The importance of putting your legal intentions in writing and complying with the requisite formalities –

Extract of speech to Shoalhaven Heads Combined Probus Club

When parties to an agreement have a well written document recording their intentions there is less chance that the written terms will be disputed. Furthermore, when a dispute does arise, parties to a written document have a better chance of resolving the issue early on than when there is no written agreement or a poorly drafted written agreement.

The validity and enforceability of oral agreements or agreements implied by actions

Where your legal intentions are not written down this does not mean you have and invalid agreement. Generally speaking, oral or implied agreements or other legal arrangements not put in writing are as legally valid and enforceable as if they had been written down. However, you could struggle to obtain any legal relief because of lack of reliable evidence as to those intentions.

At Common Law (that is, judge-made law) there is no requirement to put any agreement in writing. It does not matter whether you agreement is written down, made orally or implied by actions. All of these methods of communicating your legal intentions are acceptable and enforceable. Obviously, however, the actual terms of oral and implied agreements are not always easy to ascertain. Lapse of time and therefore the parties' inability to accurately recall of the terms of the agreement is one of many issues usually faced by a person trying to prove an oral or implied agreement.

To give clarity to many common legal agreements, legislation has been introduced in some instances to make it a requirement that legal intentions be put in writing. Relevant legislation will often also insist on other formal requirements for the enforceability of the document such as registration. An agreement that doesn't comply with the legislated formalities is usually valid, but also usually unenforceable until such time as it complies with the formalities.

In Australia this is certainly the case with any agreement to do with land. You cannot buy, sell, restrict the rights in your own property or obtain any additional rights over someone else's property and expect these rights or obligations to be upheld by others without putting that agreement in writing. In addition, that written document requires proper execution, which involves not only the signing of the document by the involved parties, but also the verification of the identities of those parties and usually the payment of some form of tax such as stamp duty. It also requires that the document be registered and that registration be accessible on a public domain. If the agreement to transfer of land does not meet these requirements the court will not usually enforce that agreement.

A well drafted agreement will achieve the following:

1. It will focus the minds of the involved parties to think about "what if" scenarios and develop a plan of action should those scenarios arise in practice. This is vital for the resolution of disputes before they become serious.
2. It will spell out the expectations of each party of themselves and the other party.
3. It will prevent or shorten any dispute. Most people don't go out of their way to breach agreements. Disputes usually arise because of confused expectations.

4. It defines procedures for dealing with problems including disputes. Dispute resolution processes will generally encourage dialogue in a non-threatening arena. Conciliation and mediation are usually encouraged and in fact usually required before parties can take each other to court.
5. Very importantly, it saves time and it saves money when dealing with disputes.