

# Choses in Possession

**Goods or chattels** and **tangible** items in possession fall under this header. A further subdivision exists: legal choses in action; and equitable choses in action.

- Differences with Topic 1 (Real property / land)
  - Real property / land
    - Tenure and estates
    - Range of subsidiary interests carved out of fee simple (eg life estate, lease, easement, profit a prendre)
    - Writing (Conveyancing Act ss 23C(1)(a), (b), 54A)
  - Choses in possession
    - Absolute ownership
    - Others interests based on possession
    - Possession rather than writing.

## Distinction between choses in possession vs choses in action

There exists a clear distinction between choses in possession and choses in action, and there is no halfway house, or third category (*Colonial Bank v Whinney* - eg shares in a company are distinctly choses in action).

There have been calls to expand this distinction as to allow for digitalisation, however such calls have been rejected (*Your Response Ltd v Datateam Business Media* - eg Court rejected the argument that law should recognise a form of intangible property that would be susceptible to 'possession').

## Ownership and Possession

### Ownership

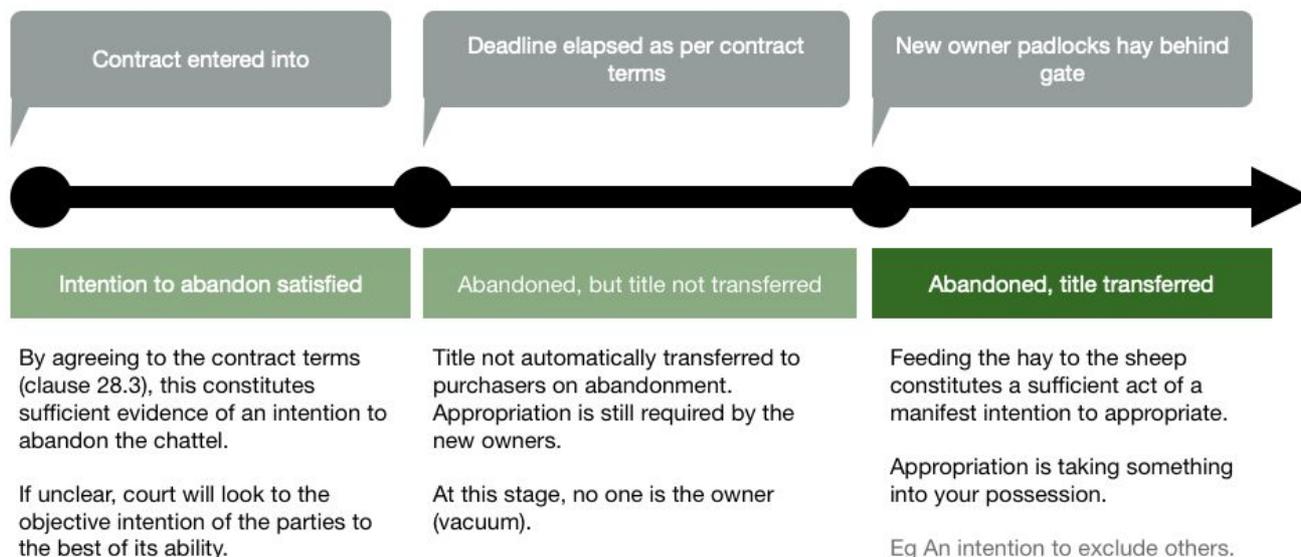
For choses in possession, there is no doctrine of tenure or estates (like there is in real property). 'Ownership' in this sense refers to an abstract relationship between a person and a thing - a residual 'bundle of rights' in an asset - must have at least a present right to future possession (*Re Jigrose*).

To establish ownership: no intention of further ownership + intent to own and appropriate goods (*Re Jigrose*).

---

<b>Abandoned</b>	Title remains with original owner until they <b>manifest an intention to abandon it</b> , and <b>another person appropriates it</b> . <ul style="list-style-type: none"><li>• Manifestation: Evidence from the circumstances (<i>Moorhouse v Angus &amp; Robertson</i> - value, location, bin). This can be via a contractual clause (<i>Re Jigrose</i>).</li><li>• Appropriation: Depends on the circumstances, but probably requires physical control and intention to control. Exclusive possession will be sufficient.</li></ul>
------------------	--

---



### Possession

Possession is a 'definite legal relation to something capable of having an owner'. It does not need to be righteous (ie a thief can still have possession over your stolen car). Only one person may have possession at any given time.

#### Elements of legal possession: physical control + intention (*The Tubantia*).

The significance of possession, beyond being a legal interest, is that it is:

- Evidence of title; and
- Confers possessory title, good against all except the owner (eg If I possess something, I am entitled to continue to possess it, subject to the rights of a superior rights-holder or a superior earlier possessor).

The extent to which physical control will constitute possession depends greatly upon the circumstances (*The Tubantia* - eg sending divers, doing works on the ship, excluding strangers). The plaintiff just needs to do with the chattel what a purchaser 'would prudently have done', the use and occupation of which the subject matter was capable. This must nevertheless be combined with an intention to possess.

Compare 'possession' with 'custody': 'Such a relation towards a thing as would constitute possession if the person having custody had it on his own account' (*FCT v ANZ*). It is enough that you have physical control *in fact* (eg holding the key to open the box and produce the documents). Operation of contractual restrictions not relevant.

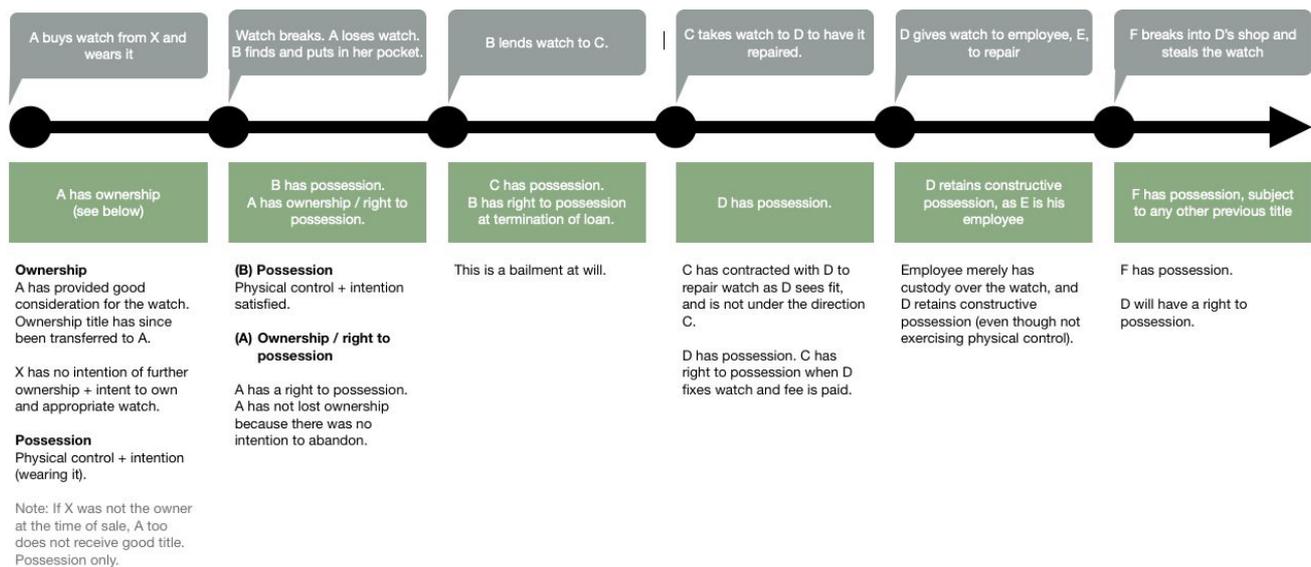
Be careful with terminology:

---

<b>Constructive possession</b>	In circumstances where an employee/agent/servant enjoys physical possession over a chattel, the law will say that person only has custody. The employer/principal/master has <b>constructive possession</b> over that chattel. ie Despite not exercising physical control, the law construes that person to have possession and is able to exercise all the rights that possession brings.
--------------------------------	---

---

## Practice scenario



## Delivery

The concept of delivery refers to the 'voluntary transfer of possession from one person to another' (*Gamers Motor Centre* per Mason CJ). It doesn't matter what type of delivery we say has occurred. Same consequences flow irrespective of type. 2 (maybe 3) types:

Actual delivery	Change in actual possession.
Constructive delivery	Change in legal character of possession. Haven't actually given you the chattel, but have altered the legal character in which you possess the chattel - and the law construes the delivery. ( <i>Gamers Motor Centre</i> per Mason CJ - a receipt exchange meant the Dealer held the vehicle as bailee pursuant to the agreement to buy a car) Eg Delivery by attornment [formally acknowledging a transfer or something]: <ul style="list-style-type: none"> <li>• Seller in possession attorns to buyer after sale and holds as bailee;</li> <li>• Buyer in possession prior to sale holds goods after sale on own account;</li> <li>• Bailee for seller attorns after sale to buyer and holds as bailee for buyer.</li> </ul>
Symbolic delivery?	In circumstances where the bulky chattel is incapable practically of actual delivery (eg yacht) ( <i>Bank of NSW v Palmer</i> ). Delivery of a symbol may be construed as delivery (eg delivering a part of the chattel, eg key - <i>Lock v Heath</i> (one chair, when many are being sold)). Might be regarded as as form of constructive delivery (as declaring yourself as bailee).

## Transferring Ownership through Losing and Finding

### Questions to consider

Preliminary question: Has the chattel been abandoned or lost? Owner will only have a claim if lost. If there was an intention to abandon, their title evaporates.

### Issues:

- Potential claimants - what is the basis for their claim (owner, occupier, finder? Finder as agent/employee?)
  - Finder and occupier's claims will be based on possession.
- In determining the respective titles of the occupier vs the finder, consider the location of chattel - where is the chattel? (eg in or attached to land, or on the land? Attached to a building, on or in the building?)

# Security Interests Under the PPSA

Transactions discussed above may attract *Personal Property Securities Act 2009* (Cth) ('PPSA') rules, particularly:

- Mortgages (transfer of ownership by way of security);
- Pledges (pawning) (transfer of possession by way of security); and
- Charges (whether fixed or floating).

Likewise for statutory securities (eg torrens title mortgages) - ss 56, 57 *RPA*.

PPSA also applies to quasi-security interests and hire-purchase and retention of title arrangements. It also impacts upon priority, results of insolvency, etc (cf *White v Spiers*).

## 1. Does a security interest exist? - s 12 (threshold question)

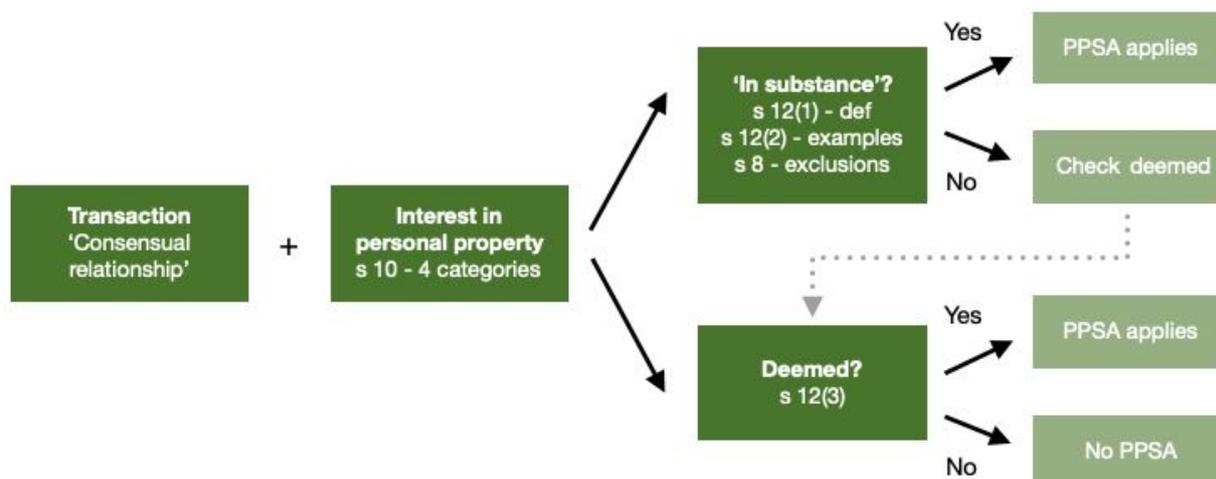
*PPSA* s 12(1):

A 'security interest' is: 'an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation'.

The PPSA captures more security interests than traditionally captured under common law.

- 1) Traditional security interests
  - Chattel mortgage; pledge
- 2) Transactions that secure payment or performance
  - Eg Retention of title sale, hire purchase, assignments (mortgages) of debts or shares
- 3) Some transactions, even if they don't secure payment or performance
  - Eg Certain leases and other bailments; assignments of certain debts

The consequence of this is that security interest holders need to take steps to protect that interest. PPSA also impacts on priority; purchaser from grantor; insolvency of grantor.



### Elements

'Transaction'	Not defined in <i>PPSA</i> , but s 8 <i>PPSA</i> affirms the below Canada/Victoria SC view: 'Consensual relationship between parties to transfer something, not statutorily enforced agreement.'
'Interest in personal property'	Defined in s 10 <i>PPSA</i> . Different schema to the general law. No land. The below are subsets of personal property: