

Episode 60

Call of Stamp Duty

Intro

This is Risk on Air by Lawcover, and today's episode is Call of Stamp Duty.

Julian: Welcome to Risk on Air. I'm Julian Morrow and today we're joined by Matthew Cridland who's a partner at K&L Gates and an expert in indirect taxes. Matthew, welcome.

Matthew: Thank you very much. Great to be here.

Julian: And I'm very relieved that you're here because we're talking tax today and we're talking about concessions, exemptions and apparent misconceptions. Some of the practical tips that solicitors should be aware of in terms of dealing with duties payable and eligibility for exemptions and concessions. So, we are definitely in need of an expert and that's definitely not me, Matthew - so let's see how we go. Perhaps I could ask you first, why is this a topic that we are discussing on a Lawcover podcast?

Matthew: Sure. It's an area where there's frequent mistakes. It's an area where everybody assumes that it's going to be relatively simple - we're talking about transactions that are quite common, say the purchase of a residential property, and people assume that the duty issues are all well understood and easy to navigate, but there's always some tricks and traps.

Julian: Yeah, exactly. That's a particular area of risk, isn't it, where you think you've got your head around the situation, but slight little changes that can always happen at the last minute can have major financial consequences.

Matthew: Exactly, that's right.

Julian: Well, let's talk through a few of them. What is section 18 of the Duties Act (Duties Act 1997 (NSW)), Matthew, and why should we be worried about it?

Matthew: Why should anyone care about section 18.3? It's probably just useful to explain at the outset that when we're talking about a purchase of property, people think of it as one transaction and only one transfer duty event. In New South Wales, it's actually two. So, the transfer duty liability is crystallised when the contract of sale is first executed. So the moment a person signs on the dotted line as the purchaser, that crystallises the transfer duty liability for them as the purchaser of that particular property. Of course, there is then the actual transfer of the title to the property which occurs upon settlement.

- Matthew:** Now that could be some days, months or even years later depending on what the settlement period happens to be. And so it's not uncommon where a purchaser has rushed into a contract that they subsequently think, oh gosh, I've entered this contract in my own personal name but really I'd rather have actually acquired that in a related company or in a related family trust, for example. So how can I now transfer that to that related vehicle, whether it's a company or a trust, in a manner that doesn't crystallise a double duty liability? And so that's what section 18.3 is meant to deal with. It does provide a bit of a concession so that you're not subject to that double duty.
- Julian:** Okay, so when does it apply?
- Matthew:** In order to satisfy the requirements, one of the things that people get wrong where they do misapply the exemption or the concession, I should say, is the parties need to be related when the contract was signed. Now that's where the trick or the trap comes in. People think that's easy I'll just sign it as Matthew Cridland, I've signed on the dotted line and then I'll set up Matthew Cridland Proprietary Limited. But if I set up that company at a later point in time after I've already executed the contract, the company's not related to me.
- Julian:** At the time, yeah.
- Matthew:** And therefore, albeit we're both related at settlement, we don't satisfy the very specific legislative requirement. I should have also explained earlier that whilst a single purchase is 2 dutiable events, there is a concession for the transfer that occurs on settlement, but that concession only applies where the transfer is, quote, in conformity with the contract. So it needs to be a transfer to the named purchaser on the contract. If there's a transfer to somebody other than the named purchaser, that risks double duty applying and that's where this related party concession then comes in to potentially save the day in the appropriate circumstances.
- Julian:** Okay, so it's got to be a related party at the time. I think the legislation also says approximately with. Now, how much real room have we got approximately there?
- Matthew:** Not a lot. So yeah, it's a very strict definition and people also get confused between the distinctions between related persons and associated persons – they are 2 distinct definitions in the Duties Act. They are both found in the dictionary to the Duties Act at the very back of the legislation. So it's important to do 2 things - one is to make sure that the party to whom you're intending to transfer the property is in fact the related person as defined, but then also to make sure that the relationship existed at the appropriate time, which was when the contract was first executed.
- Julian:** And it's very easy for people to miss that because in our heads we think of it as one transaction.
- Matthew:** That's right. They don't view it as two different duty timing points, they just think it's one transaction and I'm buying a property on settlement and I've got to pay the duty before settlement. These days with the conveyancing, you can't complete the settlement unless the duty has been assessed and it's usually paid directly to Revenue New South Wales on settlement via PEXA. So people just think of it as one duty liability, one acquisition, one issue, when in fact there's two very distinct duty timing points.

- Julian:** And you've already said that related person is a clearly defined terms. I think you've given us one example, which could be related if they happen at the same time, which is a person and a company. Could you give us a quick sense of what comes within that concept of related person?
- Matthew:** Sure. So it might include a spouse, it might include other relatives within members of a family. So those types of related persons are the ones that we would normally think of. But again, as I say, it's quite a strict test, so it is always necessary to double check it. And sometimes it goes the other way. We've talked about the example of an individual who later decides, gosh, I really want to put the property into a company. Sometimes it might be the other way around where you've signed the contract as a director of a company and on reflection, for whatever reason, it may be preferable to actually acquire it as an individual for land tax or income tax reasons. So again, in all those situations, it's necessary to consider whether there's a provision which provides an exemption where there's a change in the purchaser or the transferee in that way.
- Julian:** And I suppose it follows from that, if you have a client who's looking to make some sort of tweak that they don't think is a big deal, that's a real point of risk where you've got to slow it down, probably take a bit of time yourself to look into it, but also flag it with the client.
- Matthew:** Absolutely. Just I guess pausing, thinking about is this the best and the only way to achieve this outcome?
- Julian:** And it's always difficult because at these moments everyone's like, oh, we've done the deal and everyone wants to get it done really quickly...
- Matthew:** Yeah, there's always a lot of settlement pressure.
- Julian:** That's right.
- Matthew:** I would just say that if the related person exemption is not available, there are other ways that you can change a purchaser under a contract. Usually, the safest way to do it is to actually work with the vendor and have them agree to the termination of the original contract, which triggers an exemption on that cancelled contract, and then enter into a new contract on the same terms but in the name of the preferred purchaser.
- Julian:** I see. So, starting again and formalising that might be better than trying to sort of fix it or make an exception down the track.
- Matthew:** Absolutely. It's a big double duty risk because everybody knows and accepts there will be ad valorem transfer duty on the purchase of real property. That's a given. What you don't want to do inadvertently is trigger double duty by having one lot of duty on the contract and then full duty on the transfer of settlement because the transfer is not in conformity with the contract. And so either you've got to identify relevant concession or exemption, or alternatively, start again with the vendor's consent, if you can obtain it, rescind the contract, and then have a new contract entered into in the name of the correct purchasing entity.
- Julian:** And if you can't do that and you think you might be able to rely on section 18.3, you've got to be very, very acutely aware of all those little distinctions that we've just been talking about.
- Matthew:** Exactly right.

- Julian:** All right, let's move along to the first home buyers assistance scheme. What are the pitfalls that practitioners should be aware of with that one?
- Matthew:** Sure. Now again, it's a great concession for people that are trying to acquire their first home. It's not limited to new properties. The concession can apply to existing or new properties and it can also extend to vacant land on which a house is to be built in certain circumstances. The main traps that people fall into is they don't double check carefully the eligibility requirements. So if you've got two or more people that are acquiring it, so often a married or de facto couple, one of them needs to be a permanent resident or Australian citizen. Neither of them, if they're buying it together, can have previously claimed an equivalent concession or previously acquired a residential property in Australia.
- Julian:** Right, so the first part of the first home owner applies to both people.
- Matthew:** Correct. The other thing is that the concession applies to the acquisition of the whole of the property. Now that may sound very simple and straightforward, but often these days with the bank of mum and dad in the background, it's not uncommon for parents to perhaps acquire a 20% interest because they're stumping up with the deposit and they want some security in relation to the monies that they've loaned to help with the purchase of that.
- Julian:** The whole point of the bank of mum and dad is that they've got a property and so that can affect the eligibility because if they've got an interest, they're not a first homeowner.
- Matthew:** That's right. And as I say, the concession is specific to an acquisition of the whole interest. So if you've got the two co owners, a married couple that qualify, but you've got, as you say, mum and dad that don't, who are in there as a third co owner, that's when the eligibility requirements may not be satisfied. There's also post-acquisition residency requirements for existing homes and new homes. So, it's not enough to meet the purchaser eligibility requirements in terms of being Australian citizens or permanent residents and being a first home. You also have to actually move into the property within 12 months of acquisition and then you have to use it continuously as the principal place of residence for at least 12 months after having moved in. Those tests could effectively apply for up to a further two years post acquisition - so you've got the 12 months to move in and then the 12 months of continuous use as a principal place of residence. And it's fair to say that Revenue New South Wales does check, they will get on to the purchases and ask, have you actually moved in? Are you utilising this as your principal place of residence? Where else are you living? Those sorts of things. So yeah, it's quite important to be aware of both the pre-purchase requirements as well as the post-acquisition requirements.
- Julian:** Absolutely, yeah. So that's quite a lot to be thinking about when again, we're all focused on the moment of acquiring the home... what happens if you satisfy all those pre-purchase requirements and your plan is to satisfy all those living arrangement requirements, but then your living arrangements change within the period?
- Matthew:** There can be some concessional circumstances. So, specifically there's a concession for ADF members, Australian Defence Force members, recognising that they may be sent overseas for a period of time or what have you. There are also what I would describe as hardship type exceptions. So if for some reason you can't live in the property as a principal place of residence for the full 12 months for some specific reason, it might be, I'm making up an example here, but it might be death in the family.

Julian: Yeah, sick relative or something?

Matthew: Serious illness. In those circumstances, you can make an application to Revenue New South Wales to have the 12 month requirement reduced or alternatively waived entirely. And that's something that the Chief Commissioner can consider and does consider on a case by case basis.

Julian: So it's not automatic, but again, it could only be something you can take advantage of if you've got that extended period in mind and you've been advised about it by your solicitor.

Matthew: Exactly. And I think the problem for solicitors, of course, is that we're all fixated on making sure that the requirements are satisfied as at settlement, but we have no control of visibility over what people are doing post acquisition. And we may assume that they're aware of their obligations, but whether they are or are not is always or can be in dispute if something goes awry.

Julian: So very important to advise about it and I'm going to go out on a limb here in a Lawcover podcast and say not only advise about it but probably make a file note of it or have a written record of it.

Matthew: Yeah, absolutely.

Julian: All right, well, we've talked about the nice situation of owning a first home, hard though that is for many people these days. Let's talk about the less pleasant end of relationships now, Matthew. Let's talk about relationship breakups and some of the pitfalls that can occur here or little changes that can mean that exemptions which might apply don't.

Matthew: Sure. So there are some specific exemptions which are available where a marriage or a de facto relationship comes to an end. And there may be circumstances where there's family court orders or there's property related agreements which are entered into. And so the Duties Act does have some very specific exemptions which can apply where there are transfers that are part of a marital or spousal breakup or where there's been family court orders that have been made relating to the distribution of property pursuant to a property agreement. The problem is where those concessions or the court orders are not strictly complied with. So examples that we may see is where mum and dad have split up, but they've got some adult children, and they may decide that rather than transferring dad's property to mum, that particular interest might get transferred to an adult child, for example - it might be half an interest in a home. It may not necessarily meet the requirements for the concession, it would need to be considered very carefully.

Julian: So that's an example where you're including a third party in an arrangement, you know, in very good faith that all those sorts of things, but as a solicitor, you need to advise that sort of scenario can have significant consequences.

Matthew: Absolutely. And another example that we've seen in this same area - a very recent example of a mistake that did result in adverse duty outcomes, was a situation where there was a court order requiring a husband to transfer his interests in a matrimonial home to his ex-wife.

Matthew: For whatever reason, the parties didn't get around to completing the transfer for a number of years and by the time that they did ultimately get around to it, the former wife had remarried and in order for her to have the financial capacity to pay the mortgage on the full property, she needed the property to be transferred jointly to herself and to her new husband. And so what the solicitors did was they just did on instructions, they just did a transfer directly from the former husband to the new husband so that he then had a 50% interest in the matrimonial home. And that helped the former wife to satisfy her banking requirements to help finance the property. And that didn't qualify because the court orders required the transfer to be from the husband to the former wife. Had the former wife, then on transferred the title to her new husband, you would have had two back-to-back exempt transactions. But by taking a shortcut and directly transferring it to the new husband, it didn't qualify.

Julian: So it needs to be strictly in accordance with what the court order was, or if it's a financial agreement, strictly in accordance with that.

Matthew: Correct.

Julian: There's no situation where the commissioner then looks at it and goes, oh, well, I see now this is actually all consistent with the spirit of what they were doing, that's not going to fly.

Matthew: It absolutely won't fly. And this question around whether the Chief Commissioner has the discretion to correct errors of this nature, it's been raised time and time again, certainly in NCAT, New South Wales Civil and Administrative Tribunal cases. And the Tribunal is very clear. When I say regularly, this must be every two months - there's a pronouncement by NCAT saying the Chief Commissioner does not have the discretion to take into account the intention of the parties and neither for that matter does the Tribunal. So if you don't comply with the black letter law requirements, you don't qualify.

Julian: You mentioned earlier the fact that now settlements are happening electronically and I think there have been some examples where errors in the use of new electronic platforms have had pretty significant tax consequences. That was the situation in the case of *El Chami* and the Chief Commissioner of State Revenue (*El Chami v Chief Commissioner of State Revenue* [2025], NSWCATAD 266), a 2025 case before NCAT. What happened there?

Matthew: So it's a textbook example of where people have tried to do the right thing, but they've just made what I would call a genuine inadvertent administrative error. So we've talked about the fact that these days there's e-conveyancing, which all occurs via PEXA. It's probably just worth noting for listeners that there's also two different duty lodgement regimes that can potentially apply in this e-conveyancing world. One is what is referred to as EDR or electronic duties returns. I often refer to that as in-house stamping. So a number of law firms, including my own, we have access to EDR, we're licensed to use EDR and for all intents and purposes we can in-house assess the duty on appropriate transactions. That means that the documents are not lodged with Revenue New South Wales, they just get a transaction record.

They see the amount assessed and our client uses that self-assessment, which is generated via EDR. They use that duty assessment number as a part of their PEXA record and that allows settlement to go through. That's distinct from what's called e-duties, which is a portal that allows you to lodge documents with Revenue New South Wales for assessment.

- Matthew:** An example of that is if a contract for the purchase of land has a price above \$20 million, we're not permitted to self-assess that via EDR. We have to lodge that via e-duties for assessment by Revenue New South Wales. So there's two different streams, if you like, of duty assessments. One is what I'd call self-assessed, the other is commissioner assessment. Where we're seeing the errors is with the self-assessments. And so what happened in El Chami, and it's not limited to that case, we have seen other instances of it, is where a firm has, on instructions from a client, they're agreeing a 50% interest in a matrimonial home between a married couple or de facto spouse or couple.
- Julian:** So Mr El Chami owns the house 100%, but he's going to transfer half of it into his wife's name with the intention that that's going to qualify for an exemption.
- Matthew:** Absolutely, that's exactly right. And then what happens is that due to an administrative error, it might be a paralegal who's conducting the work because it's really data entry. They inadvertently transfer not a 50% interest in the property, but a 100% interest. And so what happens is the assessment, the duty assessment might be done correctly - so they've put it through EDR as a exempt spousal transfer, 50% interest transfer. That goes through because it's self-assessed. No one picks it up until its audited many months or years down the track.
- Julian:** But in the background, there's this error looming and then that gets picked up how?
- Matthew:** It just gets picked up on review. So what will then happen is that when the self-assessment is completed, it generates what's called a DAN or duty assessment number. That duty assessment number must be put into the PEXA workspace and without it, settlement can't complete. So we've self-assessed it as an exempt spousal transfer, we've got our duty assessment number, that duty assessment number is then input into the PEXA workspace and due to a clerical error, rather than a 50% interest being transferred its put in as a 100% interest. Nobody picks it up and settlements completed. And next thing you know, the land registry services, the title records have been updated to reflect that the spouse now owns a 100% interest.
- Julian:** Yeah, right. And so that comes to light. Now, I've heard what you've said so far, Matthew, that the commission is going to be strict about these sorts of things, but errors happen. What did the solicitor in that case do? And I suppose following from that, what should they have done?
- Matthew:** So clearly there's been a transfer in error. Everybody knew that it was meant to be a 50% interest, it was 100% interest. What they did in that particular case was they then did a second, what I'd call a rectifying transfer. So they've then transferred 50% back to the original spouse.
- Julian:** So they haven't undone the transaction, they've said, okay, well we transferred 100%, so we've got to transfer 50% back.
- Matthew:** Correct. And what Revenue New South Wales have said is, well, that transfer of the 50% interest back is exempt and it's exempt for one of two reasons. It's either a second spousal transfer which is exempt or the same reason the original one would have been had it been done correctly or alternatively there is a specific exemption in the act for a transfer which is done to correct an error in an earlier transfer. So, for either of those two reasons the transfer of the 50% back won't trigger any further duty. The problem is it doesn't remove the error on the erroneous transfer of 100% and the duties on 100%.

- Julian:** Right. The attempt to fix it has not incurred additional tax, but it hasn't removed the liability for that first transaction.
- Matthew:** That's exactly right. And so we do have a lot of instances where solicitors find themselves in this situation. And I must say it's a horrible situation to find yourself in, people are doing their best. These are not intentional errors. I wouldn't even say they're careless errors, they're just things that happen in a busy practice. But Revenue New South Wales is very clear, NCAT is very clear, including in that El Chami decision that there is simply no discretion for the commissioner to waive the liability on grounds of unfairness. One thing that what you could conceivably do before you do the rectifying transfer is approach LRS and say to LRS, look, there's been a mistaken transfer, can you exercise a discretion that the Registrar General has in the Real Property Act (Real Property Act 1900) to amend the title register. Now, if the Registrar General exercises that discretion to make that correction to the title record, that correction operates as though the error had never occurred. So it renders the erroneous transaction void ab initio.
- Julian:** And therefore no tax.
- Matthew:** And therefore no tax. And there has been New South Wales Supreme Court cases in rare circumstances where the Registrar General has done that, where it's been confirmed that if the Registrar General exercises that discretion, there won't be duty. And that was also referenced and alluded to in that El Chami decision. The problem is that in this new PEXA e-conveyancing world, the Registrar General is very worried about the indefeasibility of the title records. And the prevailing view, and it's not for me to speak for LRS, but in my dealings with that office, the response that we're typically getting is the Registrar General will not correct errors that have been made where transactions have been otherwise correctly processed through PEXA - that's not what the discretion is for, and they apply it in very exceptional circumstances. So it really leaves you really with nowhere to move in terms of trying to correct errors of that nature without having a duty liability.
- Julian:** Yeah, and no one wants to be hoping that they'll get a beneficial exercise of a discretion. The thing to do is to avoid being in that scenario. So it's very hard to say avoid human error because human errors are going to happen, Matthew. As a practice management question though, what can practitioners do to minimise the risk of things like that happening and having really significant tax consequences?
- Matthew:** I think there's really only two things. One is having a checklist and just working through it carefully to make sure that all of the I's have been dotted and T's crossed. And the second thing, dare I say it, people that are supervising paralegals or junior staff need to actually double check the work. And as a partner of many years experience I know how difficult that can be at the end of the day when you've been focused on your own matters to then turn around and look at somebody else's work, particularly if it's a data entry exercise. It's just so easy to miss the detail, but they're really the two things. And then I think, of course, AI is going to come into its own at some point, not in terms of doing the work, but rather supporting people in practice to double check the work and just make sure that everything that should have been included has been included.
- Julian:** Although no doubt there'll one day be a case about when the AI somehow gets it wrong. But again, very important just to be aware of these issues and to have in place practice management techniques that will minimise the risk. What about transfers that arise as a result of a will? Where can things go wrong there?

- Matthew:** So again, there are particular transfer duty exemptions where usually real property assets or other dutiable property is transferred to a beneficiary pursuant to the trusts that are contained within a will. Now once again, there's a reference in the relevant provisions to transfers that are quote unquote in conformity. Now the main example of where things start to go awry is where you might have a relatively large estate that has multiple properties and you might have multiple beneficiaries and they might want to mix and match what properties they're getting or what benefits they're getting out of the estate.
- Julian:** So everyone understands what the will says but then they look at it practically and think oh wouldn't it make more sense for you take this property and I'll take that property and everyone's happy with that, but they won't be happy if they have to pay a lot more tax.
- Matthew:** That's exactly what it is. So you'll have property A and B and then two beneficiaries that might be entitled to 50% each and they say to each other, well, I don't want 50% in two properties, but I'm happy to have 100% of property A and you can have 100% of property B. And if there's a difference in value, we'll do a true up as between us - that's not in conformity with the will. And so Revenue New South Wales does take a relatively concessional approach where it's a, in that example, that imposed duty on a transfer of 50% on the basis it's not in conformity, not 100%. But again, you're moving from a position where it's entirely free of any duty to there being duty payable. And sometimes people aren't aware, they just have it in the back of their minds, mum and dad have left me this property, I'm entitled to this and they don't necessarily turn their mind to what the duty implications might be.
- Julian:** So again, what's the practical tip for solicitors dealing with this sort of situation? I suppose it would make sense to flag early on the importance of being in conformity and trying to make sure that there either isn't a change or at least that you've advised about what the consequences are.
- Matthew:** That's exactly right. Again, it all does with the written word. So going back to the actual will itself, having a look at what it says, hopefully on its clear terms as to who gets what. And then I guess it's having that conversation with the beneficiaries to say, this is what we understand the will to say, this is how we would propose all the interests be transferred. If there's any departure from that, let us know. And there may be duty and other tax implications associated with that.
- Julian:** Well, it's been really interesting talking about all these little pitfalls, Matthew, but I think it might be good to finish where we started in a way, just to underline that point about the problem here sometimes being that people are familiar with the way it goes. What can you do to guard against that other than listening to Risk on Air?
- Matthew:** Yeah, look, it's the old adage, a little bit of knowledge is a dangerous thing. And you're quite right, I think people assume that the law remains unchanged, that practice remains unchanged. Just, I guess, continually informing ourselves. So continuing to do professional development, listening to Risk on Air, looking at the alerts that are put out by Lawcover and others and the Law Society. But I guess really just double checking is the key thing. It's not assuming that you know the exemption or concessions applies, it's about double checking and confirming it does.
- Julian:** Matthew Cridland, thanks so much for joining us on Risk on Air.
- Matthew:** Thanks.

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Outro

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[*El Chami v Chief Commissioner of State Revenue* \[2025\] NSWCATAD 266](#)