd* (1995) 56 FCR 236.
22 *Loxton v Moir* (1914) 18 CLR 360, 379; *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9.

including the right to bring the action directly or by counterclaim.²³ A right to sue for performance of a contractual obligation is a chose in action.²⁴ So too is a cause of action in tort.²⁵

A chose in possession must have a physical existence. If you are reading a hard copy of this book, the physical book itself is a chose in possession, while the intellectual property rights of the copyright owner are a chose in action. The distinction between a chose in action and a chose in possession is not always so sharp. Money is personal property.²⁶ Money in the form of notes or coin is a chose in possession.²⁷ If those coins or notes are deposited to a bank account, the money deposited with the bank becomes a chose in action.²⁸ Indeed, in *Henderson v State of Queensland*,²⁹ White JA noted that a chose in action is ‘the right to recover from the bank the balance standing to the depositor’s credit in an account with the bank at the date of demand’.³⁰

Chattels and goods are personal property. The term ‘chattels’ was described in *Robinson v Jenkins*,³¹ by Fry J as ‘one of the widest words known to the law in its relation to personal property’.³² In *The Noordam (No 2)*, the Privy Council determined that bearer securities found in mail constituted goods, noting that the word is ‘of very general and quite indefinite import, and primarily derives its meaning from the context in which it is used’.³³ In that case the bearer securities were being carried by steamship diverted pursuant to a wartime reprisals order designed to prevent enemy misconduct and the free transport of property of the enemy. The underlying policy objective of the reprisals order was to prevent any kind of commodity reaching or leaving Germany.³⁴ The Privy Council considered that the critical consideration was the context in which the word ‘goods’ was used. In this case that included the policy objective of the reprisals order.³⁵ If the bearer bonds had been characterised as mail, then they were more likely to constitute neutral trade unaffected by the reprisals order. Lord Sumner drew a distinction between the nature and value of postal correspondence and that of the bearer securities: postal correspondence typically communicated information

23 *Commonwealth Bank of Australia v Horvath*, McDonald J; *Commonwealth Bank of Australia v Horvath*, (Senior) McDonald J, Supreme Court of Victoria Practice Court 9168/1994.

24 *The Minister for Health v Brambles Australia Ltd* [2009] WADC 111.

25 *The Minister for Health v Brambles Australia Ltd* [2009] WADC 111.

26 *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, 184.

27 *Croton v R* (1967) 117 CLR 326, 330.

28 *Croton v R* (1967) 117 CLR 326, 330–3; *Travellex v Commissioner of Taxation* (2010) 241 CLR 510, 532 per Crennan and Bell JJ.

29 (2013) 1 Qd R 1.

30 *Henderson v State of Queensland* (2013) 1 Qd R 1, 15.

31 (1890) 24 QBD 275.

32 (1890) 24 QBD 275, 279.

33 (1920) AC 904, 909.

34 (1920) AC 904, 910.

35 (1920) AC 904, 909.

and as such its value rested in the information conveyed between author and reader. This was in stark contrast to the nature of bearer securities, which represented an incorporeal property right transferable by delivery and nothing more. The paper securities were described by Lord Sumner as a ‘convenient form in which to transfer wealth from one country to another’.³⁶

In *Szanto v Aston* a winning lottery ticket was located in the testator’s home at the time of death.³⁷ The testator’s will bequeathed ‘all furniture and chattels that are in the house’ as at the date of his death to his daughter and son-in-law. The residue of the estate was to be shared between the testator’s three other children. The issue before the court was whether the winning lottery ticket was a chattel ‘in the house’. The court acknowledged that while ‘chattels’ extends to both choses in action and choses in possession, there was a longstanding line of authority that a bequest of ‘chattels in a house’ did not extend to choses in action, since choses in action are incorporeal property incapable of having a location. The ticket passed into residue.

Property rights can be created by statute. The statute may explicitly state that property right is being created and identify the nature of the right. Copyright is an example of a personal property right created by statute. Section 196(1) of the *Copyright Act 1968* (Cth) provides that ‘copyright is personal property, and subject to this section, is transmissible by assignment, by will and by devolution of operation of law’.

1.2 Possession

Possession is an essential concept in personal property. A right to possess is ‘a normal incident of ownership; and the name of “property” is often given to it’.³⁸ Possession confers a possessory title and can be evidence of ownership or entitlement to personal property.³⁹ Possessory title is good against every person other than the true owner.⁴⁰ Interference with possession of personal property is the basis standing to sue for remedies in detinue, conversion and trespass.⁴¹ There are at least five different types of possession. These are (1) custody; (2) actual possession or de facto possession; (3) constructive possession; (4) legal possession; and (5) a right to possess.

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36 (1920) AC 904, 908.
37 (2011) Qd R 484.
38 F Pollock and R Wright, *An Essay on Possession in the Common Law* (Clarendon Press, Oxford, 1888), 27.
39 *Russell v Wilson* (1923) 33 CLR 538; *Field v Sullivan* (1923) VLR 70; *The Anderson Group Pty Ltd v Tynan Motors Pty Ltd* (2006) 65 NSWLR 400; *Specialised Transport v Dominiak* (1989) 16 NSWLR 657.
40 *Russell v Wilson* (1923) 33 CLR 538, 546–7, per Isaacs and Rich JJ;
41 See W Holdsworth, *A History of English Law* (Methuen & Co Ltd, London, 3rd edn, 1923) vol III.