

# **Title Insurance: A Risk Management Tool for CPCs**

## **Part 2 - Fraud and Forgery**

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### **Introduction**

There has been much publicity in the media recently about the rise of identity fraud and the use of counterfeit certificates of title in conveyancing transactions in New South Wales.

The New South Wales Law Society and the Australian Institute of Conveyancers (NSW) have both issued alerts to members concerning counterfeit and fraudulently obtained Certificates of Title in response to a number of fraud schemes uncovered in New South Wales<sup>2</sup>.

Whilst ideally extreme care should be used to identify and prevent conveyancing fraud, the reality is that the conveyancing system in New South Wales is inherently susceptible to fraud and forgery involving real property, leaving many victims of fraud with limited options for recovery and compensation.

Title insurance is another option now available to home owners providing private insurance compensation for losses arising from conveyancing fraud.

### **Title Insurance coverage for fraud and forgery**

One of the consequences of the Torrens System in New South Wales is that a purchaser who acquires land through a forged or fraudulent instrument, but is not a party to the fraud, will receive an indefeasible title on registration of the forged or fraudulent instrument, and the former owner will not be entitled to have the title restored or to monetary compensation from the new owner/purchaser<sup>3</sup>.

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<sup>1</sup> B Soc Sc LLB (Hons), Solicitor (NSW & ACT).

<sup>2</sup> See for example Law Society Circular dated 10 January 2007 entitled "Warning on Counterfeit Certificates of Title" concerning a major fraud scheme subsequently reported in the Sydney Morning Herald on 13 January 2007.

<sup>3</sup> Where an owner is deprived of title as a result of forgery or other fraud, his or her right to recover the land is converted to right to compensation (s 129 RPA 1900) and the former owner is not entitled to have the title restored and is statute barred from commencing an action to recover Torrens title land against the registered proprietor (s 118 of the RPA 1900).

Whilst the former owner may seek compensation for their loss from the Torrens Assurance Fund, the compensation provisions in the Torrens legislation have in the past created considerable practical difficulties for claimants as often valid claims were denied and claimants experienced considerable delays in compensation claims being paid<sup>4</sup>.

It remains to be seen whether the amendments to the *Real Property Act 1900* brought about by the *Property Amendment (Compensation) Act 2000* will have any practical benefits in overcoming the tendency of the administrators of the Fund towards defending claims on technical points resulting in complex litigation. Recent case law in New South Wales indicates that the Registrar-General may still interpret the new legislation in such a way as to limit the availability of compensation from the Fund<sup>5</sup>.

Moreover, in circumstances where a loss is caused by any fraudulent, willful, or negligent act or omission by a solicitor, licensed conveyancer, or real estate then a claimant will have no recourse to the Fund and will be required to seek compensation from the solicitor, real estate agent, or CPC's professional indemnity insurer<sup>6</sup>.

### **What does the Stewart Title policy cover?**

The Stewart Title policy provides coverage to the insured in relation to any "fraud, forgery, duress, incompetency or impersonation" which leads to a defect in the title to the insured's land"<sup>7</sup>.

### **Example**

*Somebody forges your client's Certificate of Title and sells or mortgages the land to an innocent third party who is not party to the fraud. The transfer or mortgage is registered thereby conferring an indefeasible title upon the purchaser or mortgagee. Your client loses their ownership of the land or suffers a loss as a result of the registered mortgage.*

*There is some evidence that your client's real estate agent is involved in the fraud and your client's claim against the Torrens Assurance Fund is denied.*

*Your client is forced to commence legal proceedings against the real estate agent's professional indemnity insurer who also denies that their insured was negligent.*

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<sup>4</sup> Law Reform Commission Report 76 (1996) Torrens Title – Compensation for Loss, paragraph 2.40: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R76CHP2>.

<sup>5</sup> See for example *Diemasters v Meadowcorp and Jain v Registrar General* (2001) NSWSC 495 (18 June 2001) and *Challenger Managed Investments Ltds v Direct Money Corp P/L* (2003) NSWSC 1072 (28 November 2003).

<sup>6</sup> Section 129(2)(b)(i)&(ii) of the *Real Property Act 1900*.

<sup>7</sup> Clause 2.1 (d) of the Stewart Title Policy.

## **Financial indemnity against actual loss**

In relation to the above example, Stewart Title will provide an indemnity against actual loss in circumstances where forgery, fraud, impersonation, duress, mental incompetence, or incapacity results in the owner being deprived of his/her ownership of the land or someone else claims to have an interest in the land up to the policy amount.

## **What is the “Actual Loss”?**

In relation to the above example the actual loss will be assessed by a registered valuation expert to determine the value of the insured property and the insured will be compensated on a no fault basis, providing that the insured did not create, allow (through their own acts or omissions), assume, or agree to the circumstances giving rise to the loss. Stewart Title may then of course seek compensation from the Torrens Assurance Fund under its rights of subrogation under the title insurance policy.

## **The Benefits of Title Insurance**

Unlike the Torrens Assurance Fund, a title insurance policy is a policy of *insurance* and therefore the policy and the conduct of the title insurer in relation to processing the claim are subject to the provisions of the *Insurance Contracts Act 1984* (Cth) and the provisions of the title insurance policy will be construed strictly against the title insurer in accordance with the *contra preferentum* rule

As noted above, the advantage of claiming under a title insurance policy rather than the Torrens Assurance Fund in the event of loss through fraud and forgery is that a title insurance policy is a “no fault” policy and the coverage is not limited where the fraud or forgery is occasioned by the insured’s legal practitioner, conveyancer, or real estate agent, nor is it necessary to commence administrative proceedings or legal proceedings in order for compensation to be payable. As long as the insured has suffered “actual loss” as a result of a matter covered under the title insurance policy and the insured is able to provide proof of loss then the title insurer is obligated to pay the claim.

Title insurance therefore offers a quicker, easier and cheaper claims process for home owners who are deprived of title through real estate fraud and forgery.

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