DUAL Transaction Solutions

Insurance for Mergers & Acquisitions transactions

DUAL

Our Transaction Solutions team in ANZ provides tailored insurance solutions for commercial real estate and corporate Mergers & Acquisitions (M&A) transactions.

Our Transaction Solutions team is a market first in ANZ, with the ability to issue both Warranty and Indemnity (W&I) insurance and Title Insurance policies from one team. This results in a streamlined and efficient process, allowing brokers and insureds to deal with a single market/contact point for each of the policy options described below. Our Transaction Solutions products help to protect against financial losses arising in real estate and corporate M&A transactions. There are three broad options/structures (or a combination of) available:

1. **W&I Insurance:** Covers a breach of the warranties or indemnities given by the warrantors (usually the seller) in a sale agreement
2. **A Title to Securities and/or Real Estate policy:** Covers insured events related to ownership of real estate and/or ownership of shares in a company or units in a unit trust
3. **A Specific Risk policy:** Protects against certain issues disclosed by the seller or uncovered during due diligence

Option 1 - W&I Insurance

W&I insurance provides a specialised form of coverage designed to protect parties involved in M&A transactions. It provides cover for financial losses arising from a breach of the warranties or indemnities given by the warrantors under a sale agreement.

W&I insurance enables smoother transactions by transferring risk away from the purchaser, thereby facilitating deals and enhancing the overall security and confidence of both parties involved in the M&A transaction.

Maximum limits: A$ / NZ$ 50m of coverage for the full suite of warranties. This limit can be deployed for a primary policy, or in excess of another W&I policy (subject to aggregation).

Jurisdictional appetite: Australia, New Zealand, Singapore and Hong Kong. Other APAC jurisdictions can be considered on a case-by-case basis.

Why choose W&I insurance?

- Bid enhancement
- Clean exit for sellers
- Enhanced protection for buyers
- Enables smoother transaction process
- Extends the cap and/or duration of warranties
- Protection of key relationships
- Protection of parties from unforeseen risks
- Reduces the potential for disputes

Option 2 - A Title to Securities and/or Real Estate policy

This style of policy indemnifies an insured (typically the buyer) for loss arising out of risks related to legal ownership and use of real estate and/or ownership of shares/units.

Our Title Insurance policies can be used in various ways, depending on the transaction structure:

a. A **Title to Real Estate** policy can be used for direct transfers of real estate
b. Where real estate is transferred indirectly by way of the sale of shares or units in a property owning company or trust, a **Title to Securities and Real Estate** policy can be used
c. If the transaction does not relate to real estate (or if the insured only wants cover in respect of the shares or units being sold and not the underlying real estate), then our **Title to Securities** policy can be used

These style of policies contain a set list of insured events that are designed to correspond with the title and capacity warranties given under a sale agreement, along with certain other matters affecting ownership and use of real estate (if applicable). It is also very common to insure known issues (see Option 3) within this policy.

Why buy it?

a. The insured events are disconnected from the warranties under the sale agreement, meaning there is no need to prove a breach of warranty in order for the policy to respond
b. The policy period is not fixed and will run for so long as the insured owns the property or securities, as applicable
c. In a distressed sale, a liquidator may be unwilling and/or unable to provide certain warranties – in this scenario, the policy acts as a form of 'warranty replacement' tool

Maximum limits: Up to AUD $573.5 m (or local equivalent) per transaction/asset. If the deal relates to a portfolio of properties, a higher overall policy limit may be available, subject to specified sub-limits applying per property/risk.

Jurisdictional appetite: Australia, New Zealand, Singapore, Hong Kong, Japan and South Korea. Other APAC jurisdictions can be considered on a case-by-case basis.

Option 3 - A Specific Risk policy

A **Specific Risk policy** (also referred to as a **Known Risks policy**) protects buyers and lenders from financial losses arising from certain legal defects or issues affecting (i) legal title/ownership of real estate or securities and/or (ii) the use of real estate. These risks are typically identified during due diligence or disclosed by the seller pre-purchase. Refer to (i) Appendix A for some common known risks that we insure, in respect of both real estate and securities and (ii) Appendix B for some specific claims examples that demonstrate this form of policy in action.

This policy may be purchased to protect a buyer against certain matters it has identified during due diligence. Equally, a seller may know that the asset being sold is affected by an issue that a potential buyer will likely discover (i.e. missing planning documentation, a boundary encroachment, missing share certificates or other supporting title documents). In such a situation, the seller could package up the insurance solution as part of the sales process and effectively purchase the insurance for the benefit of the seller and buyer, transferring risk from the parties to the insurer.

Why buy it?

a. Transfers risk away from the seller and buyer to the insurer
b. The known issue may not be curable, so insurance may be one of the only viable options to limit the exposure of the seller and/or buyer
c. Speed – it can be much quicker to insure the risk than to negotiate robust indemnities under a sale agreement, or attempt to fix the problem
d. It can replace the need for escrow arrangements, allowing the release of funds to investors.
e. It can assist with borrowing – lenders may be very cautious of red flags noted in due diligence reports

Maximum limits: Up to AUD $573.5 m (or local equivalent) per transaction/asset. If the deal relates to a portfolio of properties, a higher overall policy limit may be available, subject to specified sub-limits applying per property/risk.

Jurisdictional appetite: Australia, New Zealand, Singapore, Hong Kong, Japan and South Korea. Other APAC jurisdictions can be considered on a case-by-case basis.

Appendix A – Examples of specific risks

Real estate

- Unapproved/illegal building works
- Access issues (pedestrian and/or vehicular)
- Actual or potential breaches of easements, covenants and rights or restrictions contained in title deeds/documents
- Lack of necessary rights to use or access the property, including for services
- General title defects (actual or potential), including missing title documents/deeds, inability to verify the chain of title, encumbrances and charges
- Breaches of, or unfulfilled, planning obligations/conditions
- Zoning issues/defects
- Actual or potential third-party rights affecting title to and/or use of, the property
- No search/search validation
- Transactions at undervalue
- General issues regarding capacity and/or authority
- Actual or potential restrictions on transferability of real estate
- Issues with (or missing) building permits/approved documents, planning permits, occupancy permits and/ or building classification certificates
- Boundary issues/encroachments (actual or potential)
- Lease forfeiture risks (registered leases)
- Uncertainty regarding whether third party consents are required/relevant under title or associated documents and/or inability to obtain such consents, where required
- Adverse possession
- Mining/mineral reservations
- Limited title/qualified title
- Defects in title plans
- Discrepancies between title documents
- Lender specific coverages related to the issues outlined above
- Cross-lease issue
- 'Limited as to parcels' risks

Securities/corporate matters

- General title defects (actual or potential), including missing title documents/deeds, inability to verify the chain of title, encumbrances and charges
- Actual or potential third-party rights affecting title to the shares/units
- Missing or unknown shareholders/unitholders
- General issues regarding capacity and/or authority
- Actual or potential restrictions on the transferability of shares/units
- Defective share/unit buy-backs
- Actual or potential share-capital discrepancies
- Technical legal risks affecting legal existence of companies, good standing and/or validity of historical decisions/transactions
- Transactions at undervalue
- Lender specific coverages related to the issues outlined above

Want to learn more?

Let's arrange a joint webinar to explore how these solutions can benefit your clients.

Appendix B – Specific risks (Real Estate) claims examples

Restrictive covenant

Insured Value: A$28,500,000

Premium: A$5,985

Background

The insured had acquired land being used for student accommodation purposes. This use breached a restrictive covenant recorded on title.

At the time of acquisition, the insured purchased a policy from DUAL to protect it if any third party sought to enforce the terms of the covenant.

After completion, a beneficiary of the covenant contacted the insured threatening to enforce the terms of the covenant.

Outcome

The matter was swiftly settled for A$285,000 in exchange for a full release of the covenant. Operations continued at the property, without disruption.

Incurred loss: A$322,500

Settlement cost: A$285,000

Insured's Legal Fees: A$37,500

Excess: Nil

Access

Insured Value: A$2,470,000

Premium: A$3,950

Background

The insured had purchased a plot of regional land that had the benefit of development consent.

Access to the development site required contractors to traverse a portion of land owned by neighbours.

During development, the neighbours raised a claim seeking to prevent access after contractors caused parking issues in the surrounding area, as well as leaving debris all over the road.

Outcome

DUAL engaged with the neighbours and a settlement was reached. An easement was granted in exchange for the developer agreeing to (i) repair any damage caused to the road and (ii) to contribute to a sinking fund for ongoing repair and maintenance of the road.

The settlement costs were covered but the repair costs and sinking fund contribution fell outside the scope of the policy.

DUAL also covered legal fees incurred in preparing the deed of easement and the settlement deed.

Incurred loss: A$116,000

Settlement cost: A$114,000

Insured's Legal Fees: A$2,000

Excess: Nil

Encroachment / adverse possession

Insured Value: A$399,000

Premium: A$1,330

Background

The insured had acquired a small industrial warehouse.

A small portion of the physical boundaries of the property encroached onto adjoining land. DUAL provided a policy which protected the insured against claims by the adjoining landowner regarding the encroachment.

The adjoining owner planned to sell their property and the issue was identified by a prospective purchaser, following which a claim was made against the insured.

Outcome

DUAL engaged quickly with the claimant and settled the matter for A$5,900. DUAL also covered the surveying and legal costs associated with transferring title to the land in question.

Incurred loss: A$12,000

Settlement cost: A$5,900

Insured's Legal Fees: A$6,100

Excess: Nil

Flyer: M&A-Transactions - 10.26

Disclaimer: The hypothetical examples provided are for illustrative purposes only and do not guarantee coverage. Actual claims are assessed individually and subject to the terms and conditions of the relevant policy. For tailored advice, please consult your broker.

Helping you do more

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