

# **TRANSFER OF PROPERTY TO GAY & LESBIAN COUPLES - QUEENSLAND**

**by  
Paul Agnew**

**State Manager – QLD**

**National Compliance & Risk Management Director**



## Introduction

Recently a borrower's solicitor made objections to a person transferring half of his interest in a house in Queensland to his gay partner on the grounds of "natural love and affection". The solicitor objected on the basis that he believed that gay and lesbian couples were not legally recognised because federally same sex marriages in Australia are not recognised and similarly that applies to de-facto relationships.

The following is commentary in relation to this issue and detailing the steps necessary for gays and lesbians to not only transfer property to his/her partner but also to obtain stamp duty exemptions associated with such transfer in Queensland.

### Can a transfer between same sex couples be lawfully recognised?

The *Land Titles Act* and *Property Law Act* in Queensland do not prohibit a person transferring an interest in his/her property by way of gift or nominal consideration. The relevant Acts do provide that any disposition or transfer of land should always be evidenced in writing and that such transfer may have words which express the nature of the transaction (e.g. "by way of gift"; "the natural love and affection borne by the transferor for the transferee"; and like phrased wording).

### Can same sex couple gifts of property be entitled to stamp duty exemptions?

In Queensland, the Office of State Revenue ("OSR") has issued Practice Direction DA67.1 which effectively states that any transfer or agreement for the transfer of land in Queensland will incur transfer duty unless it falls within various exemptions. Section 151 of the *Duties Act* 2001 ("Duties Act") provides an exemption from transfer duty in cases where there is a transfer by way of gift of an interest in residential land from one party to a marriage or de facto relationship to the other party, if the parties will own the land as joint tenants or tenants in common in equal shares after the transfer and the property will be the principal residence of the parties.

The main question is to determine how the OSR defines "de facto relationship". Pursuant to Schedule 6 of the *Duties Act* and Section 32DA of the *Acts Interpretation Act* it defines "de facto relationship" as a relationship between de facto partners. The *Duties Act* requires the people to be living together for at least two (2) years as a couple on a genuine domestic basis. The *Acts Interpretation Act* then provides that a "de facto partner" is a reference to either one of two persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family.

In deciding whether two persons are living together as a couple on a genuine domestic basis, any of the following circumstances may be taken into account:-

- (a) The nature of and extent of their common residence;
- (b) The length of their relationship;
- (c) Whether or not a sexual relationship exists or existed;
- (d) The degree of financial dependence or interdependence and any arrangement for financial support;
- (e) Their ownership, use and acquisition of property;
- (f) The degree of mutual commitment to a shared life, including the care and support of each other;
- (g) The care and support of children;
- (h) The performance of household tasks;
- (i) The reputation and public aspects of their relationship.

However, two persons are not to be regarded as living together as a couple on a genuine domestic basis only because they have a common residence.

*Most importantly, the gender of the persons is not relevant in determining whether they are in a de facto relationship.* Accordingly, gay and lesbian couples do fall within the definition of "de facto relationship".

### Steps to be taken to obtain the stamp duty exemption.

To receive the exemption the party transferring the interest in the property must be able to attest to the following in the form of a Statutory Declaration:-

- (a) The transferor is a party to a de facto relationship;
- (b) The transferee is the other party to the de facto relationship;
- (c) The date they commenced to live together as a couple on a genuine domestic basis;
- (d) The transfer of property consists of an interest in residential land;
- (e) The transfer does not relate to non residential land;
- (f) After the transfer the parties will own the land as joint tenants or tenants in common in equal shares;
- (g) The transfer is by way of gift;
- (h) The property will be the parties' principal residence from the date of transfer.

Such statutory declaration containing the above details must be submitted with the transfer or an agreement for transfer, together with the approved OSR Form 2.2.

One thing to be particularly mindful of in relation to obtaining the exemption is that it must be by way of gift. Accordingly, references to making nominal payments or assuming liability of the loan over the property will deem such transfers invalid for exemption purposes.

### **Conclusion**

In Queensland, gay and lesbian couples are not prohibited from gifting their assets and they are entitled to stamp duty exemptions in doing same on the above grounds.

Please contact Paul Agnew from Mortgage Settlements Australia on (07) 3223 5998 or by email at [pagnew@settlements.net.au](mailto:pagnew@settlements.net.au) if you have any queries in relation to the above or would like to know of any developments in relation to this Article.



**Paul Agnew**  
**Mortgage Settlements Australia**

This article is for the general information of Mortgage Settlement Australia's clients and associates. The information contained in this article should not be relied upon without first consulting us and obtaining specific advice. The date of this article is 9 March 2006.