

LAWS2012 Property and Commercial Law

Study Notes — Real Property, Personal Property, Assignment, Priorities and Security Interests

Created for Semester 1, 2026

Colour key

Corin v Patton

Case names — plum, italics

s 23C(1)(c) Conveyancing Act 1919 (NSW)

Legislation — navy

equity will not perfect an imperfect gift

Key principles — teal

registration does not validate a void instrument

Critical points — deep red, soft rose tint

Structure follows the LAWS2012/LAWS5008 Learning Guide sequence (Topics 1–5B), as confirmed by the 2026 Unit of Study Outline. Unless stated otherwise, “CA” is the Conveyancing Act 1919 (NSW), “RPA” the Real Property Act 1900 (NSW), “SGA” the Sale of Goods Act 1923 (NSW) and “PPSA” the Personal Property Securities Act 2009 (Cth).

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Topic 1: (A) The Concept and Function of “Property” and (B) Real Property — Introduction to Real Property

1.0 Exam Scaffold: Establish Party’s Interest in Land

1. What is the nature of the interest that X party has in this case?
 - (a) **Fee Simple** (freehold estate) — right to exclusive possession for an unlimited period
 - (b) **Life Estate** (freehold estate) — interest in land that lasts for duration of the measuring life, i.e. the person or a third party, e.g. you can grant life estate your spouse, with remainder to children
 - (c) **Native Title**
 - (d) **Easement** — benefits one parcel of land but burdens another land
 - (e) **Profit a prendre** — right to go on someone else’s land and remove something naturally occurring
 - (f) **Lease** — gives you right to exclusive possession of land for a certain limited period, it is a personal property not real property
 - (g) **Other: Merely License**
2. **Exam order:** establish any legal interest first (Old System — 1.6; Torrens — 1.7), then any equitable interest (1.4), then resolve priorities (Topic 5A). Headings now follow the sequence of the 2025 Learning Guide.

1.1 Introduction to General Property Concepts

1.1.1 Concepts of Property

1. **Property as a legal relationship:** “property” does not describe a thing but a legal relationship with a thing — a degree of power over the thing that the law recognises as permissibly exercised; it is often described as a “bundle of rights” (*Yanner v Eaton* (1999) 201 CLR 351, Gleeson CJ, Gaudron, Kirby and Hayne JJ).
2. **Legal relationship, not full ownership:** ‘Property’ **DOES NOT** necessarily mean full, beneficial or legal ownership. **RATHER**, property is a ‘legal relationship’ with an object which grants a person a right to exercise power over the object in some respect.
3. **Varied intensity:** Property is a variable concept which can have different degrees of intensity (per Gleeson CJ, Gaudron, Kirby and Hayne JJ in *Yanner v Eaton* (1999)).
 - **Facts:** An Aboriginal man (appellant) in QLD used traditional hunting methods to catch two juvenile crocodiles. Did not have license, permit or certificate or authority as required under the *Fauna Conservation Act*. Magistrate first found the man’s clan had a connection with the land long before the common law, and that the *Native Title Act* said if he was exercising native title rights, he could not be prosecuted.
 - (a) **No full ownership = co-existing property rights here:** In the present case, it **COULD NOT** be concluded that the statute granted full beneficial ownership or a possessory right over fauna to the Crown when it referred to ‘property’: this would lead to **ABSURD** results in the case of migratory birds, or animals coming in and out of boundaries. *As there is no absolute full ownership, property rights could coexist.*
 - (i) **Purpose determines between competing interests in property:** Purpose of the statute was to create a paid licensing system, the reference to property was merely ‘a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource’ ([28] per Gleeson CJ, Gaudron, Kirby and Hayne JJ). The reference to property in the statute was a mere licensing right
4. **Optional reading:** K Gray and SF Gray, “The Idea of Property in Land” in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (OUP, 1998) 15–51.

1.1.2 The Numerus Clausus Principle and Legal Limits of Property — Licences

1. The nature of **X** interest is not a proprietary interest in the land but is a personal interest through a **License**.
2. **Numerus clausus**: the law recognises only a closed list of proprietary interests (for land: fee simple, life estate, lease, easement, profit à prendre, mortgage/charge, restrictive covenant etc). Parties cannot create a new type of property right by contract; a right that does not fit a recognised category takes effect only as a personal right — here, a licence enforceable against the licensor alone (*King v David Allen & Sons Billposting Ltd* [1916] 2 AC 54).
3. **Intention only for license in contract, not exclusive possession**: There is no intention from the contract to create a property right. The agreement (between the licensor and licensee) **did not give the licensee an interest in land** (*in rem*) which would be enforceable against anyone (like the other company), but merely **created a personal obligation** on the part of the licensor to allow the licensee the use of the wall for advertisements. The **rights can only be enforced against the licensor**. As the licensor was now unable to fulfill his obligation under the agreement, he was liable in damages for breach of contract (*Lord Buckmaster* LC page 61 in *King v David Allen & Sons Billposting Ltd* [1916] 2 AC 54)
 - (a) There was **never any assignment of the agreement** to the company under the new lease; therefore the obligation remains with the licensor. The company's failure to honour the agreement means that the licensor is liable in damages
 - (i) **Not lease**: Posting bills on building **CANNOT** be lease, as it needs right to exclusive possession
 - (ii) **Not easement**: It **COULD NOT** be an easement — an easement is a right burdening one piece of land and benefiting another piece of land. It did not benefit land owned by the company
 - (b) Despite the situation being beyond his control, the licensor is in breach of his obligation to the licensee. He must thus be made responsible.
 - **Facts**: King/Licensor (defendant) had an agreement with the licensee (plaintiff) to permit affixation of posters and advertisements on the walls of a picture house proposed to be built on his property by a company. Defendant agreed that he would not permit any other person to affix any advertisement to the walls and agreed to assign to the trustee all his interest in the agreement. King then leased the cinema to a new company, did not mention the original agreement in the lease or any assignment of the interest of King to the new company. Plaintiff tried to put up posters but forcibly couldn't.

1.1.3 Possession and Title

1. **Possession as a root of title**: at common law possession is itself a source of title — a possessor holds a title good against everyone except a person with a better (earlier) title. The same idea underlies the finder's title to chattels (see 2.3.2).
2. *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (Reading Guide: [37]–[38], [69], [82]–[83]; Text [2.25]): on acquiring sovereignty the Crown took radical title, not absolute beneficial ownership, so pre-existing rights of the Indigenous occupants could survive (see 1.3.2). The majority grounded native title in the traditional laws and customs of the Indigenous inhabitants rather than in possession; Toohey J also accepted that occupation could found a common law possessory title.
3. **Optional reading**: M Crawford, *An Expressive Theory of Possession* (Hart, 2020) ch 1 and 54–59.

1.2 Classification of Property Rights

1.2.1 Real and Personal Property; Legal and Equitable Interests

1. **Real v personal property**: the classification is historical, not physical: “real property” was property protected by the real actions (freehold interests in land). Leases, although interests in land, were historically personalty (“chattels real”). Personal property divides into choses in possession (Topic 2) and choses in action (Topic 3).

Topic 2: Personal Property — Introduction to Choses in Possession

2.1 Taxonomy of Personal Property: Choses in Possession v Choses in Action

1. **General Law:** *Colonial Bank v Whinney* (1885) 30 Ch D 261 at 285–290 (Fry LJ, dissenting; upheld by the House of Lords (1886) 11 App Cas 426)
 - (a) **Only two forms of personal property:** "All personal things are either in possession or in action. The law knows no *tertium* quid between the two." (Per Fry LJ at 285 in *Colonial Bank v Whinney* (1885))
 - (i) **Shares and Debt are choses in action:** Holds that shares are choses in action for all purposes, and thus do not pass as they were not considered goods (per Fry LJ at 286 in *Colonial Bank v Whinney* (1885)) as it is a bare right without any occupation or enjoyment
 - (ii) **Debts are choses in action:** Debt is regarded as "choses in action" (per Fry LJ at 286 in *Colonial Bank v Whinney* (1885))
 - **Issue:** Do shares pass to B's trustee in bankruptcy as property of the bankrupt to be put towards payment of B's creditors?
 - **Construction of legislation:** Turns on construction of *Bankruptcy Act 1883 s 44(2)* (per Cotton LJ at 273):
 - Relevant property includes "all goods, being at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof: Provided that things in action, other than debts due or growing to the bankrupt in the course of his trade or business, shall not be deemed goods."
 - (iii) **Database not choses in possession:** *Your Response Ltd v Datateam Business Media Ltd* [2015] QB 41, affirming the principles derived in *Colonial Bank v Whinney*
 - **Intangible only is choses in action:** Per Moore-Bick LJ at [26]: "that decision (*Colonial Bank v Whinney*) makes it very difficult to accept that the common law recognises the existence of intangible property other than choses in action (apart from patents, which are subject to statutory classifications...'"
 - **No physical manifestation:** As the database was not a choses in possession, but a choses in action, without having physical manifestation, it could not be detained and there was no possessory lien.
 - **Court reluctance to move away:** Court reluctant to move away from the traditional categorisation of property, although it does express sympathy for trial judge's awareness of the need for the law to keep abreast for technological developments (per Moore-Bick LJ at [9]–[10]). However, it is a matter for parliament (at [27])
 - **Intended consequences:** Per Davis LJ at [38], [39]: "... appeal to modernism has its attractions... the court should resist those attractions... The law of unintended consequences is no part of the law of England and Wales. But it is worth paying attention to it, in an appropriate case,"
 - Emphasising that: Changing and undermining the fundamental distinctions of the law will have significant consequences on the application of the law more generally, and that could result in injustice, unfairness and should only be contemplated by parliament
2. **2025 development (UK):** the *Property (Digital Assets etc) Act 2025* (UK) (Royal Assent 2 December 2025) provides that a thing — including a thing that is digital or electronic in nature — is not prevented from being the object of personal property rights merely because it is neither a thing in possession nor a thing in action. This implements the Law Commission's "third category" (Digital Assets: Final Report (2023) ch 3)

and **qualifies the “no tertium quid” dictum in England and Wales**. There is no equivalent Australian statute; in Australia the question remains one for the common law.

3. **Mandatory reading:** Sir Roy Goode, “What is property?” (2023) 139 LQR 1 — read for the critique of the traditional binary taxonomy and its fit with intangibles such as data and crypto-tokens; compare *Your Response Ltd v Datateam Business Media Ltd* [2015] QB 41.
4. **PPSA taxonomy:** the *Personal Property Securities Act 2009* (Cth) s 10 uses its own categories: “personal property” (property, including a licence, other than land or a statutory right declared not to be personal property); “land” (which excludes fixtures); “goods” (tangible personal property other than financial property and investment instruments); “financial property” (eg chattel paper, currency, documents of title, investment instruments, negotiable instruments); “intermediated security”; and “intangible property” (personal property that is not goods, financial property, an investment instrument or an intermediated security — eg debts, contractual rights, IP). **These categories cut across the general law choses in possession / choses in action divide.**

2.2 Identifying Legal Interests in Choses in Possession: Ownership and Possession

1. Identify **legal interests** in choses in possession

(a) Ownership

- (i) **Nature of Ownership:** Ownership is the most comprehensive real right since it provides the most extensive and absolute dominion over an object. Ownership confers on the owner the competence to enjoy, use, possess, dispose of and alienate the object, as well as the capacity to ward off any encroachment on the object (*Report on the Giving of Security by Means of Movable Property* (Project 46, Pretoria, February 1991), para [2.2.1]).

- (ii) **Abandonment CAN divest ownership, and ownership can be gained through appropriation:** *Re Jigrose Pty Ltd* [1994] 1 Qd R 382

- **Abandonment**

- **Intention:** ‘**Intention** is the **critical issue** where an issue of abandonment is raised’ (384)
 - ‘As a general proposition, if I throw something away, I truly abandon it. I intend no longer to retain possession. I do not propose to seek it out and I have no further interest in ownership. If however I lose something, I have not those intentions’ (385)
 - ‘Cl 28.3 seem to be equivalent to the vendor representing that it has **no further interest in chattels, neither in possession nor in ownership.**’ (386)

- **Appropriation** (per Kiefel J)

- ‘Title is **NOT however automatically transferred** to the purchasers on abandonment. It will pass where there is **an act such as appropriation.**’ (387)
- ‘Appropriation in this sense means taking to oneself as one’s property. That would require in the context of an occupier, a **manifest intention** to exercise control over it: see *Parker v British Airways Board*... An **intention to exclude others is my view an exercise of control over the chattels...**’ (387) — i.e. placing the **padlock** seems to be an **indication of an intention to exclude.**

(b) Possession

- (i) **Definition:** Possession is a ‘definite legal relation to something capable of having an owner’ (F Pollock and RS Wright, *An Essay on Possession in the Common Law* (Clarendon Press, Oxford, 1888)).

- **Possession ≠ Title:** They note that possession **does not necessarily concur with title.**

4.2 Equitable Assignments of Legal Interests (Gifts)

1. **THE BELOW ISSUES ARISE if there HAS NOT BEEN a valid assignment of interests** under s 12 *Conveyancing Act*, i.e. **ASSIGNMENT OF LEGAL CHOSSES IN ACTION has FAILED**
2. **Voluntary/Gift assignment of Land/Shares/Assignable Choses in Action under s 12 *Conveyancing Act*:**
 - (a) **General Rule:** In order for a voluntary settlement to be valid and effectual, the settler must have done everything necessary to be done in order to transfer the property to render the settlement binding, as there is no equity in this court to perfect an imperfect gift (*Milroy v Lord* (1862) 4 De GF & J 264; 45 ER 1185 at 274 per Turner LJ)
 - (b) **Need signing and writing (s 12 *Conveyancing Act*)**
 - (c) **Two fold test** (per Deane J at 582 in *Corin v Patton* (1990) 169 CLR 540):
 - (i) (1) Whether the assignor (or donor) has done all that is necessary to place the vesting of the legal title within the control of the donee **AND**
 - **Necessary:** Means everything necessary to effect the transfer (Mason CJ and McHugh J in *Corin v Patton*)
 - (ii) (2) Beyond the recall or intervention of the assignor (or donor).
 - In *Costin v Costin* (1997) 7 BPR 15,167, Brownie AJA (at 15170) determined that the assignor had done everything that was necessary for him to do **HOWEVER**, it was **not beyond his recall** as he **could countermand that authority** by instructing his solicitors to stop the paperwork.
 - (d) **Note: Writing still required under s 12.**
 - (e) **Effect:** Once that stage is reached and the gift is complete and effective in equity, the equitable interest in the land vests in the donee and that being so, the donor is bound in conscience to hold the property as trustee for the donee pending the vesting of the legal title (at 582 in *Corin v Patton*).
 - (f) **Subject to some small doubt: Noted Below**
3. **Choses in Possession — No Equitable Assignment under *Corin v Patton*:** No case where a *Corin v Patton* analysis has been applied to a chattel. It is not possible to put a transfer beyond recall and still fail with legal transfer for choses in possession.
4. **Choses in Action unassignable under s 12 (*partial chose in action*):** Not all attempted choses in action fall within s 12 *Conveyancing Act*, i.e. partial assignment chose in action, and hence are un-assignable. As it cannot be done at law, there cannot be a *Corin v Patton* analysis as there are **no legal requirements** that can be met because it **cannot be done at law**. However, it is assignable under equity as equity always allows equitable assignments of legal choses, provided that there is **a sufficient and clear expression of intention to assign** a legal chose in action (*Norman v FCT* (1963) 109 CLR 9 at 32–33 per Windeyer J).
 - (a) No requirement for writing, though will benefit claim. No need to give notice to debtor.
5. **Choses in Action assignable under s 12 — Yes Equity under *Corin v Patton*:** Subject to a caveat, it seems that *Corin v Patton* analysis does apply here.
 - (a) **Does not say who gives notice:** Key point here is that s 12 does not say WHO needs to give notice to the debtor, i.e. the original debt holder is not obliged to inform the debtor, and thus the new debt holder can.
 - (b) **Need signing and writing (s 12 *Conveyancing Act*)**
 - (c) **Subject to some small doubt:** Lord Macnaghten suggests that sufficiently clear expression of intention to assign should be sufficient to assign in equity (*Wm Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 461). The introduction of s 25(6) *Judicature Act* has arguably made full legal choses harder to assign in equity. It was criticised that s 25(6) *Judicature Act* was supposed to be a 'machinery' provision to encourage the efficient administration of the law, rather than to change the substantive law (see *Wm Brandt's* at 461–462, where Lord Macnaghten said the Act did not forbid or destroy equitable assignments; see also *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [69]–[78] on

assignment of choses in action). This casts some doubt over whether the principle from *Corin v Patton* is applicable in future cases.

4.3 Contracts to Assign Legal Property (For Value Transfers)

1. The position is very different as someone who is seeking to buy a legal interest cannot be in a worse off position than someone who gets it as a gift
2. **In respect of land, equity cannot take cognisance of the contract UNLESS s 54A Conveyancing Act is satisfied i.e. in writing and signed:**
 - (a) No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, **unless** the agreement upon which such action or proceedings is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto lawfully authorised by the party to be charged.
3. **Effect of equity for land and shares:** If X has a signed and written binding contract to create a sale of land, then X will have an equitable interest in the property (*Lysaght v Edwards*), noting that it is not a legal interest given that it has not been obtained. As per Jessel MR, the moment a valid contract for sale is formed, the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the **vendor having the right to the purchase-money, a charge or lien.**
 - (a) **Possibility for Specific Performance:** Key idea is that equity will do this IF the contract in question is one where equity will decree **specific performance** in this vendor-purchaser constructive trust.
 - (i) **Caveat specific performance does NOT mean beneficiary under a trust:** A purchaser does have equitable rights upon the deal being signed but it does not mean that the purchaser becomes the full beneficiary in equity at the moment that the deal is signed (Mason J at 184 in *Chang v Registrar of Titles* (1976) 137 CLR 177). It is doubtful whether a vendor under a contract of sale can properly be described as a trustee... unless settlement has taken place and all that remains is the transfer of legal estate. However such a description of a vendor as trustee and purchaser as beneficiary considerable difficulties arise (per Jacobs J at 189-90 in *Chang v Registrar of Titles*).
4. **Whether we have a vendor-purchaser constructive trust?**
 - (a) We have a contract when the agreement is struck to borrow the funds. If that is a specifically enforceable contract then there is a trust sub modo at that time, but it is not clear here if this is specifically enforceable because we do not know if the share is in a private company or not.
 - (b) Once the value is given, we know from *Lysaght v Edwards* and *Chang*, that equity would intervene and recognise that the Bank has an equitable interest as owner in equity, and the value is given as the money is lent.
 - (c) The bank does have an interest in the shares by virtue of what the parties have undertaken.
 - (i) Therefore there is an equitable interest under a vendor-purchaser constructive trust.
 - (d) If consideration has not been paid, it is a sub modo constructive trust (have an equitable interest but as a beneficiary sub modo), whereas if consideration is paid, then it is a pure vendor-purchaser constructive trust.
 - (e) **If it is NOT A SPECIFICALLY ENFORCEABLE CONTRACT, then you cannot obtain equitable interest**
 - (i) **Note: ALL FORMS OF REAL PROPERTY interests are considered specifically enforceable**
5. **If cannot establish interests under s 54A, there are Exceptions:** Part Performance — **Topic 1** etc.

5A.5 General Law Priority Rules: Contests in Equity

Prior Equitable Interest v Subsequent Equitable Interest

1. **General Rule:** *Qui Prior Est Tempore Potior Est Jure* – Where equities are equal, the first in time will prevail.
2. **Exception Test - Quality Assessment:** However, equity has taken a broader view than the law when determining the nature and extent of priority conflicts. The test in determining the better equity per Mason and Deane (at 341 in *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326) is to bear in mind the conduct of both parties, the question of any negligence on the part of the prior claimant, the effect of any representation as possibly raising an estoppel and whether it can be said that the conduct of the first or prior owner has enabled such a representation to be made. Postponement can occur through either the **contribution** of the earlier holder's action or neglect, **OR** that it was **reasonably foreseeable** that the earlier holder's actions would create the later equitable interest.
 - (a) **Rationale:** Mason and Deane JJ considered the competing theoretical basis for granting priority, either between estoppel or a more general approach (at 339-340 in *Heid*) though determined the more general and flexible principle to be more preferable given that it avoids contortions and convolutions associated with basing the postponement, giving better equity though an examination of the relevant circumstances.' (at 341 in *Heid*). **Postponing Conduct?:** Privy Council in *Abigail v Lapin* (at 502)
 - (b) **Contributed:** Postponement occurs only where the earlier holder's act or neglect contributed in some way to the later holder acquiring its interest without notice of the earlier interest (per Gibbs CJ at 333 in *Heid*) **OR**
 - (i) **Conduct of original title (giving title), holder at fault:** 'Here, because that party has vested in him a legal estate or has given him the indicia of a legal estate in excess of the interest he was entitled in fact to have, so that he has in consequence been enabled to enter into a transaction with the third party on the faith of his possessing the larger estate.' (at 507 in *Abigail v Lapin*).
 - (ii) **Allowing Mrs H to represent to world:** Their conduct in allowing Mrs Heavener to represent to the world that they had good title contributed to the creation of the subsequent mortgage that Abigail held (at 499-500 in *Abigail v Lapin* [1934]).
 - (iii) This **indirectly allowed Mrs H to represent** that she was the registered proprietor of the land and that no prior interest existed, and it was clear postponing conduct (in *Abigail v Lapin*)
 - (c) **Reasonably Foreseeable:** Where it was "reasonably foreseeable" that, as a consequence of the acts or omissions of the earlier owner, a later equitable interest might be created and that the owner of that later interest would assume the non-existence of the earlier (per Mason and Deane JJ at 345 in *Heid* (1983))
 - (i) **Reasonably foreseeable:** 'The delivery of the documents to [Gibby] armed [Connell Investments] with the capacity to represent itself to be the true owner of the property and to engage in fraudulent and deceptive conduct of the kind which took place. The risk of [Connell Investments] engaging in that conduct was **reasonably foreseeable**. ... The inevitable conclusion therefore is that there was negligence of the part of Heid ...' (per Mason and Deane JJ at 345 in *Heid v Reliance Finance Corporation Pty Ltd* (1983))
 - **Did not check solicitor:** Gibby was not a solicitor and they did not check
 - **Receipt was incorrect:** A large part of the purchase price had been left outstanding, contrary to an acknowledgment of receipt in the transfer
3. **Case:** *Abigail v Lapin* [1934] AC 491; (1934) 51 CLR 58 (PC)
 - (a) **Facts:** Mr and Mrs Lapin executed a transfer of their land in favour of Mrs Heavener, who became the registered proprietor. Although the transaction was absolute in form, in substance it was a mortgage, and therefore the Lapins retained an equity of redemption in the land. Mrs Heavener granted a mortgage over the land to Abigail, which was unregistered. The priority contest was between the Lapins' earlier equitable interest and Abigail's later equitable interest.

Topic 5(B): Commercial Dealings as Security Interests over Property

5B.1 Traditional Forms of Security

1. **Traditional Forms of Security:** Mortgage, charge or pledge. Forms are mutually exclusive.
 - (a) **Mortgage:** Transfer of **title**
 - (b) **Pledge:** Transfer of **possession**
 - (c) **Lien:** Right to retain possession until payment. A common law (possessory) lien generally carries no power of sale; a power of sale arises only by statute or agreement (eg *Uncollected Goods Act 1995* (NSW)).
 - (d) **Charge:** As an **appropriation** of property for satisfaction of an obligation
 - (e) **Fixed v floating charge:** a fixed charge attaches to specific assets immediately, so the chargor cannot deal with them free of the charge without consent; a floating charge hovers over a class of present and future assets (eg stock-in-trade) which the chargor may deal with in the ordinary course of business until crystallisation. Both are security interests under the *PPSA* (s 12(2)(a)–(b)), which uses the concept of “circulating assets” instead (s 340).
2. *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, esp at [1]–[33]:
 - (a) **Facts:** Palgo made 7-day loans, secured by a ‘goods mortgage’ under which borrower transferred title to, and stored goods with, Palgo as lender.
 - (b) **Issue:** Was Palgo in the business of lending money on the security of “pawned goods” within the *Pawnbrokers and Second-hand Dealers Act 1996* (NSW) – a question of statutory construction.
 - (c) **Majority Held:** No.
 - (i) Pawn = pledge, meaning a ‘**bailment** of **personal property** as **security**’
 - (ii) **Distinct** from **mortgage** — **transfer** of **title** by way of security
 - (d) **Held:** Palgo does not need a license, and is not in breach of legislation. **It is not lending on the security of pawned goods, but rather lending money on the security of chattel mortgages.**
3. **Statutory security:** a Torrens mortgage (*Real Property Act 1900* (NSW) ss 56, 57) — see 1.5.2.

5B.2 Security within the Scope of the Personal Property Securities Act 2009 (Cth) [‘PPSA’]

1. **What is Personal Property?:**
 - (a) **Section 10 PPSA:** Personal property means property (including a licence) other than:
 - (i) (a) land; or
 - ‘Land’ is defined so as to exclude fixtures (s 10 PPSA); interests in fixtures are separately excluded from the PPSA by s 8(1)(j)
 - (ii) (b) a right, entitlement or authority that is:
 - (i) Granted by or under a law of the Commonwealth, a State or a Territory; and
 - (ii) Declared by that law not to be personal property for the purposes of this Act.
 - (b) **Types of property:** Goods; Financial Property; Intermediated Property; and Intangible Property
 - (i) **Examples include:** Goods as **tangible** property; Shares as **financial** property; Debts and other contractual rights as intangible property.
2. **Does a security interest exist?:** (a ‘threshold question’)
 - (a) **In Substance:** A security interest means an interest in **personal property** provided for by a **transaction** that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property) (s 12(1) PPSA)
 - (i) **Ask if it is a personal property (s 10 PPSA), whether a transaction AND identifiable interest**

(ii) **Interpretation:**

- Emphasis on function rather than form. Extends to 'almost anything' with a security function (*Bank of Montreal v Innovation Credit Union*)
- **Key elements:** Transaction; Personal Property; Property Interest; Secures payment to performance
 - **Personal property** includes many different kinds of tangible and intangible property, other than real property. Examples include motor vehicles, household goods, business inventory, intellectual property and company shares. Personal property is known as collateral if it is (or is anticipated to be) the subject of a security interest.

(iii) **Transactions include:** **Not exhaustive** (s 12(2) PPSA) — **consensual** + valid agreement

- a fixed charge; a floating charge; a chattel mortgage; a conditional sale agreement (including an agreement to sell subject to retention of title); a hire purchase agreement; a pledge; a trust receipt; a consignment (whether or not a commercial consignment); a lease of goods (whether or not a PPS lease); an assignment; a transfer of title; a flawed asset arrangement.

(iv) **Exclusions:** s 8 PPSA excludes — e.g. charge or other interest... **created by operation of law** (hence can only be consensual arrangement); an interest in a fixture(b) **In Deemed:** A security interest also includes the following interests, **whether or not the transaction concerned, in substance, secures payment OR performance of an obligation (s 12(3) PPSA) Specified interests include:**(i) Interest of a **transferee** under a transfer of an account or chattel paper (s12(3)(a) PPSA 2009 (Cth)) (**Outside scope of course**)(ii) Interest of a **consignor** delivering goods under a 'commercial consignment' (s12(3)(b) PPSA 2009 (Cth))

- **Definition of commercial consignment:** (s 10 PPSA 2009 (Cth)); see *Arcabi* (part 2)
 - **Consignor retains** an **interest** in goods that the consignor delivers to the consignee; **AND**
 - The **consignor delivers the goods** to the consignee for the **purpose of sale, lease OR other disposal**; **AND**
 - The **consignor** and the **consignee both deal** in goods of that **kind in the ordinary course of business**;
 - **Excludes:** Does not include an agreement under which goods are delivered to:
 - an auctioneer for the purpose of sale; or
 - a consignee for sale, lease or other disposal if the consignee is generally known to the creditors of the consignee to be selling or leasing goods of others.
 - **Definition of consignor at [31] in *Arcabi*:** An arrangement whereby an owner sends goods to another on the understanding that such other will sell the goods to a third party and remit the proceeds to the owner after deducting his compensation for effecting the sale is an example of a consignment agreement.

(iii) Interest of **lessor/bailor** of goods under a PPS lease (see *Arcabi* (part 1); *Forge*) (s12(3)(c) PPSA)) (**Focus in ICPL**)

- **Definition of PPS lease:** PPS lease defined in s13(1) PPSA 2009 (Cth):
 - **Duration:** (Applies to leases/bailments entered into **on or after 20 May 2017**)
 - (a) for a term of more than **2 years**; **OR**
 - (b) for an indefinite term (even if the lease or bailment is terminable by any party on notice); **OR**

- (c) for a term of up to 2 years that is automatically renewable, or that is renewable at the option of one of the parties, for one or more terms if the total of all the terms might exceed 2 years; **OR**
 - (d) for a term of up to 2 years, where the lessee or bailee, with the lessor's or bailor's consent, retains uninterrupted (or substantially uninterrupted) possession for more than 2 years after the day the lessee or bailee first acquired possession (**but not until the lessee's or bailee's possession extends for more than 2 years**).
 - **Note Duration:** Before 20 May 2017 → (1) A PPS Lease means a lease or bailment of goods: (a) for a term of more than one year; or (b) for an indefinite term.....
 - Regular engagement in the business of leasing or bailing goods (s 13(2)(a)-(b) *PPSA 2009* (Cth)) (*Forge*)
 - The section only applies to a bailment for which the bailee provides value (s 13(3) *PPSA*)
 - **However**, a **PPS lease** does not include: (s13(2) *PPSA 2009* (Cth))
 - s 13(2)(c): lease of consumer property as part of a lease of land where the use of the property is incidental to the use and enjoyment of the land
 - s 13(2)(d): lease or bailment of personal property prescribed by the regulations for the purposes of this definition, regardless of the length of the term
3. **Application:** *Re Arcabi Pty Ltd (recs & mgers apptd) (in liq); Ex parte Theobald & Herbert* (2014) 288 FLR 236
- (a) **Facts:** *Arcabi*'s business: 'storage and sale of rare coins and bank notes'. Some goods owned by Investors, who had consigned or bailed them to *Arcabi*. Those third parties were described by the court as 'investors'. Receivers appointed by Bank to *Arcabi* seek directions from court (for their proposed course of action) that they can return goods to investors on the basis that the investors are not secured parties.
- (i) **Bailment:**
- First looked at whether there was an *in substance security interest* (paras 20-22)
 - **FACTORS INDICATING BAILMENT NOT AN IN SUBSTANCE SECURITY INTEREST:** Held not an in substance security interest. First, having considered the records and made due enquiry there was no suggestions the Goods would vest in *Arcabi* on the expiry of the bailment. Second, there was no suggestion that *Arcabi* would have an obligation to purchase the Goods. Third, the term of the arrangement was not likely to be for the major part of the economic life of the Goods as those Goods had an indefinite life subject to storage conditions. Finally, the nominal payment for the bailment - which was usually \$240 - did not equate to the capital cost of the Goods.
 - Deemed security interest - PPS lease? (paras 23-27)
 - **FACTORS INDICATING BAILMENT NOT AN IN DEEMED SECURITY INTEREST:** Prima facie bailment, however were profiting from the exchange of rare coins/bank notes rather than acting as a bailor themselves. It was also a hobby rather than ordinary business
- (ii) **Consignments:** At 46, it was held that a reasonable interpretation of the arrangement between parties was a consignment for goods
- *In substance security interest?* (paras 31-49)
 - **NOT:** Consignment Only Goods did not comprise security for a payment or for performance and hence not a security interest for the purposes of s 12(2)(h) of the *PPSA* and no room for s 267 applying, or vesting of any interest in *Arcabi*
 - Deemed security interest - commercial consignment (**REFER TO** s 10 *PPSA*)? (paras 50- 59)
 - **NOT:** Clearly consignor retains interest and delivers goods for purpose of sale. It was held not to be in the ordinary course of business. Were not known to have dealt with **goods of that kind** in the course of ordinary business