SALE OF GOODS

OUTCOMES o Definition and classification of goods o Sale of goods distinguished from other sales o Warranties as to title o **Transfers by non-owners** o Passing of property o Risk o **Retention of title** o Implied terms (general, fitness for purpose, merchantable quality) o Sale by sample o **Remedies (buyer and seller)** o **Vienna Convention**

The principles of common law relating to the Sale of Goods were codified in the UK under:

- Sale of goods act 1893
- Bills of Sale Act,
- Factors Act
- Bills of Exchange Act.

Each AUS state/territory passed legislation practically identical to the UK acts.

- Different states have different section numbers
- NSW Sale of Goods Act 1923
  - **Definition:** a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration/price. (s6 SOG Act)
  - Definition outlines certain kind of contract "contract of sale of goods"
  - Act provides **"default rules"** so parties can contract out
  - Defines warranty but NOT condition
    - **WARRANTY**: an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract. The breach of which gives rise to a claim for damages, but not the right to reject the goods and treat the contract as repudiated.
  - Not a complete code
    - applies only to the sale of goods & has no application to contracts for the provision of services or expenditure of skill and workmanship
    - Most of the normal principles of contract law continue to apply.
    - REFER **s4(2)-(3) SOG Act**

s4 (2) SOG Act REMEDIES

1. specific performance
2. Injunction
3. EQ lien in cases where paid for but not yet completed

s56 SOG ACT protects remedies 1-3 of s4 (2)

- s4 (2) (a) amended s4(2) in areas where:
  - rescission applies for innocent misrepresentation
  - swept away right to rescind (if performed can't rescind).
  - h/ever academic argument as to whether or not it applies

GOODS

- For the SOG Act to apply there must be a sale of goods (s5)
- **DEFINITION/ISSUES**:
  - excludes land or interest in land, chooses in action and money
  - includes:
    - all chattels personal other than above items
    - things severed from land provided the thing is capable of severance and there is in fact an agreement to sever, otherwise it will be a sale of land and not a sale of goods; Mills v Stokman (1966) 116 CLR 61.
  - Definition difficulty in distinguishing contract for the sale of goods from a contract for work done and materials supplied.

- If the contract is one for the transfer of title to a chattel then it is a sale of goods
  - However if essence of the contract is the skill of the other party then it is not a contract for the sale of goods.
  - For example: a contract for the sale of a mink jacket is a sale of goods even though skill is expended in its creation; Marcel Furriers Ltd v Tapper [1953] 1 WLR 49. However, a contract with an artist to paint one's portrait is not a contract for the sale of goods; Robinson v Graves [1935] 1 KB 579.
  - Position is not clear with respect to software.(See Construction Products Pty Ltd v

- Goods need not be transferred at the time of making the contract but may be transferred at a later time
    - Essential character/substance test
        - Tendency to return to older test in Lee v Griffin (1861)
        - Per Blackburn J "if the contract be such that it will result in the sale if a chattel, the proper form of action, if the employer refuse to accept the article when made, would be for not accepting."
        - Difficulty of distinguishment between tests (essent. indistinguishable) drawn in Hewett v Court
        - Application unpredictable
    - Arguable that a better test would be whether the contract results in the sale of a chattel; see Delta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd [1979] VR 167 at 181-186.
    -

ELEMENTS IN A CONTRACT OF SALE OF GOODS

- A contract for the sale of goods is defined as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for price. (see s6)
    - Ordinary contract principles apply
    - 3 points must be present
        - The seller transfers or agrees to transfer
        - Property in the goods to the buyer
        - For money consideration (price)
- The SOG Act will not apply to any transaction, which is not a contract for the sale of goods.
- Refer s5(1) and s6(2)-(4) SOG Act
- The difference between a sale & an agreement to sell is merely the time of passing of property/imposition of some condition on passing of property.
    - Contract acts as conveyance of property (compared to sale of land contracts which are separate instruments)
    - Contract may be an agreement to sell even though the parties have express unconditional sale (e.g. unascertained goods, Jansz v GMB Imports P/L (1979) VR 581)

SALE OF GOODS DISTINGUISHED FROM OTHER SALES

- **Transfer or agrees to transfer**
    - Hire purchase agreements
        - If goods are stated to remain the property of the owner until paid even though the buyer is given possession and there is an obligation on the buyer to pay all instalments without the right to return the goods then the contract is one for the sale of goods; Lee v Butler [1893] 2 QB 318.
        - if there is a hiring of the goods on payment of instalments with a proviso that if all instalments are paid the goods become the property of the buyer then there is merely an offer to sell; Helby v Matthews [1895] AC 471.
- **Money Consideration**
    - In order to constitute a sale of goods under the Act there must be some money consideration for the sale.
        - The SOG Act does not apply to transactions in which the consideration is provided by barter, exchange or gift

- This does not mean that the price of the goods must be fixed by the contract, although it usually is.
  - Even if the price is not fixed all the elements of a concluded contract must still be present.
- Refer s 13 SOG Act

- **Property**
  - Ownership in the goods must be transferred.
  - Refer s 5(1) SOG Act

- **Time**
  - Refer s15 SOG Act
  - Stipulations of time are to be treated as not of the essence (unless the contract otherwise provides.)

- **Exclusions**
  - Refer s 4(4) SOG Act
  - Parties contract out (s57 SOG Act)
    - Express/implied/conduct/usage/course of dealings
    - Trade Practise Act N/A
      - implies terms into contracts for the supply of goods to a consumer; ss.66-72
      - similar to that which the SOG Act implies and cannot be excluded; (s68)
      - If the goods are not of a kind ordinarily acquired for personal domestic or household use or consumption then the seller can limit their liability to the repair or replacement of the goods or the cost thereof (s68A)
    - Fair Trading Act implied terms N/A

  - **No contract out of consumer sales** (s62-4) and implied terms (s18-20)
    - Any provision in a contract amounting to a consumer sale, which purports to excluded or vary any of the implied terms relating to Description, Fitness for Purpose, Merchantable Quality and Sale by Sample is void.
    - The onus of proof lies on the person who asserts that a sale is not a consumer sale (s63)
    - Definition of consumer sale (refer s62 SOG Act):
      - a sale by a seller in the course of a business
      - goods commonly brought for private use
      - Sold to a person who does not buy for a business

  - Subject matter of contract must be goods (s5)
  - Contract for working materials not a contract of sale of goods
  - Contract for building a house not a sale of goods (Hewitt v Court)
  - Gifts not contract for sale of goods (s6(1))
  - Barter contracts not contract for sale of goods
    - Can't rely on implied terms here but common law

- **Agreement to sell v sale of goods**
  - The term contract for sale of goods includes:
    - Agreement to sell (executory contract)
    - A sale of goods (executed contract)

AGREEMENT TO SELL	A SALE OF GOODS
▪ Occurs where ownership of goods	▪ Occurs where ownership of goods

▪ When delivered becomes a sale (e.g.: unascertained goods)	▪ Goods agreed upon at time of sale (no further obligation by seller)
▪ Seller has right to sue for damages in event of default. ▪ Buyer (where default) can only sue as goods not yet passed to them.	▪ Seller has right to sue for price of goods ▪ Buyer has right to sue for damages if seller defaults, and conversion if wrongful disposal occurs.
▪ Risk is with the seller (ownership not yet passed to buyer)	▪ Risk after sale is with the buyer (goods already passed)

CLASSIFICATION OF GOODS

- **Existing Goods**
  - **DEFINITION**: Those goods owned or possessed by the seller at the time of contract (where goods are existing at the time of contract conclusion)
  - Refer s10 SOG Act
- **Future Good**
  - **DEFINITION**: those goods to be manufactured or acquired by the seller after the making of the contract for sale
  - goods may be **UNASCERTAINED** or **SPECIFIC**
  - Refer s10 SOG Act
  - If sufficiently identified, they may be specific goods so that their destruction may frustrate the contract (s12)
  - Purported sale of future goods cannot pass property in the goods
  - Contract acts as an agreement to sell rather than a sale (s10 (3))

SPECIFIC GOODS	UNASCERTAINED GOODS
• Those goods identified and agreed upon at the time contract of sale is made	• goods sold under description where no particular goods identified & agreed upon at time contract made
• E.g.: specific piece of Dresden china	• E.g.: 100 tonnes best quality meat
• Property passes to buyer at such time as parties intended transfer, taking into account the terms of contract, conduct & circumstances of the case	• Property not passed until the goods become ascertained, being in a state appropriate to the contract (either by assent of buyer-seller/seller- buyer)
• Where contract of sale & goods without knowledge have perished at time contract is made, contract is void. (s11)	
• Where agreement to sell & without the fault of the seller/buyer, the goods perish before risk passes, contract is avoided (s12)	

WARRANTIES AS TO TITLE

- **REFER TO IMPLIED TERMS SHEET ON WEBCT (SUMMARIES)**
- See s5 (1) for definitions
  - Distinction between warranties and conditions made in SOG Act and common law
  - Whether a term of contract for the sale of goods is a condition or a warranty depends on

        - Stipulations as to time of payment are not deemed to be conditions of sale (essence of time depends on contract terms)
        - Stipulations as to time for delivery of goods are considered essential terms unless the contrary intention is clearly shown.

- A term may be implied into a contract by:
    - Fact
    - Law
    - Custom

    - Certain implied warranties and conditions are applicable for the sale of goods
        - Doesn't apply to consumer contracts
        - See s17 SOG Act
        - s17 (1) demonstrates that the essence of a contract of sale of goods is one which requires a transfer of title. If the seller cannot give good title then the buyer can rescind the contract and recover all money paid to the seller notwithstanding that the buyer has had the use of the goods in the interim; <u>Rowland v Divall</u> [1923] 2 KB 500 at 506-507 per Atkin LJ

    - Similar terms are implied by the <u>Trade Practices</u> Act 1974 (Cth).
        - These terms are broader than those implied by the <u>Sale of Goods</u> Act as they relate to the supply of goods rather than the sale of goods.
        - However, they are confined to the supply of goods by a corporation in the course of a business to a consumer.
        - s69 (1) Trade Practices Act 1974 (Cth) equal provision to s17 SOG Act
            - TPA is not limited to the sale of goods but applies to the supply of goods
            - The supplier must be a corporation
            - The supply must be to a consumer.
                - Supply by non-corporate entities to consumers is now covered by s.40O of the <u>Fair Trading</u> Act 1987 (NSW) which is in like terms to that of s.69 of the TPA.
                - Like the TPA s.40O cannot be excluded (see s.40M)
            - Unlike the SOG Act warranties as to title it is not possible to exclude the warranties implied by s.69 (see s68 TPA)
                - However, s.69 (3) does permit a contract to be expressed to allow the supplier to transfer to the consumer only such title as the supplier or a third person may have in the goods.

.

    - A breach of condition may be treated by the innocent party as a breach of warranty (right to claim damages and terminate)
        - Terms implied by the SOG Act or TPA are simply terms of the contract and their breach gives rise to damages.
        - If breach of SOG Act, will not permit the return of the goods unless the contract can be rescinded at common law
        - If breach of TPA, there is a statutory right of rescission even if property in the goods has passed to the buyer (see s75A TPA)
        - s16 SOG Act
            - lays down the principles for dealing with breaches of conditions and warranties
            - If the seller is in breach of a condition the buyer may waive the breach of the condition and sue for damages (s16 (1))

        - The breach must be treated as a breach of warranty unless the contract says otherwise; see s.16(3)
            - In contract for the sale of goods where the buyer accepts delivery of the goods the buyer cannot rely on a breach of a condition by the seller and reject the goods
    - Warranty must be distinguished from a representation amounting to an expression of opinion. Also from a representation of fact which induces but does not form part of the contract.

- The SOG Act distinguishes between terms that are:
    - Conditions
    - Warranties
    - Intermediate stipulations
        - Not defined
        - s4 (5) preserves the common law position requiring the seriousness of the breach of such a stipulation as justification for repudiating the contract

CONDITIONS	WARRANTIES
• Gives a right to reject the goods and treat the contract as repudiated.	• For definition see s17 and s5(1) SOG Act
• Not defined by SOG Act but at common law	

- The imposition of implied terms as to quality of goods reflected a move away from the principle of 'caveat emptor' or buyer beware
    - This reflected the changing nature of commercial goods as a result of the industrial revolution. As goods became more complex it was no longer the case that the buyer could ascertain for him or herself the quality of the goods by mere inspection

SOG Act implies certain implied terms in all contracts for sale unless different intentions can be shown. Implied Terms (SOG Act) are:

- **<u>Conditions as to title</u>**
    - Implied condition on the part of the seller that he/she has a right to sell goods/will have a right to sell goods when the property is to pass (s17 SOG Act)
    - Amounts to a guarantee of undisturbed possession
    - Example:
        - Buyers title avoided by reason of fact that seller has no title transferred, buyer is entitled to a refund of any money paid for goods, notwithstanding buyer might have had temporary enjoyment/use of them (Rowland v Divall)
        - If seller has no title, lack of consideration
        - Where a seller who has no title to goods purports to sell subsequently acquires a good title before the buyer rescinds, seller can hold buyer to contract (title goes to feed/cure the previously defective title and will pass to the buyer-Patten v Thomas Motors P/L)
    - Warranties implied as to title per SOG Act:
        - That the goods are free from any change or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made
        - That the buyer will have and enjoy quiet possession of the goods. This amounts to

- **<u>Correspondence with description (sale by description)</u>**
  - Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description (description identifies goods) (s18 SOG Act)
    - The implied condition that the goods will correspond with that description means that the goods will not correspond where the buyer would be able to reject the goods as being of a different kind from those he or she agreed to buy; <u>Ashington Piggeries Ltd v Christopher Hill Ltd</u>
    - **Buyer has not seen the goods**
  - If goods do not conform to description, buyer is entitled to:
    - Reject the goods for breach of the implied condition
    - Sue for damages
  - Implied condition can apply if:
    - The buyer has not seen the product and is relying on the description alone (Varley v Whipp)
    - Buyer seen and examined goods (provided bought according to description)
  - Applies even if not sold by dealer (private sales)
  - Care must be exercised to distinguish between statements of description that identify goods and statements of quality as these do not form part of the contractual description of the goods (for the purposes of determining breach)
    - Where the sale is by sample as well as by description the goods must correspond with the description as well as the sample
    - For example: In <u>Ashington Piggeries Ltd v Christopher Hill Ltd</u> [1972] AC 441 the herring meal was still held to be sold by description notwithstanding that it contained toxic material. By contrast, in <u>Elder Smith Goldsborough Mort Ltd v McBride</u> [1976] 2 NSWLR 631 a buyer who bought a bull at auction was held to have bought the bull by the description of "a breeding bull' having regard to the price paid and the circumstances of the sale. Thus the bull being sterile the buyer was able to recover damages from the seller for non-correspondence with the description
  - s70 TPA implies similar term into contracts for the supply of goods by a corporation in the course of a business to a consumer where the supply is by description
    - difference between s70 TPA and s18 SOG Act is:
      - the exclusion of auction sales
      - TPA applies only to corporations here. Section 40P of the <u>Fair Trading</u> Act 1987 (NSW) implies a like term into contracts for the supply of goods by a person in the course of a business to a consumer where the supply is by description
  - See **s18** SOG Act
    - implies a term that the goods will correspond with the description in the contract
    - argument that should be considered as facet of doctrine of failure of consideration
  - See **Speedway case**
    - s18 applies where goods are sold by description even though the buyer has inspected the goods.
    - Unascertained goods are always sold by description.
    - Specific goods can be sold by description.
    - In order for there to be a sale by description, the goods must be selected because of their correspondence to a certain description or classification. That is the description must go to identifying the goods

    - The ordering of goods over the counter is normally a sale by description.
    - Blurring of contractual and pre-contractual representations (WIDE)
    -

- <u>**Merchantable Quality**</u>
  - Merchantable quality has been defined as fit for any of the purposes for which the goods are normally put (see <u>David Jones v Willis</u> (1934) 52 CLR 110 at 123 per Starke J and <u>Grant v Australian Knitting Mills</u> (1936) 54 CLR 49 at 60.)
  - Where goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods are of a merchantable quality, provided that if the buyer has examined the goods there is no implied condition as regards defects which such examination ought to have revealed (**s 19 SOG** Act)
    - Goods are commercially saleable under the description they were sold (**common law viewpoint)**
    - Definition per Australian Knitting Mills Ltd v Grant/**s19(2)** SOG Act
    - No comprehensive definition (read in light of facts surrounding the case)
    - For the condition of merchantable quality to be implied in contract, the goods must be bought by description (interpreted broadly). Goods may be bought by description even where the buyer has seen and examined the goods provided they were bought by description
      - see Lord Wright at 61 per Grant v Australian Knitting Mills Ltd
  - if the buyer examines the goods before the contract is made, the condition is not implied as regards to defects which such examination ought to have revealed
    - see Thornett & Fehr v Beers & Sons [1919] 1 KB 486
  - goods sold by description over the counter must be of merchantable quality
  - Goods must be merchantable in the state in which they are sold
    - A defect, which is easily cured, is just as bad as one that is permanent. (see <u>Grant)</u>
    - It is no defence for the seller to say that they were unaware of the defect in the goods or that the defect was that of the manufacturer

Goods must be:

- Bought by description
- From a seller who deals in goods of that description (contractual)
- Then there is an implied term as to merchantable quality
- But not if the buyer examines the goods if the examination ought to have revealed the defect

  - The main difference with consumer sales is that the goods must be fit for the purpose or purposes for which they are commonly bought
    - whereas under s19 (2) the goods need only be fit for any one of the purposes for which they are normally sold having regard to their price and description
    - where the goods are sold as second hand then the liability of the seller for goods which are not of merchantable quality is limited to that of the cash price of the goods **(s64(9))**
  - **TPA-see s71(1)**
    - Focuses on reasonable expectations of the consumer
    - Description of goods important factor in application
  - **SELLER'S OBLIGATION**
    - Not clear whether goods must be of merchantable quality at time of delivery or

        - Seller is responsible for latent defects (per **DIXON TEST**)
        - At time of sale, buyer may know of defects in the goods, hence not entitled to later claim unmerchantability due to known defects (see s71(1) TPA)
        - For bulk goods, where part of goods defective, buyer entitled to treat entire consignment as unmerchantable

- <u>**Fitness for purpose**</u>
    - s19 SOG Act strongest protection for buyer.

To establish a breach, it must be shown that the buyer expressly or by implication:

- **Makes known to the seller the purpose for which the goods are required**
    - See s 19(1) SOG Act
    - Definition of 'particular purpose' quite general
    - If goods are such that they have only one purpose then the buyer makes this purpose known to the seller simply by asking for the goods by description (PURPOSE INFERRED)
        - See Grant v Australian Knitting Mills
    - However if the buyer wishes to put the goods to an unusual use then this must be expressly made known to the seller

- **To show that the buyer relies on the seller's skill and judgement**
    - Doesn't need to be total or exclusive reliance
        - Partial reliance sufficient to bring s19(1) into operation
    - The buyer shows reliance on the seller's skill by selecting a seller who makes it his or her business to supply goods of the same description
    - If reliance is between 2 manufacturers, reliance will be a question of fact, answered by looking at the whole course of dealings.
    - If clause in contract excluding reliance on retailer, etc, this negates s19(1)
        - Clause cannot be part of contract as brought to attention after conclusion of contract for sale
    - The seller accepts that reliance by the buyer making known the purpose for which the goods are required and then supplying those goods
        - This is so even if the seller does not in fact have that skill.
        - See Ashington Piggeries
    - Non-reliance can be inferred
        - Within knowledge of the buyer

- **The goods are in the course of the seller's business to supply**
    - The seller is deemed to have the skill to know whether the goods are fit for the purpose because he or she deals in goods of that description
        - This means that because the seller deals in goods of a kind that fits the description, the seller is deemed to hold him or herself out as having the necessary skill to select goods that will be fit for the particular purpose for which he or she knows the buyer wants them
        - may be in the course of the sellers business to supply even if the seller is dealing for the first time in these goods provided the seller is willing to accept orders for them
    - The sale of the goods have to form an integral or regular part of the seller's business it is enough if it is peripheral to other business activities (see <u>Stevenson v Rogers</u> [1999] 2 WLR 1064.)
    - Cannot be in course of business if seller doesn't have a business
        - Private sales outside ambit

        - Considered that seller deals in goods of the description if they are willing to accept orders in the course of business (at 495)

    - **The goods are not fit for the said purpose**
        - Goods can be fit for purpose if they are able to fulfil that purpose at the time of sale even though they subsequently break down
            - Will depend on the condition of the goods at the time of sale and their subsequent use.
            - See Crowther v Shannon Motor Co Ltd
        - See s71(2) TPA and s40Q(2) FTA

    - **SELLER'S OBLIGATION**
        - Liability of seller quite strict (duty)
        - Must provide goods which are reasonably, not absolutely, fit for purpose (obligation)
        - Seller will only be responsible if they are in the same apparent state as when they were delivered apart from normal wear and tear (Lambert v Lewis)

- <u>**Sale by Sample**</u>
    - Where there is a sale by sample, there is an implied condition that (however no firm rules apply):
        - The bulk will correspond with the sample in quality
        - The buyer will have a reasonable opportunity of comparing the bulk with the sample
        - The goods will be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample (s20 SOG Act)
        - Question of fact (test is one of)
    - Closely related to sale by description
        - Usually find in favour when sold in bulk
        - Not a sale by sample if buyer does not rely upon the sample
        - s20 (2) (c) relates to merchantability and the sample
            - can contract out of conditions of section
            - agreement which purports to oust them must be clear and unambiguous to have effect
    - There must be an express or implied term in the agreement that the goods sold will correspond with the sample. It is not enough that during negotiations the buyer is shown a sample
        - See <u>J S Robertson (Aust) Pty Ltd v Martin</u> (1956) 94 CLR 30 at 60.
    - The reasonable opportunity afforded to the buyer to compare the bulk with the sample means that the examination need only be that of a reasonable person doing such inspection
        - The buyer in inspecting the sample need not pull the sample apart or subject it to any unusual tests
        - See <u>Drummond & Sons v Ingen & Co</u>
    - However if the buyer fails to find a defect in the sample that a reasonable inspection should have revealed then the buyer cannot complain that the bulk has the same defect
    - Exceptions:
        - If the contractual description of the goods is vague, obscured or fraud is involved then parole evidence might be admitted to show that the sale is one by sample

        - Buyer shows that there is a collateral contract that the goods agree with a shown sample
            - See Thorne (LG) & Co Pty ltd v Thos Borthwick & Sons (A/asia) Ltd

<u>TRANSFERS BY NON-OWNERS</u>

- **REFER TO TRANSFERS BY NON-OWNERS SHEET (WEBCT SUMMARIES)**
- Rights of a buyer where the seller had no title to the goods.
- Constitutes a breach of the term implied by s.17 (1) and gives the buyer an action against the seller.

A SELLER CANNOT GIVE A BETTER TITLE THAN THAT HE/SHE POSSESSES -NEMO DAT QUOD NON HABET (S26 (1) SOG ACT)

- This raises an important conflict in the law between the need to protect the property of the true owner and the need to uphold commercial transactions. The law has therefore developed a number of exceptions.

EXCEPTIONS TO NEMO DAT

- **ESTOPPEL**
    - s26 (1) SOG Act
    - The true owner's conduct must be such that he or she is prevented at law from denying the seller's right to give a good title to the buyer.
        - conduct may comprise expressly or impliedly representing that the seller has the authority to make the sale
        - directly arming another to act has owner or agent of the owner
        - A failure to take steps to prevent the a sale could in some cases constitute estoppel but inaction, silence or gross carelessness in the protection of one's own property is not enough; <u>Thomas Australian Wholesale Vehicle Trading Co Pty Ltd v Marac Finance Australia Ltd</u> (1985) 3 NSWLR 452 at 469 per McHugh JA.
    - **TYPES (see Moorgate Mercantile Co Ltd v Twitchings)**
        - Representation
        - Negligence
            - Must be a duty of care owed by the owner to the innocent buyer and therefore mere carelessness is not enough.

- **SALE UNDER A POWER OF SALE OR COURT ORDER**
    - s26 (2) (b) SOG Act
    - definitions:
        - Common law power of sale=a sale under a pledge or a bill of sale.
        - Statutory power of sale=a sale under the SOG Act by an unpaid seller where property in the goods has passed to the buyer or a sale under the <u>Uncollected Goods</u> Act 1995 (NSW) by a repairer who has not been paid.
        - Sale by order of the court=one that occurs where property is seized pursuant to a writ of execution in the course of enforcing a judgement.

- **SALE BY MERCANTILE AGENT**
    - s26(2) (a) provides that the nemo dat rule doesn't effect the operation of the <u>Factors (Mercantile Agents)</u> Act 1923 (NSW)
        - 5 Factors (Mercantile Agents) Act 1923

        - protects persons who buy from those who hold themselves out as being in the business of a dealer in the type of goods sold
        - Operates to create the seller as agent of the owner with express authority to sell.
    - In order to claim the benefit of s.5 a buyer must prove:
        - The seller was a mercantile agent.
        - The owner entrusted the goods (or their documents of title) to the seller.
            - Onus is on the true owner to disprove the entrustment was with his or her authority or consent; Associated Midland Corporation v Sanderson Motors Pty Ltd [1983] 3 NSWLR 395 at 400.
        - The seller was so entrusted in his or her capacity as a mercantile agent.
            - The entrustment must occur while the seller is a mercantile agent.
            - Section will not apply if the seller later becomes a mercantile agent; Heap v Motorists' Advisory Agency Ltd [1923] 1 KB 577 at 588.
        - The mercantile agent makes the sale in the ordinary course of business.
            - The 'ordinary course of business' is a question of fact having regard to the commercial area in which the mercantile agent operates, and includes the hours of business kept and the place from which the business is operated so that there is nothing to indicate to a buyer that anything wrong is being done; Associated Midland Corporation v Sanderson Motors Pty Ltd [1983] 3 NSWLR 395 at 400.
        - The buyer acquires the goods in good faith and without knowledge of the mercantile agent's lack of authority.
            - Good faith means honesty and mere negligence is not enough to show an absence of good faith.
            - Wilful blindness to obvious facts may demonstrate lack of good faith.
            - The buyer must show he or she did not have actual notice of the lack of authority; Associated Midland Corporation v Sanderson Motors Pty Ltd [1983] 3 NSWLR 395 at 401.
    - The overall onus of proof lies on the buyer who claims title under s.5(1); Associated Midland Corporation v Sanderson Motors Pty Ltd [1983] 3 NSWLR 395 at 399.
    - In cases where the mercantile agent remains in possession after the entrustment is finished then the buyer is given a similar protection under s5 (2) to that given under s5 (1).

- **REGISTRATION OF INTERESTING GOODS ACT 1986**
    - s26 (2) (a) provides that the *nemo dat* rule does not effect the operation of the Registration of Interests in Goods Act 1986 (NSW).
        - Act provides protection to the buyer of prescribed goods, which are the subject of a registrable interest
        - Purchased by non dealer from dealer in the goods, in good faith and for value with/without notice of registrable interest
            - Buyer obtains good title
        - OR purchased from debtor, in good faith for value without notice of the registrable interest
        - effect of the ROIG Act is to protect a buyer who comes within the Act from mortgagees, lenders and other secured creditors who would otherwise be able to claim an interest in the goods in priority to the buyer

        - This reflects the policy of the Act that secured creditors who do not register their interest must bear the loss and not the buyer in cases where the seller sells goods with no title or a defective title.
        - Act will not protect the buyer from claims by the true owner of a stolen vehicle
            - See s29A Motor Dealers Act (exception s29B)
    - See s9 ROIG Act for more info on how act works/details
    - The provisions relating to notice are contained in s.3 (3), s.3A, s.8 (3) and (4).

FACTORS(MERCANTILE AGENT) ACT	REG. OF INTERESTS IN GOODS ACT
• Goods are only entrusted by the owner to the dealer who then sells them.	• Buyer in good faith for value and with or without notice of the registrable interest from a motor dealer
• operates to create the seller as agent of the owner with express authority to sell	• dealer sells as if owner of the goods

- **AGENCY**
    - exception to the nemo dat rule is the common law relating to principal and agent (see lecture 7 on AGENCY)
    - The owner of goods constitutes another person as his or her agent to sell those goods then the buyer will obtain good title notwithstanding the fact that the agent does not have title to those goods.
        - This form of agency operates independently of the Factors (Mercantile Agents) Act, s.10.

- **SELLER IN POSSESSION**
    - This is the situation where A sells goods to B but A retains possession of those goods after sale. If A subsequently sells those same goods to C then C will obtain a good title notwithstanding that property had passed in the goods to B. B is left with an action against A.
    - REQUIREMENTS:
        - Good faith
            - Means honestly done even though negligence may be involved; s5(2).
        - Without notice
        - Continuous possession
    - s28 (1)=effect of this section is to deem A to be authorised by B to make the sale to C, provided C acts in good faith and without notice of B's interest
        - Seller A must remain in actual continuous physical possession.
        - Excludes constructive possession; Mercantile Credits Ltd v F C Upton & Sons Pty Ltd (1974) 48 ALJR 301.
    - This exception protects a buyer who buys from a seller who retains possession of goods sold to another.

- **SALE UNDER LIEN OR STOPPAGE IN TRANSITU**
    - This is a situation of the unpaid seller of goods where property has passed to the buyer
    - Section 50(2) gives the seller rights of sale and a person who buys from the unpaid seller receives a good title
    - **SEE LECTURE 2**

- **BUYER IN POSSESSION**
    - In this situation, B buys or agrees to buy goods from A and obtains possession with A's consent. Property in the goods remains with A. B then sells the goods to C. C