

Title Insurance: A Risk Management Tool for Conveyancers

Part 2 - Survey and Boundary Defects

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Introduction

Advising a purchaser client about risks associated with survey and boundary defects should form an integral part of any effective risk management strategy. Unfortunately, in practice, clients rarely obtain a survey report.

How can conveyancers effectively manage this risk?

One option available to conveyancers is title insurance. In Part 2 of this article series on title insurance as a risk management tool, we look at the issue of survey and boundary defects and discuss how the Stewart Title “Residential Purchaser Policy” may be utilised by conveyancers as a means of effectively managing survey and boundary defect risks.

Title Insurance for Survey and Boundary Defects

Losses arising from building encroachments and boundary discrepancies (land area miscalculations) are risks which fall outside of the indefeasibility provisions of the *Transfer of Land Act 1958* (Vic)².

Survey reports are of course fundamental in identifying or disclosing whether the improvements erected on the land the subject of a contract for sale encroach on adjoining land or whether the land is subject to encroachments from adjoining properties. Without a survey report it is also difficult to advise whether the improvements comply with the terms of any covenants or restrictions registered on title, such as building height restrictions and minimum setback requirements, or whether the improvements erected on the land interfere with an easement or right of way burdening the property.

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² Section 42 (1)(b) of the *Transfer of Land Act 1958* (Vic)

Ideally, a purchaser should obtain a survey report. However, in practice, many purchasers do not obtain a survey report and as a result, following settlement, bear the risk of any non compliance with local government legislation and/or boundary discrepancies and encroachments upon adjoining properties which the survey report would have disclosed.

What does the Stewart Title policy cover?

The Stewart Title policy provides coverage to the insured in circumstances where the insured suffers actual loss as a result of encroachments, boundary discrepancies and non compliance with or a violation of a covenant or restriction³. Title insurance also provides an indemnity in respect of “actual loss” suffered by the insured which includes future loss or damage where someone else builds a structure, other than a boundary wall or fence, which encroaches on the insured’s land following completion⁴.

Example

You act for a purchaser. Your client did not conduct a survey of the property prior to settling the purchase. Following settlement, your client finds that part of the brick garage encroaches on their neighbour’s property. The neighbour either wants the encroaching structure demolished or demands compensation from your client to allow the encroaching structure to remain. You also discover that the house does not comply with a height restriction covenant imposed by Council. Council requires compliance with the covenant.

What is the “Actual Loss”?

In relation to the above example, Stewart Title would be obligated to indemnify the insured for any “actual loss” arising from the encroachment and non compliance with Council requirements. Such loss might include:

- The costs of compensating the adjoining property owner in consideration of the adjoining owner granting an easement allowing the encroaching structure to remain;
- Legal costs incurred in defending any proceedings brought by the adjoining owner against the insured;
- If the encroaching/non compliant structure has to be demolished and cannot be rebuilt then the loss in the market value of the property for the deprivation

³See Clauses 2.1(l) & (o) of the Stewart Title policy.

⁴ Clause 2.2 (b) of the Stewart Title policy.

of the use of the encroaching/non compliant structure (such as a deck or carport or living space) – if the structure can be rebuilt within the boundary or in compliance with the covenant then ***the costs of rebuilding the structure***.

- In circumstances where the insured has entered into a contract to sell the property and prior to completion the purchaser elects to rescind the contract because of the issue of the encroaching structure the actual loss would include (for example) the interest payments on any bridging loan secured by the insured to purchase a new home, any subsequent shortfall in the contract price if a subsequent purchaser is found (the marketability coverage).
- If there was a dispute in relation to the encroachment or the covenant or proceedings are issued against the insured in relation to the covenant or encroachment, then the title insurer would be obligated to defend the insured's title and would pay the costs incurred in that defence.

Adverse Possession

The Stewart Title policy also provides an indemnity against actual loss arising from loss of title by adverse possession.

In Victoria, section 42 (2)(b) of the *Transfer of Land Act 1958* effectively provides that a certificate of title does not guarantee a registered proprietor title against an adverse possessor.

Once a person in occupation obtains title by adverse possession, the former registered proprietor will not be entitled to compensation and will have no recourse to the Consolidated Fund.

Where an insured suffers a loss of title by adverse possession, in respect of a whole or part parcel of land, then Stewart Title will compensate the insured for the loss in market value of the land. This ability to insure against the risk of adverse possession has been unavailable in the market prior to the introduction of title insurance.

Coverage for Known Survey Defects

In addition to protecting purchasers against *unknown* survey and boundary defects, Stewart Title may also provide coverage for survey and boundary defects which are discovered during the conveyancing transaction or otherwise disclosed in the contract, such as for example, specific disclosures of encroachments or non compliance with easements and restrictions affecting title to the land with no additional premium payable.

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

The Stewart Title policy will therefore provide a benefit to a purchaser who did not obtain a survey report prior to completion, but following completion, discovers a boundary discrepancy or discovers non compliance with the terms of a covenant or restriction which must be complied with or loses land because of a claim of adverse possession. Normally, a purchaser would assume the risk of unknown boundary faults and contraventions of covenants and restrictions following settlement. Title insurance allows a purchaser to transfer this risk to Stewart Title.

The benefit for the conveyancer is that in the event of a loss incurred by the purchaser as a result of unknown survey or boundary defects, the purchaser can make a claim on the title insurance policy on a “no fault” basis rather than commence proceedings against the conveyancer’s professional indemnity insurance.

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