

# Mortgage Lenders Policy

## Contents

<u>Mortgage Lenders Policy</u>	<u>3</u>
<u>Privacy Statement</u>	<u>9</u>
<u>Policy Schedule</u>	<u>10</u>







## 1. DEFINITIONS

In this policy, the following terms have the following meanings:

- 1.1 “Authorised Expenses” means any costs, legal fees and expenses that First Title is obliged to pay under this policy and has approved in writing.
- 1.2 “Covered Risks” means the risks, matters and circumstances described in paragraph 3 of this policy.
- 1.3 “First Title” means First American Title Insurance Company of Australia Pty Limited ACN 075 279 908.
- 1.4 “Insured” means the insured named in paragraph 1 of the Schedule and also includes the persons or entities described in paragraph 5.1.
- 1.5 “Insured Mortgage” means the mortgage described in paragraph 4 of the Schedule.
- 1.6 “Jurisdiction” means the state or territory in which the Land is situated.
- 1.7 “Know, Known or Knowing” means having actual knowledge and not constructive knowledge or notice which may be impaired by matters appearing in the Public Records.
- 1.8 “Land” means the land described in paragraph 5 of the Schedule and structures and improvements constructed on the land which by law are taken to be part of the land.
- 1.9 “Laws” mean, without limitation, all Commonwealth, federal, state, territory or local authority laws (statutory or otherwise), orders, codes, regulations, ordinances and proclamations which have force and effect in the Jurisdiction and “Law” will be considered accordingly.
- 1.10 “Policy Amount” means the amount insured by this policy specified in the Schedule.
- 1.11 “Policy Date” means the date of this policy specified in the Schedule.
- 1.12 “Public Records” means records established or maintained at the Policy Date, under Laws and which impart constructive notice of matters relating to property (freehold or leasehold) in the Jurisdiction to those acquiring an interest in it for value.
- 1.13 “the Schedule” means the policy schedule attached to and forming part of this policy.
- 1.14 “Unmarketable” means an alleged or apparent defect in the title to the Land which is not excluded from cover under this policy and which allows another person to refuse to perform a lease, complete a contract to purchase or take a mortgage.



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## **2. COVERAGE STATEMENT**

Provided that the premium is paid and subject to the terms and conditions of this policy including the Schedule (which forms part of this policy) and relying on the information disclosed to First Title, as the circumstances may require, First Title will do the following:

### **2.1 ACTUAL LOSS**

Indemnify the Insured against actual loss, not exceeding the Policy Amount, sustained or incurred by the Insured in relation to any of the Covered Risks if they exist or occur on or before the Policy Date: and

### **2.2 FIRST TITLE'S DUTY TO DEFEND**

In addition to First Title's indemnity liability for the Insured's actual loss, if asked by the Insured under the terms of paragraph 7 of this policy, First Title will defend either or both the title to the Land and the Insured Mortgage for the Covered Risks insured by this policy. First Title will also pay any Authorised Expenses that it incurs in that defence. First Title can end this duty to defend the title to the Land and / or the Insured Mortgage by exercising any of the options listed in paragraph 9 of this policy.

## **3 COVERED RISKS**

### **THE TITLE TO THE LAND**

- 3.1 The person or entity described in paragraph 3 of the Schedule is not the owner of the estate or interest in the land.
- 3.2 Someone other than the person or entity described in paragraph 3 of the Schedule owns an estate or interest in the title to the Land.
- 3.3 A document is not properly signed resulting in a defect in the title to the Land.
- 3.4 A document has not been properly registered in the Public Records resulting in a defect in the title to the Land.
- 3.5 Forgery, fraud, duress, incompetency or incapacity results in a defect in the title to the Land.
- 3.6 The title to the Land is Unmarketable.
- 3.7 There is no legal right of access to and from the Land.
- 3.8 A covenant or restriction affecting the title to the Land has not been complied with or observed.
- 3.9 Structures or improvements on the Land or on other land interfere with, encroach on or contravene the terms of an easement or a right of way affecting the title to the Land.
- 3.10 Structures or improvements on the Land encroach on to other land or vice versa.

- 3.11 The address of the Land is different to that described in paragraph 5 of the Schedule.
- 3.12 There is a charge, lien or encumbrance on the title to the Land because of a mortgage or judgement for unpaid rates or taxes.

#### **VALIDITY, ENFORCEABILITY AND PRIORITY OF THE INSURED MORTGAGE**

- 3.13 The Insured Mortgage is invalid or unenforceable as an encumbrance against the title to the Land.
- 3.14 An encumbrance, charge or lien has priority over the Insured Mortgage.
- 3.15 If one is specified in the Schedule, the assignment or transfer of the Insured Mortgage is invalid or unenforceable or title to the Insured Mortgage does not properly vest in the assignee or transferee free and clear of prior encumbrances.

#### **4. EXCLUSIONS**

First Title will not indemnify the Insured against actual loss, will not have a duty to defend and will not be obliged to pay Authorised Expense resulting from any of the following risks:

- 4.1 The existence or violation of Laws restricting, regulating, prohibiting or relating to the use or enjoyment of the Land.
- 4.2 Environmental contaminants or hazardous waste on or under the Land.
- 4.3 Rights and interests reserved under a Crown grant or lease or the Law authorising the issue of the Crown grant or lease.
- 4.4 Public or private utility undertakers or a telecommunications utility or company having statutory rights to carry out works affecting the Land.
- 4.5 Any matter which is not shown in the Public Records but which could be ascertained by an inspection of the Land or by enquiries of the persons in occupation.
- 4.6 The rights of any person in occupation.
- 4.7 Risks which:
  - 4.7.1 the Insured creates, allows or agrees to at any time;
  - 4.7.2 are Known to the Insured but not to First Title and do not appear in the Public Records on or prior to the Policy Date or when the Insured acquires an interest in the Insured Mortgage;
  - 4.7.3 cause the Insured no loss or damage;
  - 4.7.4 occur, come into existence or are recorded in Public Records after the Policy Date; or
  - 4.7.5 result in any loss of priority of the Insured Mortgage because the Insured makes further advances despite Knowing of the existence of a subsequent encumbrance, charge or lien.
- 4.8 Any covenants, conditions, restrictions, rights, stipulations, easements, mortgages, charging orders, financial obligations and any other provisions which are recorded or otherwise noted on the title to the Land in Public Records on the Policy Date. This exclusion does not reduce the coverage of Covered Risks 3.8, 3.9 and 3.12 or any additional coverage that may be contained in any endorsement(s) that may be attached to this policy.



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- 4.9 Native title claims in relation to the Land.
- 4.10 The Insured Mortgage is or is claimed to be invalid or unenforceable or is adversely affected by an order or declaration of a court or tribunal because the Insured failed to comply with Laws that regulate or affect the conduct of business by the Insured in respect of its mortgage lending business and the providing of credit.
- 4.11 The Insured pays or is liable to pay damages, compensation, fines or penalties to any person because the Insured failed to comply with or breached any of the Laws referred to in paragraph 4.10.
- 4.12 Any additional exclusions listed in paragraph 6 of the Schedule.

## CONDITIONS

### 5. CONTINUATIONS OF INDEMNITY

- 5.1 The coverage of the Covered Risks continues to protect:
  - 5.1.1 the Insured if the Insured acquires all or any part of the estate or interest in the Land by foreclosure or any other legal manner which discharges the Insured Mortgage;
  - 5.1.2 a successor, other than another insurer, who acquires an interest in the Insured Mortgage; and
  - 5.1.3 a successor who acquires the Insured Mortgage or the estate or interest in the Land by operation of law and not by purchase.
- 5.2 The coverage of the Covered Risks continues to protect the Insured only as long as:
  - 5.2.1 the Insured owns the Insured Mortgage;
  - 5.2.2 the Insured retains an estate or interest in the Insured Mortgage or Land in the circumstances referred to in sub-paragraph 5.1.1 above; or
  - 5.2.3 a mortgagee exercising a power of sale, and either:
    - 5.2.3.1 the Insured has liability to a purchaser regarding the title to the Land under a contract for the sale of the Land; or
    - 5.2.3.2 the Insured holds a debt secured by a mortgage given to the Insured by a person who purchases the title to the Land from the Insured.
- 5.3 The coverage of the Covered Risks does not continue to protect any purchaser of:
  - 5.3.1 the Insured's estate or interest in the Land; or
  - 5.3.2 a debt secured by a mortgage given to the Insured by a purchaser of the Land from the Insured.
- 5.4 If the Insured making a claim under this policy is not the party named in paragraph 1 of the schedule, First Title reserves the right to use against that Insured any rights the First Title had against that Insured's predecessors under this policy, unless that Insured acquired its interest in the Insured Mortgage or the Land as a purchaser for value without Knowing of the asserted defect, lien, encumbrance, adverse claim or other matter insured against by this policy.

### 6. NOTIFICATION OF A CLAIM

- 6.1 The Insured must advise First Title in writing as soon as possible after the Insured becomes aware of:
  - 6.1.1 litigation commenced or threatened in relation to the Insured Mortgage or the title to the Land;
  - 6.1.2 any claim which is or may be adverse to the Insured Mortgage or the title to the Land;



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- 6.1.3 a claim that the title to the Land is Unmarketable; or
- 6.1.4 any circumstance which might otherwise entitle the Insured to make a claim under this policy.
  
- 6.2 First Title's obligations to the Insured under this policy may be reduced in part or in whole if the Insured:
  - 6.2.1 fails to take all normal and reasonable steps to safeguard the Insured's interest in the title to the Land;
  - 6.2.2 fails to advise First Title promptly of any of the circumstances set out in paragraphs 6.1.1 to 6.1.4, above; or
  - 6.2.3 refuses to co-operate with First Title;and any action or omission of the Insured in these respects adversely affects First Title's ability to dispute or defend any challenge or to commence any action against other persons.

## **7 DEFENCE AND PROSECUTION OF ACTIONS AND THE INSURED'S DUTY TO CO-OPERATE**

- 7.1 If the Insured asks First Title in writing, First Title will, at First Title's cost and without unreasonable delay, defend the Insured in litigation in which a third party asserts a claim adverse to the title to the Land or the Insured's interest in the Insured Mortgage (but only to the extent that the litigation involves a Covered Risk).
  
- 7.2 First Title has the right, at its cost, to commence and prosecute any action or proceeding or do any other act (including making settlement with third parties) which, in its opinion, may be necessary or desirable to establish the estate or interest in the Land as indemnified or the validity of the Insured Mortgage or to prevent or reduce loss to the Insured. First Title may take appropriate action under the terms of this policy whether or not First Title is liable under it and by doing so, First Title will not be taken to have conceded any liability or waived any provision of this policy. If First Title exercises its rights under this paragraph it must do so diligently.
  
- 7.3 Whenever First Title has brought an action or defended the Insured as required or where permitted by the provisions of this policy, First Title may pursue any litigation (including appeals) to final determination by a court of competent jurisdiction and reserves the right in its sole discretion to appeal any judgement or order.
  
- 7.4 In all cases where this policy permits or requires First Title to prosecute or defend any action or proceeding, the Insured must co-operate fully with First Title and give First Title all relevant information in relation to the action or proceeding and any appeal and permit First Title to use, at its option, the Insured's name for this purpose. If requested by First Title the Insured must, at First Title's expense, give First Title all reasonable assistance to:
  - 7.4.1 secure evidence, obtain witnesses, prosecute or defend the action or proceeding or effect a settlement; and
  - 7.4.2 do any other lawful act which, in First Title's opinion, is necessary or desirable.
  
- 7.5 The provisions contained in paragraphs 7.1 to 7.4 are subject to First Title's rights under paragraph 9.

## **8. PROOF OF LOSS OR DAMAGE**

- 8.1 In addition to the information required under paragraphs 6 and 7, the Insured must give First Title a written statement to prove the Insured's loss. This statement must be given to First Title not later than 90 days after the Insured Knows the facts which will let the Insured establish the amount of the Insured's loss. The statement must contain at least the following:
  - 8.1.1 the Covered Risk which constitutes the basis of the Insured's loss or damage;
  - 8.1.2 the amount of the Insured's loss; and
  - 8.1.3 the method the Insured used to compute that amount.



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8.2 First Title may require the Insured to show First Title its records, files and other documents whether created before or after the Policy Date which reasonably relate to the claim for loss or damage. All information that the Insured gives First Title is confidential (except matters of public record) and will not be disclosed by First Title to others unless it becomes necessary during any court proceedings or is required to be disclosed by Law. First Title's obligations to the Insured under this policy could be reduced if the Insured fails or refuses to comply with the Insured's obligations under this paragraph.

## **9. SETTLING CLAIMS AND TERMINATION OF LIABILITY**

9.1 If the Insured makes a claim under this policy for which First Title is liable or, in any other way, First Title learns of a matter or circumstance for which it is or may be liable, First Title can do one or more of the following:

- 9.1.1 pay the Insured the amount of indemnity cover then in effect under this policy together with any Authorised Expenses; or
- 9.1.2 purchase the debt secured by the Insured Mortgage from the Insured for the amount owed under it together with any interest and Authorised Expenses. In those circumstances, the Insured must transfer or assign the Insured Mortgage together with any collateral securities and credit enhancements to First Title on receipt of payment and give all necessary notices of that transfer or assignment; or
- 9.1.3 pay or otherwise settle any claim with other parties for or in the Insured's name together with any Authorised Expenses; or
- 9.1.4 pay or otherwise settle with the Insured the loss or damage provided for under this policy together with any Authorised Expenses.

9.2 After First Title has made a payment or otherwise settled a claim in one of these ways, First Title's liability to the Insured:

- 9.2.1 under this policy if sub-paragraphs 9.1.1 or 9.1.2 apply;
- 9.2.2 in relation to the Insured's claim if sub-paragraphs 9.1.3 or 9.1.4 apply, will terminate, including any obligation to defend, pay costs or prosecute or continue any litigation.

## **10. DETERMINATION AND EXTENT OF LIABILITY**

10.1 This policy is a contract of indemnity against actual monetary loss or damage. Subject to paragraphs 11 and 12, First Title's total liability under this policy (excluding Authorised Expenses) will be the lesser of:

- 10.1.1 the Policy Amount; or
- 10.1.2 the amount of the debt secured under the Insured Mortgage together with interest and Authorised Expenses which are owing and can be recovered under the Insured Mortgage at the time of loss; or
- 10.1.3 the difference between the value of the estate of interest in the Land which is the subject of this policy and the value of that interest affected by the substance of the Insured's claim.



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## **11. LIMITATION OF FIRST TITLE'S LIABILITY**

11.1 First Title will not be liable to indemnify the Insured:

- 11.1.1 if First Title establishes good and marketable title to the Land, removes the alleged defect, lien, charge or encumbrance or cures any other matter or thing giving rise to the claim under this policy in a reasonably diligent manner by any method including litigation;
- 11.1.2 until litigation, including appeals, in relation to a claim conducted by First Title (or by the Insured with First Title's authorisation) has been finally determined by a court of competent jurisdiction;
- 11.1.3 for liability voluntarily assumed by the Insured in negotiating or settling any claim or litigation without First Title's prior written consent;
- 11.1.4 if the Insured has made further advances under the Insured Mortgage after the Policy Date, except for advances a) made to protect the Insured's interest under the Insured Mortgage and b) reasonable amounts expended to prevent deterioration of the Land; or
- 11.1.5 if the Insured has made construction loan advances under the Insured Mortgage after the Policy Date, except construction loan advances for the purpose of financing in whole or in part the construction of structures on the Land which, on the Policy Date, were secured by the Insured Mortgage and which the Insured was and continued to be obliged to advance.

## **12. REDUCTION OF INDEMNITY AND REDUCTION OR TERMINATION OF FIRST TITLE'S LIABILITY**

- 12.1 The amount of indemnity cover payable by First Title under this policy will be reduced or terminated (as the case may be) by any or all of the following:
- 12.1.1 all payments under this policy except for Authorised Expenses;
  - 12.1.2 the payment by any person of all or part of the debt or any other obligation secured by the Insured Mortgage or any voluntary, partial or full satisfaction or release of the Insured Mortgage to the extent of the satisfaction or release. Despite this, in the case of a partial payment, satisfaction or release, the amount of indemnity cover will be increased by accruing interest and advances made under the terms of the Insured Mortgage up to but not exceeding the Policy Amount;
  - 12.1.3 the amount by which the Insured's acts or omissions have increased First Title's liability or reduced First Title's ability to recover amounts from third parties; and
  - 12.1.4 anything the Insured does or omits to do which adversely affects any right of recovery from third parties or reduces First Title's ability to mitigate the Insured's loss or damage.

## **13. LIABILITY NON-CUMULATIVE**

If the Insured acquires title to the estate or interest in the Land in satisfaction of the debt secured under the Insured Mortgage or any part of it and First Title has paid the amount under a policy insuring a mortgage on the Land either excluded by Paragraph 4.8 or shown as an additional exclusion in paragraph 6 of the Schedule, the amount paid by First Title will be taken to be a payment under this policy and the amount of indemnity cover will be reduced by a corresponding amount.

## **14. PAYMENT OF LOSS**

First Title shall not be obliged to make any payment under this policy unless this policy is produced to it for endorsement. If the policy has been lost or destroyed the Insured must give First Title proof of loss or destruction to First Title's reasonable satisfaction. When the extent of the Insured's loss and First Title's liability under this policy has been fully determined, First Title will pay that amount to the Insured within 30 days of that determination.



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## **15. SUBROGATION**

If First Title agrees to indemnify or defend the Insured under this policy in respect of any claim, then regardless of whether or not actual payment has been made First Title will immediately be subrogated to any rights, contractual or otherwise, which the Insured may have in connection with that claim, the Insured Mortgage of the Land. If First Title asks, the Insured must transfer to First Title all of the Insured's rights and remedies against any person or property that, in First Title's opinion, might be necessary to perfect this right of subrogation.

## **16. LIABILITY LIMITED TO THIS POLICY**

This policy and any endorsements to it given in writing by First Title shall be the entire contract between the Insured and First Title. Any claim that the Insured makes against First Title must be made under this policy and is subject to its terms.

## **17. SEVERABILITY**

If any provision of this policy is held to be invalid or unenforceable under any Law, that provision may be severed from and will not be taken to have affected the remaining provisions.

## **18. NON WAIVER**

If First Title grants the Insured time or indulgence or if First Title fails to enforce any provision of this policy or any of First Title's rights under it, First Title will not be taken to have waived its right to enforce the provisions of this policy or its rights under it.

## **19. VARIATIONS AND ENDORSEMENTS**

No variation of, or endorsement to this policy will be of any effect unless it is made in writing and is signed by First Title. Any variation of, or endorsement to this policy will be subject to the terms and conditions of this policy and will not, unless specified by First Title in writing, modify the terms and conditions of this policy or alter the Policy Date or increase the Policy Amount.

## **20. NOTICES**

All notices required to be served on or given to First Title under this policy must include a reference to the policy number and the property address and be delivered to:

Claims Department, First American Title Insurance Company of Australia Pty Limited, Level 12, 309 Kent Street, Sydney NSW 2000, Australia

## **21. PRIVACY STATEMENT**

We are committed to protecting the privacy of your personal information. This commitment is reflected in our compliance with the National Privacy Principles. For further information please visit our website [www.firsttitle.com.au](http://www.firsttitle.com.au) or call us on (02) 8235 4433 for a copy of our Privacy Statement.

File No:	0000	Premium:	\$00.00
Policy No:	0000	GST:	\$00.00
Policy Amount:	\$0.00	Stamp Duty:	\$00.00
Policy Date:	00/00/00	Total Due:	\$00.00

### POLICY SCHEDULE

- Name of the Insured:**  
[Name of Lender]
- The estate or interest in the Land which is encumbered by the Insured Mortgage is:**  
[Freehold or Leasehold]
- Title to the estate or interest in the Land is held by:**  
[Name of Registered Proprietors]
- The Insured Mortgage is described as follows:**
- The Land referred to in this policy is described as follows:**  
Address: [Address of property]  
Lot: [to be advised]  
Deposited Plan: [to be advised]
- Additional exclusions**  
[Description]

**FIRST AMERICAN TITLE INSURANCE COMPANY  
OF AUSTRALIA PTY LTD**

By \_\_\_\_\_

### **Your duty of disclosure**

Before the Insured enters into a contract of general insurance with an insurer, in this case First Title, the Insured has a duty, under the Insurance Contracts Act 1984, to disclose to the First Title every matter that the Insured knows, or could reasonably be expected to know, is relevant to First Titles decision whether to accept the risk of the insurance and, if so, on what terms.

The Insured has the same duty to disclose those matters to First Title before the Insured renews, extends, varies or reinstates a contract of general insurance.

The Insured's duty however does not require disclosure of a matter:

- that diminishes the risk to be undertaken by First Title;
- that is of common knowledge;
- that First Title knows or, in the ordinary course of its business, ought to know;
- where the duty to disclose is waived by First Title in writing.

### **Non-disclosure by the insured**

If the Insured fails to comply with its duty of disclosure, First Title may be entitled to reduce its liability under the contract in respect of a claim or may cancel the contract. If the Insured's non-disclosure is fraudulent, First Title may also have the option of avoiding the contract from its beginning.