

## Title Insurance & Illegal Building Work

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### Introduction

Despite the vendor disclosure provisions of the *Sale of Land Act 1962*, the issue of illegal building work continues to be the cause of significant practical concern to conveyancing practitioners acting for purchasers and vendors of real estate in Victoria.

While the vendor is required to disclose to a purchaser particulars of building permits obtained within a specified period of time<sup>2</sup>, the vendor provides no statutory or contractual warranty that the improvements erected on the land have been constructed and completed in accordance with the permits or that permits have been obtained in respect of all works carried out on the property.

In circumstances where the purchaser investigates the legality of the improvements after exchange of contracts, the existence of unknown illegal structures can be potentially devastating. For vendors, any pre exchange investigation by a purchaser may bring the property to the attention of the council and render the vendor liable for the cost of any rectification work.

As recent national statistics compiled by Archicentre<sup>3</sup> indicate that 22% of Victorian homes inspected by them reveal some form of illegal building activity<sup>4</sup>, the introduction of title insurance into the Australian marketplace should be regarded by conveyancing practitioners as a means of assisting purchasers and vendors in effectively managing some of the risks associated with illegal structures in residential conveyancing transactions.

### Practical Problems with 'Illegal Building Work' in Conveyancing Transactions

In order to be satisfied that the improvements erected on a property the subject of a contract for sale have been constructed and completed in accordance with relevant building permits and will not require future rectification or demolition, it is generally necessary for conveyancing practitioners to make further enquiries of the local council on behalf of their client.

One of the problems associated with bringing the property to the attention of the council following exchange of contracts lies with condition 15 of Table A of the *Transfer of Land Act 1958* or condition 15 of the Third Schedule of the *Property Law Act 1958*, which provides that "the purchaser shall assume liability for compliance with any notices or orders relating to the property sold (other than those referring to apportionable outgoings) which are made or issued on or after the day of sale but the purchaser shall be entitled to enter on the property sold (without thereby being deemed to have accepted title) at any time prior to the settlement date for the purpose of complying with any such notice or order which requires to be complied with before the settlement date."

Accordingly, following exchange of contracts, if the council inspects the property and discovers illegal building works and issues a notice or order requiring rectification or demolition, the *purchaser* will bear the responsibility and the expense of complying with the notice without any contractual or statutory right to rescind the contract.

This predicament will often deter a purchaser from making any enquiries of council following an exchange of contracts, particularly where the purchaser intends to carry out renovation works in the future and is not inclined to outlay additional rectification costs prior to completion. Vendors are also at risk where a proposed purchaser makes enquiries of council *prior* to exchange of contracts. If illegal building work is discovered and the council is required to issue a 'show cause' notice, the vendor will be required to comply with the notice and the costs associated with compliance.

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<sup>2</sup> Seven years in accordance with section 32 (1A)(a) of the *Sale of Land Act 1962*

<sup>3</sup> The building advisory service of the Royal Australian Institute of Architects.

<sup>4</sup> Archicentre News Release 1 February 2003 – <http://www.archicentre.com.au/media/archinews01022003.htm>

If the purchaser subsequently contemplates selling the property, the existence of unknown and undisclosed illegal building works also may expose the owner to the risk of council orders to demolish or rectify the building where a proposed purchaser brings the property to the attention of the council.

### **Title Insurance coverage for illegal buildings**

Stewart Title's *Residential Purchaser Policy* (the Policy) provides coverage to the insured in circumstances where the insured is ordered to demolish or rectify all or part of an existing structure due to non compliance with relevant building/or development approvals. Clause 2.1 of the Policy provides cover where the insured purchaser is "prevented by a public authority from using the land as a residence or is forced to rectify or remove all or part of the existing structure(s) on the land (other than boundary walls or fences) because: (a) it contravenes an existing zoning law; (b) of any outstanding notice of violation or deficiency notice;(c)any portion of the existing structure(s) was built or modified without building or development approvals required by law".

Under the terms of the Stewart Title policy, a purchaser will be indemnified against certain loss in circumstances where a property has been purchased that contains illegal structures, and following settlement, an order is subsequently issued by the council to rectify or demolish the building.

The Stewart Title Policy has therefore been designed to transfer risk from the purchaser to the title insurer. The benefit for purchasers is that following settlement, Stewart Title, rather than the purchaser, will assume the risk of the existence of any unknown illegal building works, and will accordingly indemnify the purchaser against actual loss caused by a subsequent demolition or upgrading order following any post settlement application for a building certificate by the purchaser. In the event of a claim there is **no excess** payable by the insured.

### **Conclusion**

Despite the introduction of vendor disclosure legislation in Victoria, the existence of illegal structures remains an area of significant practical concern to purchasers and their conveyancing practitioners.

For conveyancing practitioners, the question of whether to advise a purchaser to make enquiries of council following exchange of contracts is becoming more problematic. In many cases the decision will depend on the nature of the property being purchased and the extent of the purchaser's knowledge concerning the property.

Stewart Title's *Residential Purchaser Policy* is simply one option now available to purchasers in circumstances where the purchaser either elects not to make enquiries of council prior to completion or is unable to do so.

As purchasers continue to be exposed to the risks associated with illegal buildings in conveyancing transactions, conveyancing practitioners should be familiar with residential title insurance in order to comprehensively meet the needs of their clients intending to become property owners.