

COMMERCIAL LAW SUMMARY



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1. Understanding the Contract of Sale and the Multiple Legal Concepts of Goods

1.1 “Goods”: What are they?

All Australian states and territories have a *Sale of Goods Act*, with many of the provisions being similar.

In New South Wales, for example, “goods” are defined in the:

Sale of Goods Act 1923 (NSW), section 5(1) Definitions, “Goods”

In this Act, unless the context or subject matter otherwise requires:

“**Goods**” include all chattels personal other than things in action and money. The term includes emblems and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Moreover, Commonwealth legislation has a significant role in defining goods. The *Trade Practices Act 1974 (Cth)* affected the application of the *Sale of Goods Acts*. The enactment of the *Competition and Consumer Act 2010 (Cth)* was significant in replacing the *Trade Practices Act*. Major changes were made with the introduction of the Australian Consumer Law as Schedule 2 of the *Act*. As it stands, the Australian Consumer Law complements the *Sale of Goods Act*, and has a wider application than the previous *Trade Practices Act*. This is because of the referral of State powers that enable the Commonwealth to legislate with respect to a ‘person’ as opposed to a ‘corporation’. It is important to note that only in situations where the Australian Consumer Law does not apply, the relevant *Sale of Goods Act* is applicable.

Principally, “goods” are defined in the:

Competition and Consumer Act 2010 (Cth), section 4(1) Interpretation, “Goods”

In this Act, unless the contrary intention appears-
“**goods**” includes:

- (a) ships, aircraft and other vehicles;
- (b) animals, including fish;
- (c) minerals, tree and crops, whether on, under or attached to land or not; and
- (d) gas and electricity.

Case law is also instructive as to a working definition of “goods” in Australian law.

St Albans City and District Council v International Computers Ltd [1996] 4 All ER 481

Facts- St Albans entered into a contract with International Computers for a computer system (software). A fault in the **software** resulted in an underestimation of the rate of charge set.

Held-

- Software includes both the (tangible) disk and the (intangible) program. Disk is within statutory definition of goods, but a program, of itself, is not.
- Where **disks** are sold with **programs encoded onto them**, those programs are part of the disk and so ‘goods’. That was analogous to the **text within an instruction manual**.
- Where programs are supplied separately from disks, those programs are not goods, so the *Sale of Goods Act* would not apply. Thus, **transfer of program (mere licensing) does not constitute a transfer of goods**
- However, COMMON LAW PRINCIPLES would imply a term into the contract that the programs were reasonably fit for the intended purpose. “*An unexpressed term can be implied if the court finds that the parties must have intended that term to form part of their contract.*” ***Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*** [1973]

Telstra Corporation Ltd v Hurstville City Council (2000) 105 FCR 322

Issues- The issues were whether **electromagnetic signals** passing along the coaxial cables and **content** carried by those signals were “goods”, and were capable of being subject to excise duty.

Held-

- In ***Pont Data***, it was agreed that in the absence of a statutory definition ordaining otherwise, even electricity was not “goods”; and even where a definition included

electricity, the word still did not include encoded electrical impulses (analogous to electromagnetic waves).

- In ***Adams v Rau***, approved in ***Mutual Pools***, the court held that production of shorthand writers of transcript was not goods because they were not brought into existence for sale as a commodity, but for the purpose of enabling employers to have the benefit of services given in the course of a skilled vocation.
- To provide information is to provide service, not “**goods**”.

***Elitestone Ltd v Morris* [1997] 1 WLR 687**

Facts- A chalet resting on concrete pillars was set into the ground. The chalet was connected to usual services. The chalet cannot be taken down and re-erected elsewhere, but can only be removed by demolition.

Held-

- “**Whether a structure became part and parcel of the land itself depended on the degree and the object of annexation to the land; that, assessed objectively.**”
- An issue arose as to the degree of annexation, that being whether the chattel can be removed without injury to itself or the land. It was held that **a degree of permanence must exist.**
- **Purpose** is also important: ***Holland v Hodgson***.

***Mason v MWREDC Limited (includes Corrigendum dated 3 January 2012)* [2011] FCA 1512**

Facts- The case concerns a dispute over discovery of documents and whether Mr Mason may claim relief.

Held- The court interpreted s 2B of the *Competition and Consumer Act 2010* (Cth) in holding that the definition of persons “involved” in a contravention of the Act should not apply to persons acting in their capacity as officers in the State of Queensland. That is, s 2B was interpreted to limit the application of the Act in relation to the Australian Consumer Law (Schedule 2) regarding persons “involved” in breach.

***Leucadia National Corporation v Chichester Metals Pty Ltd (Formerly FMG Chichester Pty Ltd)* [No 2] [2011] WASC 301**

Facts- A claim was made under s 87 of the former *Trade Practices Act 1974* (Cth). As the events occurred before 1 January 2011, claims under the *Competition and Consumer Act 2010* (Cth) and the Australian Consumer Law were not sought. However, the court related the proceedings to the current Act so as to follow current law.

Held- The court interpreted ss 5(1), (3) and (4) of the *Trade Practices Act*, and related the new counterpart provisions in s 5 of the *Competition and Consumer Act*. It was held that s 5 operates to vitiate 'any application made to the Court by an applicant otherwise than in accordance with its terms'. It was further held that it is not a matter for the Minister to determine whether the application is 'effective or valid in relation to a proceeding brought by the applicant'.

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