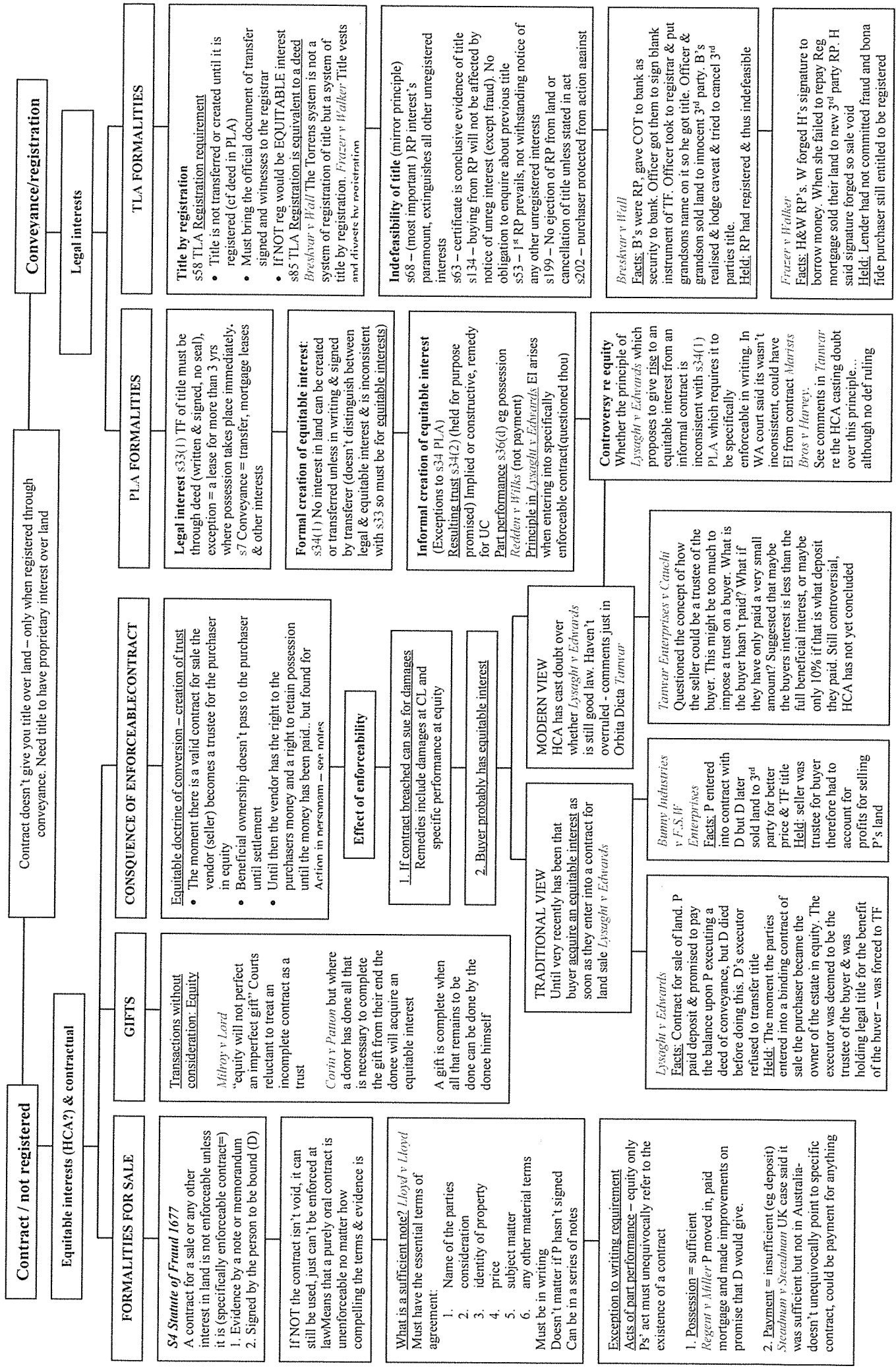


# CREATION & TRANSFER OF PROPRIETARY INTERESTS IN LAND



**Contract / not registered**

Equitable interests (HCA?) & contractual

**FORMALITIES FOR SALE**

**SA Statute of Fraud 1677**  
 A contract for a sale or any other interest in land is not enforceable unless it is (specifically enforceable contract=)

1. Evidence by a note or memorandum
2. Signed by the person to be bound (D)

If NOT the contract isn't void, it can still be used, just can't be enforced at law. Means that a purely oral contract is unenforceable no matter how compelling the terms & evidence is

What is a sufficient note? *Lloyd v Lloyd*  
 Must have the essential terms of agreement:

1. Name of the parties
2. consideration
3. identity of property
4. price
5. subject matter
6. any other material terms

Must be in writing  
 Doesn't matter if P hasn't signed  
 Can be in a series of notes

Exception to writing requirement  
 Acts of part performance – equity only  
 Ps' act must unequivocally refer to the existence of a contract

1. Possession = sufficient  
*Regent v Miller*: P moved in, paid mortgage and made improvements on promise that D would give.
2. Payment = insufficient (eg deposit)  
*Steedman v Steadman*: UK case said it was sufficient but not in Australia – doesn't unequivocally point to specific contract, could be payment for anything

**GIFTS**

Transactions without consideration: Equity  
*Milroy v Lord*  
 "equity will not perfect an imperfect gift"  
 Courts reluctant to treat an incomplete contract as a trust

*Cornin v Paton* but where a donor has done all that is necessary to complete the gift from their end the donee will acquire an equitable interest  
 A gift is complete when all that remains to be done can be done by the donee himself

1. If contract breached can sue for damages  
 Remedies include damages at CL and specific performance at equity

2. Buyer probably has equitable interest

**CONSEQUENCE OF ENFORCEABLE CONTRACT**

Equitable doctrine of conversion – creation of trust  
 • The moment there is a valid contract for sale the vendor (seller) becomes a trustee for the purchaser in equity  
 • Beneficial ownership doesn't pass to the purchaser until settlement  
 • Until then the vendor has the right to the purchaser's money and a right to retain possession until the money has been paid.. but found for Action in personam – see notes

**Effect of enforceability**

1. If contract breached can sue for damages  
 Remedies include damages at CL and specific performance at equity

2. Buyer probably has equitable interest

**TRADITIONAL VIEW**

Until very recently has been that buyer acquire an equitable interest as soon as they enter into a contract for land sale *Lysaght v Edwards*

*Lysaght v Edwards*  
 Facts: Contract for sale of land. P paid deposit & promised to pay the balance upon P executing a deed of conveyance, but D died before doing this. D's executor refused to transfer title  
 Held: The moment the parties entered into a binding contract of sale the purchaser became the owner of the estate in equity. The executor was deemed to be the trustee of the buyer & was holding legal title for the benefit of the buyer – was forced to TF

**MODERN VIEW**

HCA has cast doubt over whether *Lysaght v Edwards* is still good law. Haven't overruled - comments just in *Orbita Dicta Tamwar*

*Bunney Industries v F.S.W*  
 Facts: P entered into contract with D but D later sold land to 3rd party for better price & TF title  
 Held: seller was trustee for buyer therefore had to account for profits for selling P's land

*Tamwar Enterprises v Canchi*  
 Questioned the concept of how the seller could be a trustee of the buyer. This might be too much to impose a trust on a buyer. What if the buyer hasn't paid? What if they have only paid a very small amount? Suggested that maybe the buyers interest is less than the full beneficial interest, or maybe only 10% if that is what deposit they paid. Still controversial, HCA has not yet concluded

Contract doesn't give you title over land – only when registered through conveyance. Need title to have proprietary interest over land

**Legal interests**

**PLA FORMALITIES**

**Legal interest s33(1)** TF of title must be through deed (written & signed, no seal), exception = a lease for more than 3 yrs where possession takes place immediately.  
 s7 Conveyance = transfer, mortgage leases & other interests

**Formal creation of equitable interest:**  
 s34(1) No interest in land can be created or transferred unless in writing & signed by transferer (doesn't distinguish between legal & equitable interest & is inconsistent with s33 so must be for equitable interests)

**Informal creation of equitable interest**  
 (Exceptions to s34 PLA)  
 Resulting trust s34(2) (held for purpose promised) implied or constructive, remedy for UC  
 Part performance s36(d) eg possession  
*Redden v Wilks* (not payment)  
 Principle in *Lysaght v Edwards* EI arises when entering into specifically enforceable contract (questioned though)

**Controversy re equity**  
 Whether the principle of *Lysaght v Edwards* which proposes to give rise to an equitable interest from an informal contract is inconsistent with s34(1) PLA which requires it to be specifically enforceable in writing. In WA court said it wasn't inconsistent, could have EI from contract *Martins Bros v Harvey*.  
 See comments in *Tamwar* re the HCA casting doubt over this principle... although no def ruling

**TLA FORMALITIES**

**Title by registration**  
 s58 TLA Registration requirement  
 • Title is not transferred or created until it is registered (cf deed in PLA)  
 • Must bring the official document of transfer signed and witnesses to the registrar  
 • If NOT reg would be **EQUITABLE** interest  
 s85 TLA Registration is equivalent to a deed  
*Breskvar v Wall* The Torrens system is not a system of registration of title but a system of title by registration. *Fraser v Walker* Title vests and divests by registration

**Indefeasibility of title** (mirror principle)  
 s68 – (most important) RP interest's paramount, extinguishes all other unregistered interests  
 s63 – certificate is conclusive evidence of title  
 s134 – buying from RP will not be affected by notice of unreg interest (except fraud). No obligation to enquire about previous title  
 s53 – 1<sup>st</sup> RP prevails, not withstanding notice of any other unregistered interests  
 s199 – No ejection of RP from land or cancellation of title unless stated in act  
 s202 – purchaser protected from action against

*Breskvar v Wall*  
 Facts: B's were RP, gave COT to bank as security to bank. Officer got them to sign blank instrument of TF. Officer took to registrar & put grandsons name on it so he got title. Officer & grandson sold land to innocent 3<sup>rd</sup> party. B's realised & lodge caveat & tried to cancel 3<sup>rd</sup> parties title.  
 Held: RP had registered & thus indefeasible

*Fraser v Walker*  
 Facts: H&W RP's. W forged H's signature to borrow money. When she failed to repay Reg mortgage sold their land to new 3<sup>rd</sup> party RP. H said signature forged so sale void  
 Held: Lender had not committed fraud and bona fide purchaser still entitled to be registered

## Fixtures

**The connection between land and property:**  
A chattel (thing) can become part of the land depending on how it is attached. Has significance for ownership

**Legal significance of why it is important to determine whether something is a fixture**  
Sale of land: could raise disputes over what is included in a land sale. s41 PLA The rule is: everything which comes within the definition of a fixture is included unless expressly excluded  
Mortgage v. Mortgagee: Fixtures are part of the security of a mortgage, whether they were attached before or after you entered the mortgage (ie until it is paid off)  
Strictly you cannot remove it unless the financier gives you permission  
Landlord v. Tenant: What ever the tenant attaches becomes the property of the landowner if they are fixtures

### STEP 1: DOCTRINE OF FIXTURES

Applies assuming that ownership of fixtures is not determined by any express term of the contract

### STEP 2: COMMON LAW MAXIM

MAXIM: "Quicquid plantatur solo, solo credit". What ever is attached to the land, it goes with the land, it becomes the property of the land owner

*Celia Sebea v The Territory of Papua* Facts: Gov leased land from aboriginals for dev of airstrip. Also developed buildings. Then acquired compulsorily. Dispute was over the amount of compensation which was to be paid for it. Gov argued it shouldn't include the cost of the building as it wasn't constructed by the local people  
Held: Fixtures are part of the land, whatever is fixed on the land is the property of the land owner. Here the local people owned the land and buildings. Must include cost of the buildings

### *Brand v Chris Building Co Pty Ltd*

Facts: D constructed a building on P's land by mistake (ie didn't have P's consent or knowledge). When D realised he asked P for permission to remove it & offered to restore the land back to how it was. P refused & refused to pay compensation. Instead bought an action against D preventing them from entering the land.  
Held: whatever is attached to the land becomes the property of the owner & they are entitled to keep it. P did not have to pay compensation. D tried to plead estoppel but couldn't because the owner wasn't aware that D was mistakenly constructing a house on the land, (otherwise they could have)

PLA:NOTE: s122 & 123 changes this  
"Unjust enrichment" *Matthews v Paul* (1986) 162 CLR 221  
Where improvements are made to property (as in Brand's case) and the beneficiary may be ordered to give a fair and just compensation (fair value) for the benefit or enrichment if he accepted or constructively accepted

### STEP 3: TEST FOR DETERMINING WHETHER SOMETHING IS A FIXTURE:

#### 2) Degree of annexation

- o Establishes Prima Facie whether it is a fixture
- o Refers to the means of HOW the chattel is attached to the land
- o If it is attached to the land other than by its own weight (eg screws and bolts) it is prima facie a fixture *Manufacturers Ltd v Federal Commissioner of Taxation*
- o The onus is on the other party to prove that it is not a fixture on the BOP
- o The assumption applies even if the degree of attachment is only very slight *Holland v Hodgson*
- o If it is attached to the land only by its own weight (eg table) then prima facie it is not a fixture

#### 1) Object of an annexation

- o Refers to what the INTENTION of the fixture is
- o Test according to *Palumbo v Palmberri* and *Eon Metals v Commissioner of Taxation*
- o Intention must be for 'Permanent improvement of the land' versus 'for better use of the item' to be a fixture
- o If it is only slightly attached it is most likely not intended to permanently improve the land
- o If the thing is attached for better use of the item it will not be a fixture (eg mounted photo)
- o Courts will assess whether something is a chattel from the surrounding circumstances and the nature of the chattel

### Guidelines for determining object of annexation – look at all the surrounding circumstances

1. **Fixers intention** - Original person who fixed it, not necessarily the current owner
2. **Subjective** (that person in particular) v **objective** (what a reasonable person would have intended) **intention**  
o Both need to be considered but the **most important** is objective intention of what a reasonable person would have intended *Eon Metals v Commissioner of Taxation* (WA) (1991) 22 ATR 601
- o Look at what a reasonable person would assume of the intention of the fixer by looking at all the circumstances and conditions
3. **Manner of attachment**
  - o If lightly attached - most likely not intended to be a permanent improvement
  - o If firmly attached – most likely to be intended as a permanent improvement
  - o Not conclusive - you can have something just attached by their own weight that are fixtures eg pavers, or machines that are easily moved (*Holland v Hodgson*), although mining equipment which was transportable was held to be a chattel (*Eon Metals v Commissioner of Taxation*)
4. **Nature or function of the article in relation to the main use of the land**
  - o Eg machinery most likely to be a fixture (*Holland v Hodgson*)
  - o However, in *Eon Metals v Commissioner of Taxation* mining equipment was chattels because of the limited life of the mine, common practice and economic incentive of removing them
  - o Lecture theatre seats – integral part of the purpose of the lecture theatre therefore would be fixture
  - o Look at main purpose of the land and then assess the things in relation to the purpose
5. **Status of the affixer**
  - o If landowner – you are assumed to attach the thing for permanent improvement of the land (*Holland v Hodgson*)
  - o If tenants - unlikely you intended a permanent improvement for the land
6. **Purpose of Attachment**
  - o Not conclusive, depends on the facts of each case
  - o To prevent a thief?
7. **The above factors are just a guide, must look at the surrounding circumstances** *Palumbo v Palmberri*  
o Just because the court has held something to be a fixture in the past doesn't mean to say they will in every instance

### *Holland v Hodgson* (1872) LR 7

Facts: Issue over whether machinery, whether bankrupt owner could take trustee could sell with land. Some were bolted to floor with nails (sewing factory) so were prima facie fixtures. Owner had to rebut by showing the intention of attaching, was not to make a permanent improvement to the land, but to prevent them from wobbling; better use the items better. They could be removed easily as well  
Held: Machinery was part of the factory; main purposes must have been a permanent improvement for the land must have been intended as a permanent improvement

### *Belgrave Nominees v Barvin Scott Air Con*

Facts: D installed aircon connected to water pumps & brackets. Didn't get paid & wanted to remove  
Held: was a fixture, interconnected with building.  
Objective intention: builder doesn't normally intend to take something away (subj not as import)

### *Palumbo v Palmberri*

Facts: 1 Bro sold his 1/2 of flat to other but didn't include any express info on chattels  
Held: TV antennae, blinds, stove etc were fixtures but not other items