

FASTRefi is a happening thing - Recent court case proves up benefit of Title Insurance...

The unattended settlement process for refinances ("*FASTRefi*" as we call it) was introduced in Australia by First Title some years ago. The process means that a refinance can happen following loan approval in a matter of days rather than weeks, giving the lender a competitive advantage, improving customer experience and means that the broker gets paid their commission a lot earlier.

From the broker side, in contrast to the traditional refinance process, it reduces delay in the customer receiving funds and also means that there is little scope for the outgoing lender's retention unit to contact the borrower to try and make the refinance fall over, as the lender only becomes aware of the refinance once it has already occurred. There are a number of lenders who have now adopted this unique process, and for those originators who use it, it gives them a competitive edge.

The process works with the lender advancing funds without simultaneously receiving the Title Deeds and Discharge of Mortgage from the outgoing lender. The borrower receives the loan funds much more quickly than with a traditional refinance and it enhances customer experience. However, this advantage does not come without risk. There is a delay before the Title Deeds are recovered from the outgoing lender and therefore a corresponding risk that something may occur to prevent the lender from registering its mortgage in first priority eg. the outgoing lender may erroneously give the title back to the borrower. First Title's title insurance policy insures against that risk.

In some respects, this process is a precursor to how the existing attended settlement process will need to change following the introduction of electronic conveyancing.

A recent case, *Westpac Banking Corporation v Adelaide Bank Limited* [2005] NSWSC 517, highlights the need for title insurance in this process. In that case, the insured lender refinanced the borrowers' loan with their existing bank, which was managed by a mortgage manager, Domain. However, shortly after the refinance, the borrowers drew down \$130,000 on their existing facility. An argument then ensued about priority, the Insured arguing that the further advance made by the existing lender should be "tacked on" behind the Insured's.

The case hinged partly on the notice given to the outgoing lender and whether *FASTRefi* was "industry practice". Judgement was delivered on 30 June 2005. Whilst the Insured was unsuccessful on technical grounds, the verdict serves to show that *FASTRefi* is a viable option for Lenders and that title insurance provides the lender/insured with comfort that First Title is responsible for all legal costs and any loss the Insured may ultimately suffer.

The process in 2003 was somewhat novel, with outgoing lenders (and, more particularly in this case, their mortgage managers) often failing to understand what had happened when an unattended refinance occurred. Since then unattended settlements are now becoming accepted industry practice with a number of lenders using the process (which has now been revamped and improved from our experience in the Australian mortgage market) and several hundred brokers now trained on how to use it. The decision illustrates that whilst the unattended settlement process comes with risk, ultimately it is the insurer who bears that risk. This leaves the lender and originators to get on with doing what they do best – providing loans to borrowers using a process which puts them ahead in the market, but with the added comfort of knowing that if something goes wrong, the insurer will sort it out.

The Borrower From Beyond The Grave - Fraud is a growing concern!

A recent title insurance claim highlights that identification fraud is ever present, posing problems for the lender in this matter which were ultimately accepted by First Title under a title insurance claim.

A loan for over \$200,000 was taken out by the "borrower" in 2002. The loan was repaid for almost 2 years before going into default. Possession proceedings were commenced, the "borrower" even coming into the law firm's office to accept service.

A possession order was obtained. However, several weeks later, the lender received a surprise when the Sheriff was attending the property to change the locks and was informed that the named borrower had been dead for over 2 years. The deceased real owner had left his property to his daughter in his will and probate had only just been issued. The beneficiary's lawyers had immediately contacted the lender and commenced injunctive proceedings to have the possession order set aside.

First Title was notified - and commenced investigations, as part of the "Duty to Defend" coverage under the Residential Loan Protection Policy held by the Borrower. It turned out that the deceased owner's niece was the executrix of his estate. She had custody of the title deeds. Her (now estranged) husband was a mortgage broker who had used the title deeds to obtain a loan by fraudulent means, purporting to be the "borrower".

As the injunctive proceedings were on foot and after discussions with the beneficiary's lawyers, First Title took the view that the claim should be paid. This was partly as a result of the Perpetual Trustee Victoria Limited v Tsai decision handed down last year.

As in the Tsai decision, this was an "all monies" mortgage, where the collateral loan documentation had been signed by a fraudster and not the real owner. According to the Supreme Court of New South Wales, this would mean that the lender had an indefeasible mortgage (as it was registered) but in respect of "nothing".

First Title is now pursuing the mortgage broker.

**To find out more contact • Jon Downes on
(02) 8235 4404 jdownes@firsttitle.com.au**