



*Sometimes the excitement and expectation surrounding the purchase of a property can be dampened when you inspect the property on the settlement day and the vendor has removed items from the property that you presumed would be staying.*

When you discover this, a dispute usually arises. To resolve that dispute, 2 questions usually arise:

1. What does the Contract say about the item?
2. If the Contract is silent, what does the law say?

The NSW Contract for Sale and Purchase of Land has provision on its front page for the vendor and purchaser to list what items are “inclusions” with the property and what items are “exclusions”. The Contract then defines the ‘**property**’ being purchased to be the land, the improvements, the ‘**fixtures**’ and the ‘**inclusions**’ but not the ‘**exclusions**’.

If the item that has been removed is listed in the Contract as an ‘inclusion’, the dispute usually can be readily resolved because the inclusions are part of the property which has been contracted to be sold to you. If it is listed as an exclusion, the vendor has the right to take the item.

If the item was not listed as an ‘inclusion’, the dispute then becomes whether the item is a ‘fixture’ or not. This is important because ‘property’ is defined in the Contract to include ‘fixtures’, and fixtures are to stay at the property.

## What is a fixture?

There is some difficulty in answering this question because much depends on the circumstances of each case. However, as a starting point, in general terms, if an item is permanently attached to the land, it becomes part of the land. If it is ‘attached’ to the land, the question then becomes:

1. What is the degree of attachment of the item; and
2. Was the intention to make the item part of the land?

In grappling with these questions when deciding disputes, the following points can be taken from Court decisions:

- Anything that is firmly attached to a dwelling or the land with the intention of improving the use of the dwelling is likely to be a fixture. Examples would include:
  - A clothes line cemented into the ground
  - An awning bolted to an external wall
  - A built-in cupboard



- A garden shed bolted to a concrete slab.
- Anything fixed down to make it easier to use is less likely to be a fixture. Think of a bench grinder or drill press bolted to a workshop bench.
- Anything customarily left behind is more likely to be regarded as a permanent improvement, as “part of the house” and therefore is more likely to be a fixture, even if the degree of attachment is quite slight. Think of a dishwasher, even though usually only attached by intake and exhaust hose couplings and a standard electrical supply cord.
- Anything customarily taken away is less likely to be a fixture, even if the level of attachment is considerable. Think of a washing machine, even though the degree of attachment is usually the same as a dishwasher.
- Anything that can’t be removed without damage is more likely to be a fixture. Think of a built-in sound or home theatre system.
- Where the system as a whole is a fixture, even the unfixed parts of the system are likely to be fixtures. Think of a wall mounted TV resting on brackets but not itself fixed to the wall.
- Anything that can be just picked up and carried away is less likely to be a fixture. Think of garden furniture.

## If the item is a fixture, what remedies are available?

If the item that has been removed by the vendor is a fixture, unless the vendor returns it, the vendor is in breach of the Contract. It is unlikely that the breach will give you a right to terminate the Contract. This is because for a right of termination to exist, the removal of the item must make the property so different from that which you originally contracted to buy, that you would not have entered into the contract.

The breach will however normally give you a right to claim compensation under the Contract, and the Contract usually provides a process, if you are aware of the removal prior to settlement, for you to retain part of the purchase price to cover your claim and includes provision for arbitration of disputes.

## How to avoid a dispute?

It is important to understand that, whilst you should be compensated for the item that has been removed, the value of that item removed may not justify the time and expense of pursuing a claim and the arbitration process. With this in mind, it pays to be particular about what is, and what is not, to stay with the property and ensure those items are specifically listed as ‘inclusions’ in the Contract. It is also essential to inspect the property prior to settlement to confirm the inclusions remain in place, and if not, to either delay settlement until the items are returned, or claim and negotiate compensation.

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