

# DEFENDING THE

**W**hile title insurance is a concept that originated in the US, lenders, solicitors, originators and property owners in both Australia and New Zealand now use it widely. But not everyone in the mortgage industry knows what title insurance actually is and what it does.

In respect of residential and commercial property, title insurance provides protection against ownership and user risks. With lenders, it ensures that they have a valid and enforceable mortgage that ranks in the right priority.

A question that is often asked is 'why do you need title insurance in a Torrens jurisdiction such as Australia, where there is a state guarantee of title?'

Coverage under a title insurance policy is more extensive than the scope of the statutory compensation scheme. It can include protection for illegal building structures, fraud and forgery, encroachments and boundary disputes, easements, violations of restrictive covenants, access problems, zoning problems, unregistered interests and issues arising in the registration gap.

It also means that if a claim were to arise the property owner or lender doesn't have to sue their solicitor or originator (and their professional indemnity insurer) – but simply makes a claim on their policy.

A title insurance policy is one of indemnification, so all an insured party has to establish is that they have suffered loss under a covered risk. This means that if there is a title defect in the property, the owner (or lender if in possession) simply makes a claim.

If the lender goes to enforce its mortgage and there's a challenge to the mortgage or a problem with its priority,

**We've all heard of title insurance, but what is it? What part does a broker play in the protection process? *Ellie Comerford* explains the concept and straightens out some common misconceptions around title insurance**

# TITLE

the lender can simply make a claim. A title insurance policy will also protect a lender against fraud and forgery on the part of the borrower or loan originator. An additional benefit is that the title insurance policy will cover all costs, legal fees and expenses in resolving a claim.

## Risk and recovery

Some title insurance companies will also insure 'known risks'. Some even insure over title defects not identified before settlement as well as over title defects that are identified prior to settlement (known risks).

This aspect of coverage is of particular benefit to lenders and owners of commercial property. Commercial lenders understandably have certain property title requirements that must be met as a prerequisite for settlement.

However, meeting those requirements is not always possible and can result in either a delay in settlement or no settlement at all. A title

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insurance policy can protect the interest of the lender and facilitate completion of the settlement.

The Torrens system of land is not watertight. There's a lack of security and indemnity where an interest is taken in registered land not only during the pre-registration period but also post registration. The statutory compensation scheme has fault-based exclusions, ie the government is unwilling to indemnify for losses caused wholly or partly due to the fraudulence or negligence of the agents of the property owner.

Also the costs and hurdles in accessing the statutory compensation scheme or making a professional indemnity claim can be expensive, time consuming and uncertain.

## Details, details

Title insurance is a policy of first resort. The insured owner or lender is not required to sue anybody else who may be at fault. The policy will indemnify owners and lenders against risks that existed as at the policy date which may cause problems after settlement or where a lender goes to enforce its mortgage.

Purchasing a home is possibly the biggest investment most people will make. Title insurance means an owner is the insured party in the purchase transaction and the owner (purchaser) no longer has to rely on the insurance of their professional adviser if something goes wrong. With the increase of fraud, it also provides certainty for lenders.

Title insurance is inexpensive. The premium is a one-off, low-cost payment that protects the owner for the life of ownership and the lender for the life of the loan.

It can also be used by businesses involved in buying mortgage portfolios. Without title insurance, the usual process is for a due diligence to take place in respect of either all or a sample of mortgages in the portfolio. At completion of the due diligence, there will often be disclaimers in respect of identified risks.

Title insurance can be used to insure all mortgages in the portfolio in respect of all risks covered by the policy – the cost of the premium usually being less than the cost of the due diligence.

## Role reversal?

Title insurance does not replace the role of a solicitor or conveyancer in the transaction. Typically, they will order title insurance on behalf of the purchaser or lender (depending on who is taking out a policy).

The solicitor or conveyancer will act diligently to ensure the purchaser has good title to the property being purchased. Further, it is often the solicitor or conveyancer who might identify a problem with title – and title insurance means that they can provide the purchaser or lender with a title insurance policy as additional protection.

A title insurer will usually waive the rights of subrogation against the solicitor or conveyancer involved in a title-insured transaction, which in turn means their professional indemnity insurer is not exposed.

## 10 THINGS ABOUT TITLE INSURANCE

1. It is a way of managing risk
2. It is not the same as LMI; it complements it
3. It can provide protection against fraud
4. It can dramatically expedite the settlement process
5. It is a no-fault policy unlike professional indemnity insurance where negligence must be proved
6. It offers reassurance that the title insurer will meet the costs of defending a mortgage should problems ever arise
7. It costs only a one-time premium for the life of the loan
8. It covers more than the Torrens guarantee
9. Title insurance live claims in Australia are proving up benefits
10. Title insurance risk management strategies are enhancing the mortgage documentation process

But what about mortgage brokers? What part do they play in the process? Brokers need to understand the protection offered by title insurance and how it can benefit the many parties to a transaction, ie purchaser, lender and originator.

Title insurance can be used to expedite a property purchase and provide cost savings to the borrower and purchaser.

### **The insured owner or lender is not required to sue anybody else who may be at fault**

For example, settlement of a purchase may be delayed because the borrower/purchaser is not ready for settlement to take place until a new survey or building certificate has been issued.

The broker could inform their client that their title insurer is prepared to provide insurance in place of the survey or building certificate, ensuring that settlement takes place on time!

### **Risky business**

What are the potential risks of taking on this type of insurance without a full understanding of how it works? With all insurance policies the “risk” is ensuring that the level of protection purchased meets the protection required.

A title insurer is obligated to comply with all financial services regulations

when selling title insurance, and includes providing the relevant disclosures and advice necessary for a purchaser to understand what title insurance is and how it will protect them in the event of a claim under a covered risk. If the insured understands what is covered, there is no risk in taking out title insurance. **MPA**

*Ellie Comerford, managing director, First Title*

