Title Insurance: A Risk Management Tool for Conveyancers

Part 1 – Coverage for 'Known Risks'

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Introduction

Risk management is an integral part of modern conveyancing practice. An effective risk management strategy serves the dual objectives of ensuring client satisfaction and reducing the incidence of professional indemnity claims.

One aspect of effective risk management is title insurance. Title insurance is a specialised type of insurance which can be obtained by purchaser clients during the course of a conveyancing transaction which is designed to deliver protection to purchasers against unknown or undiscoverable risks which are inherent in modern conveyancing practice that might otherwise leave a purchaser exposed to loss and damage.

In addition to protecting purchasers against *unknown* conveyancing risks, Stewart Title may also provide coverage for risks which are discovered during the conveyancing transaction or otherwise disclosed in the contract. This ability to insure against 'known risks' has not been available in the market prior to the introduction of title insurance.

In Part 1 of this article series on title insurance as a risk management tool, we discuss how the Stewart Title "Residential Purchaser Policy" may be utilised by conveyancers as a means of effectively managing 'known risks' for the benefit of their purchaser clients.

What is Title Insurance?

Title insurance may de described as a contract of *indemnity* whereby the title insurer indemnifies the insured (being the owner of a legal right in real property) against actual loss incurred by the insured as a result of any unknown title defect or other risk

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covered in the policy as at the policy date (the date of settlement)[2]. Some of these covered risks include loss caused by:

- Illegal/unapproved building work;
- encroachments;
- zoning non compliance;
- unsatisfied conditions of a development consent;
- non compliance with the terms of a positive and/or restrictive covenant or easement;
- unregistered rights of way and easements or non compliance with registered rights of way and easements;
- post settlement dealing registrations by a third party;
- fraud and forgery;
- unpaid rates and taxes resulting in a charge on the land.

In addition to indemnifying the insured from actual loss arising from a risk covered in the policy, Stewart Title will also defend the insured's title as represented in the policy and to cover the costs incurred in that defence, such as legal costs and expenses[3]. These costs would be in addition to any liability the insurer may have in respect of the indemnity amount contained in the policy.

The policy amount will normally be the purchase price of the property which will automatically increase in line with the market value of the land up to a maximum of 200% of the policy amount.

Why Title insurance?

Whilst the Torrens Title system, under which most land dealings in Victoria are registered, is designed to protect a purchaser against any defect in the registration system, it will not protect a purchaser against many of the practical risks inherent in property transactions which fall well outside of the safety of the Torrens System.

Stewart Title's 'Residential Purchaser Policy' allows a purchaser to transfer conveyancing risks which might otherwise leave your purchaser client exposed to loss and damage to Stewart Title. It is this re-allocation of risk that makes title insurance such an effective risk management tool.

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[2] See for example definitions of title insurance in O'Connor, P "Double Indemnity – Title Insurance and the Torrens System" *QUT Law & Justice Journal* Vol 3 No 1 2003.

[3] See clause 1.2 of the Stewart Title Policy.

Coverage for Known Risks

Traditionally, the purchaser's options in dealing with an adverse matter either discovered during the conveyancing transaction or disclosed in a contract for sale were limited to:

- not proceeding with the purchase;
- rescinding the contract or seeking a reduction in the purchase price; or
- proceeding with the purchase and accepting the risk.

Title insurance now provides purchasers with another option. With Stewart Title, a purchaser may insure against loss or damage arising from a risk discovered during the conveyancing transaction or disclosed in a contract for sale.

What is a 'Known Risk'?

A 'known risk' is simply any matter which may be adverse to the purchaser's interest and ownership of the property which is disclosed in the contract for sale or discovered during the course of the conveyancing transaction, including disclosures by way of correspondence, disclosure by way of replies to requisitions on title, and disclosure by way of the usual searches and enquiries carried out after exchange.

Known risks may include (but are not limited to): illegal building works, survey/boundary defects, zoning non compliance, breaches of covenants, easements and restrictions affecting the land and knowledge of unregistered rights and interests in the land the subject of the contract for sale.

Example – Illegal building work/encroaching structure

> *You act for a purchaser. The contract contains a disclosure that part of the improvements erected on the property encroaches over the adjoining property or upon an easement burdening the land. The contract also contains a disclosure that a pergola was constructed without Council approval.*
>
> *The risk to the purchaser is that Council may require the pergola to be demolished or upgraded and that the adjoining property owner may require that the encroaching improvements be demolished or demand compensation to allow the encroaching improvements to remain.*

What does Stewart Title cover?

Subject to Stewart Title's specific underwriting guidelines, Stewart Title may on a case by case basis provide coverage for the known risk with no additional premium payable. Depending on the nature of the risk and the extent and likelihood of the possible loss, Stewart Title may provide either full coverage to the insured, that is, we may treat the risk as if it were an unknown risk, or we may limit the cover provided for the specified risk to forced removal protection to cover the costs of the insured having to demolish the structure but not to cover the costs of rebuilding the structure or any diminution in the value of the property (marketability cover). In some cases, Stewart Title may elect not to insure the risk at all.

Given the diversity of risks which might be uncovered during the course of a conveyancing transaction, every risk will be assessed by Stewart Title on a case by case basis. Where a known risk is identified, enquiries should be made of Stewart Title to determine whether coverage may be offered and the extent of that cover.

The Benefits of Title Insurance

Stewart Title's coverage for 'known risks' represents a distinct benefit to purchasers and conveyancers in circumstances where a defect or risk is identified during the course of a conveyancing transaction. The benefit for purchasers is that by insuring over known risks the transaction can proceed to settlement thereby avoiding potential costly disputes with vendors and avoiding the risk of incurring loss and damage in circumstances where the risk is accepted by the purchaser. Another benefit is that there is no additional premium payable for a known risk.

Stewart Title has also provided title insurance coverage for known risks to purchasers at the request of vendors allowing the transaction to proceed to exchange. Without title insurance, the purchaser would not have proceeded with the transaction and the vendor would have lost the sale.

Another key benefit is that where coverage is provided, Stewart Title, rather than the purchaser, will assume the 'known' risk and will accordingly indemnify the purchaser against any resulting actual loss to the extent of the coverage specified in policy coverage confirmation issued by Stewart Title. In the event of a claim there is no excess payable by the insured.

For more information, please email us at paul.watkins@stewart.com or contact Stewart Title's Underwriting Department on **1800 300 440.**