



Warranty and Indemnity insurance

Australia

Warranty and Indemnity (W&I) insurance is constantly developing; new innovations are enabling transactions to close when certain issues previously would have derailed deals.

Gallagher's specialist transactional risks team can help companies strategically utilise W&I insurance as well as standalone tax, litigation, contingency, title and environmental policies to deliver a range of benefits.

Adding value to transactions

The principal function of W&I insurance is to provide financial protection for a buyer or a seller in the event of losses arising from a breach of warranty or a claim under the tax covenant. Coverage can be provided for fundamental, business and tax warranties.

Policies are designed to sit 'back to back' with the warranties and match the limitation period in the Sale & Purchase Agreement (SPA).

Buyer vs. seller policies

✓ **Buyer policies** allow the buyer to be the named insured and permit the buyer to claim directly against the policy, usually regardless of any rights they have in the SPA to pursue the seller. This allows the seller to limit their liability to a nominal level (in some cases as low as nil) but gives comfort that the policy will effectively 'replace' the seller in the event of a breach of warranty.

✓ **Seller policies** are used to sit behind the agreed seller liability 'cap' in the SPA. The selling warrantors are the named insured on the policy and if they are forced to pay a claim, can seek immediate recourse from the insurer. It allows the seller to ring-fence their financial exposure and access sale proceeds immediately.

Recent enhancements

- Cover for identified tax issues, subject to additional premium
- Low risk known issues flagged in diligence can be affirmatively covered for no additional premium
- Consequential and multiplied losses exclusions removed if SPA silent
- Excess levels have dropped significantly: 0.25-0.5% fixed retention and tipping to nil offered on operating business deals
- Synthetic tax warranties and tax deed can be attached to a policy if there is sufficient tax due diligence
- Knowledge and materiality scrapes available
- Internal financial and tax due diligence can be accepted
- General disclosure of data room and due diligence reports removed from the policy

Key facts

How much does it cost?	Operating Business: 0.8% - 1.3% Regulated Industry: 1.1% - 1.6%
What are minimum premiums?	Minimum Premiums: AUD90,000
What limits are available?	Up to AUD1bn capacity is available

Benefits of W&I insurance

The need for the policy (in particular, a buyer policy) usually manifests following the seller materially restricting the buyer's recourse under the SPA, due to a requirement or desire to make a clean exit from the transaction. However, there are a number of other strategic benefits.

Use as a strategic tool

- ✓ **Competitive auction scenarios**
The bidder can include a buyer policy with their bid, allowing the seller to limit liability.
- ✓ **Questions over seller covenant strength**
The buyer may want to transfer the risk of paying a claim from the seller to a reputable insurance company, providing financial security.
- ✓ **Lender requirements**
Certain banks only lend if a policy is in place.
- ✓ **Fund wind-up and private equity deals**
No residual liability can remain, meaning a clean exit from the investment.
- ✓ **Liquidations**
Assets are allocated between creditors and shareholders, so there can be no residual liability.

W&I Insurance does not replace the need for a thorough due diligence process and full disclosure is essential.

Standard exclusions include forward looking statements, certain fines and penalties, secondary tax liabilities and transfer pricing, pension underfunding, and completion purchase price adjustments.

Process

Any W&I policy will ideally incept at the same time that the deal closes and, if initiated in a timely manner, can be negotiated in a parallel work stream to the actual transaction.

Our team is determined to work at the speed of the deal, and not allow set transaction timelines to alter – we will work closely with the insured's legal team to enhance the policy and ensure the wording is the most competitive available in the market.

01	Initial Gallagher contact
02	Gallagher briefs insurers on a confidential basis (day 1)
03	Insurance market responds with initial indications. Gallagher/client analyse terms – interrogate market further and select carrier to finalise the insurance piece (day 2-3)
04	Insurer instructed
05	Insurer underwrites deal and conducts their own diligence, including an underwriting call (day 3-5)
06	Final policy issued and negotiated to counterparty satisfaction (day 5-7)
07	Deal executes/policy binds

Why Gallagher?

Our in-house W&I brokers and solicitors have a breadth of deal experience spanning a range of sectors and jurisdictions. Gallagher have also negotiated enhanced features of cover with the full W&I market, which are exclusive to Gallagher clients and which set our policy wordings apart. Our specialists will review all the legal, financial and tax reports with underwriters and push for as much coverage to be granted as possible.

As claims for the W&I class of insurance are becoming more widespread, Gallagher have appointed an in-house W&I claims department; the brokers that place the policy work closely with the claims team so that each client has one point of contact, which inevitably eases the claims process. As one of the world's largest broking houses, operating globally across a wide-range of classes of business, Gallagher place significant premium into the international insurance market. This means that in the event of a contentious claim, our brokers have considerable leverage and expertise to ensure that claims are resolved in our clients' best interests.

Would you like to talk?

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