

### Topic 3: Sale of Goods under the Goods Act:

Goods Act 1958 (Victoria)

The Competition and Consumer Act 2010 (Cth)

The ACL regulates a number of aspects of conduct associated with the supply of goods and services. It also seeks to safeguard the position of the consumer by the imposition of a series of guarantees.

The Goods Act applies to all domestic sales of goods and transactions. The Sale of Goods Acts applies to all contracts for the sale of goods: there is no monetary limit on the application of the Act, nor is its application limited to corporations.

#### Application of State and Territory Sale of Goods legislation:

##### Sale of Goods Act:

In order for the Sale of Goods Act to apply there must be:

1. A contract of sale;
2. Of goods;
3. As a result of which property in the goods passes;
4. For a money consideration.

#### 1. Goods

##### ➤ Specific goods:

- Are goods identified and agreed upon at the time a contract of sale is made (s 3).
- Specific goods are ones which the parties agree at the time of the contract are the unique goods subject of the agreement.
- Specific goods may be future goods, or ones which do not presently exist.
- They may include goods identified but which are not yet owned by the seller, or goods yet to be constructed yet identified (eg. By reference to a plan number).
- Example: a contract for the sale of a particular motor vehicle.

##### ➤ Unascertained goods

- Unascertained goods are goods which are not specific goods – goods which are not identified or agreed upon at the time of the making of a contract.
- Sub categories of unascertained goods:
  - > Generic goods: Sold on terms which preserve the seller's freedom to decide how and from what source the seller will obtain goods answering the contractual description. The seller can source the goods from any stock as opposed to a particular stock.
  - > Goods sold ex-bulk: These goods which are by express stipulation to be supplied from a fixed and predetermined source, from within which the seller may make his own choice (unless the contract required it to be made in some other way) but outside which the seller may not go. For example "I sell you 60 of the sheep now on my farm".

##### ➤ Ascertained goods:

- Ascertained goods in contrast with specific goods 'probably means identified in accordance with the agreement after the time a contract of sale is made'.

## **Week 5 & 6 – Topic 4 – Transfer of property under the Goods Act:**

### **Distinguishing 'Property' and 'Title':**

The purpose of the Act is to distinguish between sales by the true owner, and 'sales' by persons who are not the owner.

The starting proposition is that if a person disposes of a chattel, whether for valuable consideration or not, they can confer no better title than they have themselves.

Only a true owner can transfer property. However, in some circumstances at common law and under statute, a person who is not the owner can transfer a title sufficient to defeat even that of a true owner.

'Title' is a term used to distinguish between true ownership (property) and entitlement.

The true owner holds title – *Soglease Australia Ltd v Boston Australia Ltd* (1991)

### **The effect of the PPSA *Personal Property Securities Act 1009 (Cth)*:**

The ordinary rule is that a person may not pass any better title than he or she possesses – nemo dat rule.

There are a number of exceptions to the nemo dat rule.

### **Transfer of Property:**

The issue of when property passes in a sale of goods contract is important for the following reasons:

1. Risk prima facie passes with property.
2. A buyer may by reason of provisions in the Act lose the right to reject the goods once property has passed.
3. The party with property in the goods can generally sue for damage caused to the goods.
4. If the buyer has property in the goods they can pass good title to a third party.
5. Generally, the seller can only sue for the price if property has passed to the buyer (*Style Finnish (Qld) Pty Ltd v Abloy Security Pty Ltd* [1994]).

### **Unascertained goods: No transfer of property:**

Regardless of the intention of the parties, when there is a contract of sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained (s 19).

Property in unascertained goods cannot pass. Until the goods have been identified, property in them cannot pass to the buyer.

### **Goods other than unascertained goods:**

When goods are ascertained, the primary rule is that property in goods is transferred to the buyer when the parties intend it to be transferred (s 22(1)).

e) The buyer has notice thereof.

This rule has been construed to cover the situation where specific goods are bought which is unascertained in extent or quality and the price cannot be determined until the extent or quality of the goods is ascertained (National Coal Board v Gamble [1959]).

In order for this rule to apply, the obligation to weigh, measure or test the goods for the purpose of ascertaining the price must be required to be done by the seller, not by the buyer or third party (Nanka-Bruce v Commonwealth Trust Ltd [1926]).

The words 'measure' and 'test' are self-explanatory.

The buyer is required under the rule to have notice of the price as ascertained by the seller having weighed, measured or tested the goods. This probably requires the buyer to have knowledge of the process having been completed and the price ascertained, rather than formal notification.

→ **Goods delivered 'on approval' or 'on sale or return' (Rule 4):**

(1) When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms, the property therein passes to the buyer -

a) When the buyer signifies the buyer's approval or acceptance to the seller, or does any other act adopting the transaction;

b) If the buyer does not signify the buyer's approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

(2) What is a reasonable time is a question of fact.

For the rule to apply, the goods must have been delivered to the buyer 'on approval or on sale or return or other similar terms'.

The common feature of such contracts is that the buyer has a complete discretion as to whether to accept or reject the goods delivered on such terms.

The buyer is not obliged to show that his rejection was reasonable (Berry & Son v Star Brush Co (1915)).

**A sale of approval exists where** the parties intend that the buyer shall buy the goods delivered to the buyer if they approve them, but not if they disapprove (London Jewellers Ltd v Attenborough [1934]).

**A contract on 'sale or return' terms exists** where the goods are taken to be sold at the option of the recipient, if not previously rejected, unless returned to the seller within the time fixed by the contract or within a reasonable time (Kirkham v Attenborough [1897]).

**A sale 'on similar terms' would include** (for example) where goods are sent on trial: Beverly v Lincoln Gas Light & Coke Co (1837). **Under this rule property can pass in three ways:**

1. When the buyer indicates their approval or acceptance of the goods to the seller;

## Week 7: Topic 8: Unfair Contract Terms:

### Why the need for an unfair contract terms regime?

- Modern day shopping – online shopping – less chance of inspecting goods, opportunity to ask vendor questions about the goods, negotiate prices etc, before entering in to a contract.
- Consumer protection
- **Substantive unconscionability:** Relates to the terms themselves.
- **Procedural unconscionability:** Looks to the surrounding circumstances of the conduct.

## Australian Consumer Law – Chapter 2 Part 2.3

### Comprises of section 23 – 28

- Section 23 – Unfair terms of consumer contracts
- Section 24 – Meaning of unfair
- Section 25 – Examples of unfair
- Section 26 – Terms that define main subject matter of consumer contracts etc are unaffected
- Section 27 – Standard form contracts
- Section 28 – Contracts to which this part does not apply

**Before either party to the contract or the ACCC can seek any of these orders, three elements must be satisfied: Section 23:**

#### **1. There must be a consumer contract**

##### **What is a consumer contract?**

- Defined in s 23(3) ACL to mean a contract for a supply of goods or services or a sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.  
Generally a person is considered a consumer if:
- The amount paid for goods did not exceed \$40k – or where the costs of the goods did exceed amount then:
- The goods are of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- The goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

#### **2. The consumer contract must be a standard form contract**

##### **What is a standard form contract?**

- A standard form contract will typically be one that has been prepared by one party to the contract and is not subject to negotiation between the parties – that is, it is offered on a “take it or leave it” basis.

→ **A rebuttable presumption – section 27:** However, while ACP does not specifically define a standard form contract, section 27(1) does create a rebuttable

**Specific goods** – Are goods identified and agreed upon at the time a contract of sale is made (s 3 Goods Act).

Specific goods are ones, which the parties agree at the time of the contract and the unique goods subject of the agreement.

Specific goods may be future goods or ones, which do not presently exist.

Example: Goods yet to be constructed - reference to a plan number

**Ascertained goods** – Means identified in accordance with the agreement after the time a contract of sale is made (Re Wait).

Ascertained goods are not classifiable as specific goods when the contract is made but become identified or appropriated to the contract after the sale is made.

Example: A seller agrees to sell 100 tones of the 200 tones to wheat at the seller's silo. If the wheat is loaded onto the buyer's vehicle after the contract is made then the goods have becomes ascertained after the moment of formation of the contract and in the course of its performance, yet they were not specific at the time of the contract.

**Unascertained goods** – Are goods, which are not specific goods – goods that are not identified or agreed upon at the time of making the contract.

Sub-categories of unascertained goods include:

- **Generic goods:** These are sold on terms, which preserve the seller's freedom to decide how, and from what source the seller will obtain goods answering the contractual description.
- **Goods sold ex-bulk:** These are goods, which are by express stipulation to be supplied from a fixed and predetermined source, from within which the seller may make his own choice (unless the contract requires it to be made in some other way) but outside which the seller may go to. Example: 'I sell you 60 sheep from my farm now'

**Future goods** – Are goods to be manufactured or acquired by the seller after the making of the contract of sale (s 3 Goods Act).

Future goods include goods not yet in existence, and goods in existence but not yet acquired by the seller.