



PROTECTING YOUR TRANSACTIONS – WARRANTY AND INDEMNITY INSURANCE IN M&A TRANSACTIONS

Chris Davis
Bobby Pallier

Warranty & Indemnity (W&I) insurance has increased in popularity in recent years, especially in private merger and acquisition (M&A) transactions. However, public M&A deals have also begun adopting the practice.

W&I Insurance in M&A Transactions.

W&I insurance can be a very useful tool to minimising and managing risk in M&A transactions and provides coverage for buyers and sellers for breaches of warranties and indemnities made by the parties within the transaction documents. Introducing the question of whether to obtain W&I insurance in a transaction should be considered at the

term sheet stage and its adoption can help to expedite the signing of a deal and offers many other benefits to buyers and sellers.

The costs of a W&I policy are usually borne by both the buyer and the seller and on average premiums tend to range from 1-3% of the insured amount.

Buyer-side W&I Insurance Policy.

A buyer-side policy ensures the insurer will agree to reimburse the buyer for losses from W&I claims without first seeking to recover from the seller. The buyer can therefore recover directly against the insurer for any loss.

Seller-side W&I Insurance Policy.

Similarly, under a seller-side policy insurers will usually agree to reimburse the seller for losses arising from W&I claims made by the buyer. Further, depending on the policy, an insurer may oversee the defence or settlement of any claims which saves the seller having to spend the time and money associated in defending a claim.

Benefits of W&I Insurance.

Taking out W&I Insurance can result in the following benefits:

- simplifying the position where there are many sellers, as the buyer need only make a claim with the insurer and not each of the sellers;
- providing a 'clean exit' to a seller by leaving most of the financial and administrative burden on insurers following a claim by a buyer;
- reducing the purchase price of a transaction by the cost of the policy where there is a buyer-side policy in place;
- provides the buyer with greater certainty that a claim will be recoverable, regardless of the seller's financial position when the claim is made;
- where a seller retains an interest or a role in the company following a sale, a W&I insurance policy can protect the parties' ongoing relationship;
- improving a bid in a competitive auction – W&I insurance policies can be used to encourage bids while providing comfort to bidders in an auction sale by offering more extensive insurance warranty and indemnity protections that the seller would otherwise offer.

Due Diligence.

Parties looking to gain W&I insurance coverage must undertake extensive due diligence (DD) before an insurer will underwrite a policy for any M&A transaction. Internal due diligence is great but engaging qualified and experienced external professionals to perform a review of all transaction documents may assist with gaining better W&I insurance coverage.

Insurers will closely scrutinise the level of DD undertaken before writing a W&I Insurance policy. W&I in relation to issues that have not been adequately reviewed will likely not be covered by the insurer.

The earlier and more thorough parties are with their DD, the less likely it is for insurers to contain exclusions within the W&I insurance policy.

How can we help?

McInnes Wilson Lawyers can help:

- identify whether you may benefit from W&I insurance;
- draft and /or review your M&A transactions and advise whether you may benefit from W&I insurance;
- undertake legal due diligence;
- perform and engage experienced external providers to carry out due diligence of your transaction documents to optimise the W&I insurance coverage; and
- liaise with the right insurance company who may provide W&I insurance; and
- with providing specialist insurance lawyers to review terms and conditions of W&I insurance.

Contact the article author for more info



Chris Davis

Corporate & Commercial | Brisbane

T: 07 3014 6530

E: cdavis@mcw.com.au



Bobby Pallier

Corporate & Commercial | Brisbane

T: 07 3014 6572

E: bpallier@mcw.com.au