

C L I F F O R D  
C H A N C E

**WHAT'S MARKET?**  
WARRANTY AND INDEMNITY INSURANCE IN AUSTRALIA

# Contents

# The W&I insurance landscape in Australia

Warranty and indemnity insurance (**W&I insurance**) has become an integral component of M&A transactions in Australia, and across the globe, offering a strategic tool to manage certain transaction risks.

W&I insurance provides coverage for losses arising from unknown breaches of seller warranties and under the tax indemnity in the underlying transaction agreement. It is used to allocate risk from the seller to an insurer, either partially or fully, thereby protecting the buyer from unforeseen liabilities arising from unknown breaches, and allowing the buyer to obtain financial recourse without the need to bring claims against a seller directly. W&I insurance also reduces the seller's exposure to disputes or claims following closing, and avoids the need for holdback amounts, meaning sale proceeds can be distributed by the seller immediately following closing.

Due to their focus on clean exits and efficient capital deployment, financial sponsors have traditionally been the main users of W&I insurance, particularly on private markets

mid-cap transactions. However, W&I insurance is increasingly being used in a wider range of M&A transactions, including by corporate buyers, on public-to-private transactions and on higher value deals with an enterprise value in excess of \$1 billion.

With currently over fifteen primary underwriters in the APAC region, and with more entering each year, competitive tension amongst insurers has resulted in insurer coverage appetite growing across sectors, greater flexibility in policy structuring and historically low premium rates, as well as significantly greater overall insurance capacity/capital.

Engaging legal counsel with expertise plays a vital role in managing the W&I process efficiently and safeguarding the client's interests throughout. Legal counsel will be critical in working with the sellers and target to ensure that all material facts are disclosed, conducting fulsome due diligence, and negotiating with insurers to ensure that the policy aligns with both the transaction's and the insured's objectives.

## Key points for deal makers

- **(Purpose)** W&I insurance is used in M&A transactions to transfer risk from the seller to an insurer, for the benefit of both buyer and seller.
- **(Terms)** The current insurance market offers increasingly favourable policy terms for insureds and, despite being a mature product in Australia, W&I insurance is evolving rapidly as new insurers enter the domain, terms tilt in favour of insureds and offshore trends take hold.
- **(Contexts)** While initially a niche product used mostly by financial investors for private treaty transactions, W&I insurance is now deployed across the M&A landscape, including by corporate enterprises, on public-to-private transactions and on higher value deals.
- **(Strategy)** Assessing from the outset whether W&I insurance is suitable is crucial. Several key areas, along with any areas inadequately diligenced, are frequently the subject of carveouts and exclusions, and deal terms differ between insured and uninsured deals.
- **(Execution)** A well-run W&I process can be completed in two weeks or less. Working closely with experienced legal counsel and a proactive broker early in the sale process is key. Legal counsel will help manage the W&I process and negotiate policy terms, in collaboration with the broker who will be familiar with the insurer landscape and their requirements.
- **(Trends)** In Australia, global trends like synthetic coverage and knowledge and materiality scrapes are emerging, offering insureds greater scope to design their policy to suit their needs.

# Key benefits and uses of W&I insurance

W&I insurance offers several benefits in M&A transactions, offering risk mitigation for the seller and additional protection for the buyer. It provides a way forward where a seller is unwilling or unable, or would be unsuitable, to retain liability in respect of a breach of all or some seller warranties or the tax indemnity. In this way, it can facilitate smoother negotiations and accelerate transaction timelines. If a W&I insurance process is run effectively alongside negotiations between sellers and buyers, the entire underwriting process is usually able to be completed in two weeks or less.

For sellers, it helps to achieve a clean exit by implementing a 'nil recourse' structure, reducing the seller's exposure to disputes and claims following closing, and avoiding the need for holdback amounts, such as escrows, guarantees or reserves. Sellers are able to repatriate and/or redistribute sale proceeds, which is particularly important for financial sponsors that distribute funds promptly post-closing.

W&I insurance also helps to manage liabilities in transactions involving multiple sellers, simplifying negotiations by providing a uniform solution to risk allocation and providing a single point of recourse for the buyer rather than having to pursue claims against multiple sellers. It is particularly beneficial

for transactions with passive and/or minority sellers that have limited control or knowledge over the operations or management of the target, and so might be unwilling to give warranties beyond title and capacity.

W&I insurance can also provide additional comfort for buyers when investing into unfamiliar jurisdictions, eliminating the credit risk associated with the seller and instead providing access to an established and streamlined claims management process with reputable insurers.

Lastly, W&I insurance can help protect relationships between buyer and seller in the post-closing period, which is particularly beneficial in transactions where the sellers are rolling part of their shareholding, have ongoing business partnerships or remain part of the business management team post-closing.

Importantly, however, certain of these benefits of W&I insurance may be diminished if the buyer requires the seller to stand behind controversial coverage 'gaps'. Accordingly, it is critical that legal counsel considers the likely parameters of W&I insurance coverage early in the transaction process, and negotiates the transaction documents with this in mind.



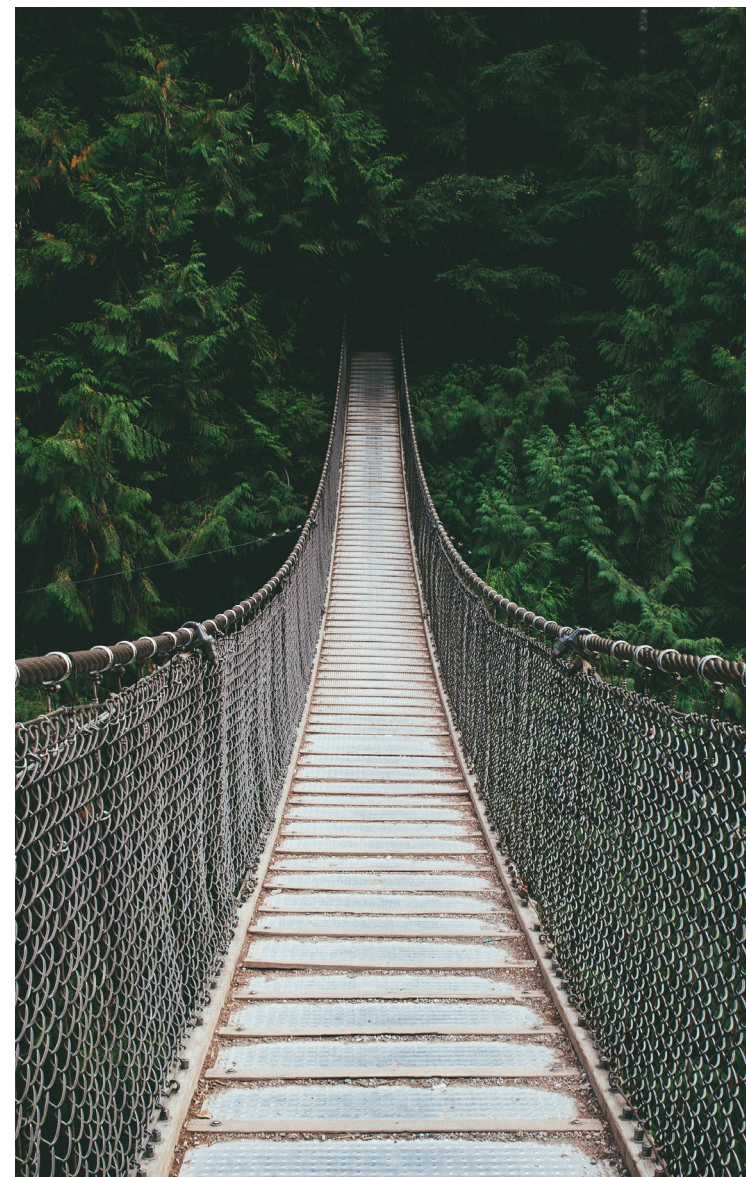
# Customary terms of W&I insurance, including distinctions against uninsured deals

Customary W&I policy terms include the following, with values ranging based on the size and complexity of the transaction, nature of the business and extent of coverage:

- **policy premium:** approximately 1% of the limit of liability;
- **limit of liability:** typically 15%-25% of enterprise value, with higher value deals slightly lower than this range, and lower value deals slightly higher than this range (on an uninsured private markets deal, limit of liability for title and capacity warranties, and for tax claims, is typically 100% of purchase price);
- **coverage period:** 3 years for general business warranties, and 7 years for title and capacity warranties, and for tax claims (shorter periods are typical on an uninsured private markets deal);
- **de minimis threshold:** 0.1% of enterprise value (on an uninsured private markets deal, there is typically no de minimis threshold for tax claims), but increasing flexibility in policy structuring means lower thresholds are now common for little, or no, extra premium;

- **retention threshold:** fixed (i.e. non-tipping) 1.0% of enterprise value (on an uninsured private markets deal, full-tipping to \$0, and no retention for tax claims, are typical), but increasing flexibility in policy structuring means lower thresholds, including tipping thresholds, are now common for little, or no, extra premium; and
- **disclosure and knowledge:** all seller warranties and the tax indemnity are subject to the buyer's knowledge at signing and at closing, *and* to disclosure (on an uninsured private markets deal, title and capacity warranties, and tax claims, are not subject to the buyer's knowledge or to disclosure, and only knowledge of the buyer at signing qualifies general business warranties).

Importantly, because insurers will not insure risk areas that have not been adequately due diligenced, W&I insurance is not a substitute for a seller and a buyer undertaking a thorough disclosure and due diligence exercise. Extensive due diligence is therefore key to obtaining favourable terms and ensuring risk areas are not carved out of coverage, particularly as policies expand to cover areas that W&I insurers did not traditionally underwrite.



# Customary carveouts and exclusions of W&I insurance

Several key focus areas are frequently the subject of carveouts and policy exclusions for insurers, the scope of which will depend on the industry in which the target operates, e.g. cyber security for a technology business.

The following key focus areas may therefore require more fulsome due diligence to ensure appropriate coverage:

- **Accounts:** the accounts warranty will need to be supported by due diligence from an external accounting advisor and will be to a standard consistent with its audit status;
- **Conditions of assets:** coverage for liabilities associated with physical assets and premises will be excluded unless technical due diligence is conducted, including site visits and physical inspections and review of maintenance policies;
- **Employment:** coverage for compliance with employment laws and industrial instruments (e.g. for underpayments and misclassification risk) will be excluded unless a comprehensive payroll sampling exercise is conducted (generally 5%

of the workforce or higher) by accounting and employment law specialists;

- **Environment:** coverage for environmental liabilities (e.g. pollution and contamination) will be excluded unless phase 1 and phase 2 environmental reports are obtained by environmental specialists;
- **Insurance:** coverage for adequacy of target's insurance policies will be excluded unless a thorough insurance due diligence report by an insurance specialist is obtained;
- **Regulatory and compliance matters:** insurers will expect a thorough review, in all relevant jurisdictions, of the relevant licences and consents required to be held by the target, and compliance with overall regulatory framework, for adequate coverage;
- **Restructures:** insurers will need to be provided the detailed legal and tax step plans of any restructure and external advice verifying the compliance with such steps, prior to providing coverage;

- **Insurable risk:** insurers are typically reluctant to provide coverage for any risks which it would be customary for the target to have covered under a separate policy of insurance (e.g. professional indemnity risk and cyber risk). Insurers are increasingly comfortable, however, to sit 'in excess' of the target's existing insurance policies to the extent a thorough insurance due diligence exercise has been undertaken

Importantly, however, as deal structures evolve and competitive market tension increases, insurers are expanding their risk appetite to cover these areas traditionally excluded from W&I policies. It is important for the insured to work with legal counsel and brokers to ensure the correct insurers are selected for the transaction, and that W&I insurance is the right tool for the transaction.

# Common claim areas of W&I insurance

Understanding the most common areas the subject of claims under W&I insurance policies can help in anticipating potential disputes, preparing more robust transaction documents and insurance policies, and scoping out due diligence exercises.

The most common claim areas are for claims relating to:

- **Tax:** breaches of tax liabilities (being also the most common, underscoring the importance of comprehensive tax due diligence to obtain favourable coverage). However, the value of tax claims are frequently lower than that of other types of claims, as they often relate to specific liabilities or disputes which are compensated on a dollar-for-dollar basis;
- **Regulatory and compliance matters:** breaches of compliance with laws and regulations. The reduction in compliance-related claims due to increased sophistication and intensity of the due diligence process for most APAC transactions is being offset by increasing scrutiny of government authorities and regulatory bodies, particularly in the context of multijurisdictional businesses.
- **Financial statements:** breaches of financial accounts warranties. These claims, which often relate to misstatements, failures to comply with accounting rules, or overstatements of profit, account for the great portion of claims made by value. This is largely because losses from these breaches are often calculated using a multiples valuation method;



# Australian and global trends in W&I insurance

## Australian trends

Australia is now one of the most mature W&I markets in the world. With new W&I insurers entering the Australian market (offering both primary and excess cover), there has been an increase in the supply of W&I policies, giving insured parties greater bargaining power. To secure deals, W&I insurers have had to: (i) reduce premiums, which are currently at historic lows, (ii) commit to a more streamlined and less intensive underwriting process, (iii) offer more competitive terms, and (iv) insure deals in sectors that were historically challenging.

There has also been a shift in the demographic of insured parties, with increasing numbers of corporates (and not just financial sponsors) utilising W&I insurance to de-risk their deals more economically.

W&I insurance is also increasingly being used in public-to-private transactions with W&I insurers now viewing public deals similarly to private transactions. In our experience, W&I insurers are engaging in a similar process as for private markets

transactions to achieve comparable coverage outcomes for buyers, other than in respect to treatment for fraud which will be excluded from coverage on a public-to-private transaction.

In addition, insurers are increasingly offering higher levels of insurance capacity and have a stronger appetite for syndication, or a 'tower' of insurance. Historically, buyers were able to obtain a policy limit of a maximum of \$100 million to \$150 million, making W&I insurance unsuitable to some higher value deals. However, in light of higher insurer demand for transactions, we expect to continue to see:

- higher value deals gaining access to insurance; and
- insureds being able to negotiate higher policy limits relative to deal size and more competitive terms.

We are also observing the growing integration between W&I insurance and existing business insurance. Provided adequate due diligence is conducted, the W&I policy may cover excess

amounts under existing business insurance policies (such as professional indemnity, and cyber policies) as a 'top-up' at no extra cost.

Lastly, W&I insurance is increasingly regarded by both financial sponsors and corporates as an essential component of *any* deal, including lower-value deals. Brokers and insurers have addressed this by offering 'off-the-shelf' W&I insurance policies that cover a limited set of identified risks based on 'market standard' warranty and indemnity packages. They are available at a reduced premium, have lower establishment and administrative costs, and offer a policy limit appropriate for deals with an enterprise value from \$1 million.



## Global market trends

The European and American markets were early adopters of W&I insurance and are becoming increasingly interrelated, with prevalence in the US pushing European insurers to offer certain US-style policy features (such as due diligence reports and data rooms not 'reading down' or narrowing the scope of the warranties). As a result, these markets offer valuable insights into potential developments and trends we might anticipate in Australia. As Australian W&I policies become more 'standardised', the use of enhancements, and synthetic and specific risk policies are areas where we expect to see significant growth as insurers, brokers and advisers develop the product further.

- **Synthetic coverage:** insurers are, for an additional premium, increasingly willing to provide coverage for tax risks identified in due diligence and which would therefore ordinarily be excluded, under a 'synthetic' tax indemnity that the seller does not have any visibility over nor provides pursuant to the SPA. 'Synthetic' warranties are also a new feature of W&I insurance. 'Synthetic' warranties may be utilised in distressed asset and administrator sales, where it is customary for a seller not to provide any substantive warranties.
- **Materiality scrapes:** these provisions, which are, for an additional premium, becoming a common feature in W&I insured global transactions, effectively eliminate the materiality qualifiers from seller warranties, offering buyers greater certainty regarding the scope of coverage.
- **Knowledge scrapes:** these provisions, which are also, for an additional premium, becoming a common feature in W&I insured global transactions, similarly effectively eliminate "to the best of the seller's knowledge" qualifiers from warranties, offering buyers greater certainty regarding the scope of coverage. This is particularly valuable in transactions where the buyer may have limited insight into the target's operations or the sellers have not held the target for a long period of time.
- **Affirmative cover:** where a matter of concern has been noted in due diligence, but its risk is considered theoretical and low, and the quantum is not material, insurers are, for an additional premium, increasingly willing to provide affirmative cover in respect of such identified matter.
- **Non-disclosure of the data room or due diligence reports:** insurers are, for an additional premium, increasingly willing to exclude either general disclosure of the data room or due diligence reports, but not both. This can be advantageous when there is a large volume of disclosed information with little or no signposting, and a buyer wishes to limit its knowledge to matters specifically outlined in a disclosure letter. Generally, excluding the data room is commonly considered preferable.
- **Retention drop-down:** insurers are, for no additional premium, increasingly willing to offer insureds a 50% drop-down to the self-insured retention from the first anniversary of closing.
- **Greater coverage in cross-border transactions:** insurers are increasingly willing to provide coverage for transactions in more challenging geographies, provided that thorough due diligence has been conducted. Growing competition between global insurers, as well as an increased willingness of deal parties to conduct thorough due diligence on the local jurisdictions in which global businesses operate, is driving insurers to assess and underwrite risks, even in less familiar markets.

# Actually recovering under W&I insurance

Whilst W&I insurance provides significant advantages for M&A transactions, the insured may encounter challenges in successfully pursuing a claim and securing a pay-out. It is therefore critical that potential policyholders and their legal counsel carefully consider the risks in the deal and practical steps involved in pursuing a claim, when considering whether W&I insurance is right for their transaction and in negotiating the policy documents.

## Making a claim: notification of a claim and litigation

### Claims Stage

At the stage of making a claim under a W&I policy, the claim will be lodged with the broker and provided to the claims team of the insurer, which will generally be distinct from the policy-writing team. The claims team are experienced in assessing claims and applying the policy. From the outset, engagement with the broker (having the relationship with the insurer) and with experienced legal counsel plays a vital role in pro-actively managing the claims process. Prompt notification of claims is critical to avoiding delays and to

ensuring that the claims fall within the appropriate coverage period.

In making a claim, the insured will be required to provide details and supporting materials to demonstrate that a breach of warranty or indemnity has occurred and to quantify the resultant loss. Demonstrating the factual and legal basis for a claim will involve:

- considering whether there has in fact been a breach of a warranty that is covered by the terms of the W&I policy;
- identifying the loss which has occurred as a result of the breach;
- establishing the appropriate measure of damages, and
- establishing that the loss is covered and not excluded with respect to the claim under the policy.

The policy terms are often complex and require precise interpretation, which can lead to disputes over coverage applicability. The claims team will

rigorously scrutinise claims to ensure they fall within the specific warranties and indemnities covered, and are not otherwise excluded by the terms of the policy. In assessing claims, the insurer claims team as a first step will generally make requests for documents and evidence in support of the insured's claims. An insured must be prepared to provide comprehensive documentation and evidence to support their claim. Ambiguous terms can increase the scope to argue against coverage, necessitating careful interpretation and negotiation of policy wording.

### Litigation Stage

If a claim cannot be resolved during the claims assessment stage, proceeding to litigation may be necessary. The insured bears the burden of proof in proving the relevant breach and proving the resultant loss. By contrast, the insurer will bear the onus of proof with respect to the relevant exclusions under the policy. In doing so, the insured faces high evidentiary hurdles for each step of the claim, and will need to put on evidence from factual witnesses and accounting and valuation experts, particularly in financial or accounting

claims, where specific evidence must demonstrate that the breach resulted in the actual loss suffered by the insured.

At the litigation stage, there may be an asymmetry with respect to the costs incurred as between the insurer and insured. Insurers, as third parties to the underlying transactions, may not have access to the relevant underlying records of the business, or to the seller, in order to defend the claim. This means it will often fall to the insured to provide the relevant disclosure of evidence, whilst the insurer will have relatively limited disclosure, and therefore comparatively lower cost exposure in defending the proceedings.

## Front-end considerations in negotiating W&I policies

Having regard to the challenges in making a claim under a W&I policy, insureds should during the policy negotiation phase be carefully focussed on the drafting of the relevant warranties and indemnities, in order to maximise the chances of a successful recovery.

### Practically speaking:

- **Analysis of coverage:** the insured should undertake a careful analysis as between the

relevant W&I coverage which is provided as against the exclusions in the policy – to determine the scope of coverage the insured is actually protected for. The focus should be in identifying and ensuring coverage for ‘high risk’ claims, for example, claims arising out of or in connection with financial statements, information accuracy and compliance with the relevant laws, and claims related to the core operations of the business.

- **Policy wording and ambiguous terms:** careful consideration should be given to the wording of the policy, and the extent to which there are any ambiguous terms. In the absence of a definition within the wording of the policy, the ordinary meaning of the word must be included. For terms which are unclear or which give rise to different interpretations, this can create ambiguity and allow a broader scope for disputes as to coverage.
- **Forecast exclusions:** it is common for W&I policies to include exclusions for loss arising out of financial estimates, budgets, projections or forecasts. This raises issues in the context of the sale of a business where the damages for breach of warranty are “the amount that,

so far as money could do it, would place [the purchaser] in the position it would have been in if the warranted position had been correct” which in practice involves an assessment of the difference between the warranted value of the share (that is, had the warranties been true) as against actual value at the time of the acquisition (for which the actual price paid can be used as a proxy). If that differential involves or is derived based on forecasts, it may be open to the insurer to argue that such loss is excluded on the basis of forecast exclusions.

- **Evidence and documentary considerations:** a robust approach to preservation of documents at the time of acquisition, and appropriate post-completion retention of services of those involved in the transaction (deal team and target management), will significantly aid the prospects of a successful recovery.
- **Timing considerations:** consider the timing of the exit relative to the claims process and potential litigation. Early notification, and proactive claims management and document provision, can help force an early decision on coverage.

# Stages of a standard 'seller-buyer flip' W&I insurance process

Marketing and submissions	Non-binding indications	Seller-buyer flip	Structuring / pre-underwriting	Underwriting	Cover
<p>Seller engages broker to explore W&amp;I options.</p> <p>Broker approaches multiple insurers to provide indicative underwriting terms.</p> <p>If available, broker and insurers will review the information memorandum, financial statements and draft transaction documents.</p>	<p>Insurers set out initial terms (including pricing), subject to further underwriting.</p> <p>Broker makes a recommendation of most favourable insurer to seller and seller makes a selection</p>	<p>At this stage, the policy typically 'flips' from seller to buyer (being the 'insured' under the policy).</p> <p>In a bilateral process, the insured's broker team is the same team that assisted the seller. In an auction process, each bidder has a different broker 'tree' or team.</p>	<p>Buyer discusses the transaction and insured needs to design product with broker and insurer.</p> <p>Buyer provides written responses to 'general' underwriting questions prepared by the insurer in relation to the target, the process and due diligence undertaken.</p>	<p>Insurer and its advisers review available information and transaction documents (in particular, scope of warranties and disclosures, due diligence reports and data room quality) to verify that a thorough due diligence conducted and documents meet market standards.</p> <p>Insured provides written responses to 'specific' underwriting questions concerning the due diligence undertaken and findings, particularly in respect of issues identified or gaps between warranties sought and due diligence undertaken.</p> <p>Policy terms are negotiated and agreed between insured and insurer, and coverage 'gaps' become known.</p>	<p>Once the underwriting process is complete and all terms are agreed upon, at signing of the transaction, the insurer issues the policy, confirming cover.</p> <p>W&amp;I policy becomes binding on the issue by the insured issuing a 'signing no claims declaration' and becomes operative on completion by the insured issuing a 'completion no claims declaration'.</p>

# Authors



**David Clee**  
Partner  
Corporate M&A  
Sydney  
T: +61 424 181 692  
E: david.clee@cliffordchance.com



**Marcus Berghouse**  
Counsel  
Corporate M&A  
Sydney  
T: +61 2 8922 8023  
E: marcus.berghouse@cliffordchance.com



**Isabelle Cameron**  
Senior Associate  
Corporate M&A  
Sydney  
T: +61 2 8922 8041  
E: isabelle.cameron@cliffordchance.com



**Cameron Hassall**  
Partner  
Litigation and  
Dispute Resolution  
Sydney, Hong Kong  
T: +852 2825 8902  
E: cameron.hassall@cliffordchance.com



**Naomi Griffin**  
Partner  
Litigation and  
Dispute Resolution  
Sydney  
T: +61 2 8922 8093  
E: naomi.griffin@cliffordchance.com



**Penelope McCann**  
Senior Associate  
Litigation and  
Dispute Resolution  
Sydney  
T: +61 2 8922 8097  
E: penelope.mccann@cliffordchance.com

# Contacts



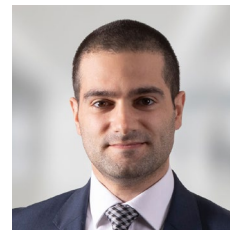
**Andrew Crook**  
Partner  
Corporate M&A  
Hong Kong  
T: +852 2825 8042  
E: andrew.crook@cliffordchance.com



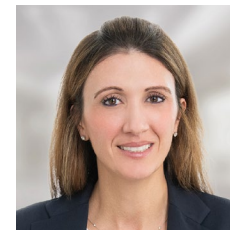
**Mark Currell**  
Partner  
Corporate M&A  
Sydney  
T: +61 2 8922 8035  
E: mark.currell@cliffordchance.com



**Elizabeth Hill**  
Partner  
Corporate M&A  
Sydney  
T: +61 2 8922 8573  
E: elizabeth.hill@cliffordchance.com



**Jacob Kahwaji**  
Partner  
Corporate M&A  
Sydney  
T: +61 2 8922 8060  
E: jacob.kahwaji@cliffordchance.com



**Nadia Kalic**  
Partner  
Corporate M&A  
Global Co-Head of the  
Sector & Resources  
Sydney  
T: +61 2 8922 8095  
E: nadia.kalic@cliffordchance.com



**Philip Podzebenko**  
Partner  
Corporate M&A  
Sydney  
T: +61 2 8922 8073  
E: philip.podzebenko@cliffordchance.com



**Reuben Van Werkum**  
Director  
Corporate M&A  
Sydney  
T: +61 2 8922 8054  
E: reuben.vanwerkum@cliffordchance.com



**C L I F F O R D**  
**C H A N C E**

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, Level 24, 10 Carrington Street, Sydney, NSW 2000, Australia

© Clifford Chance 2025

[www.cliffordchance.com](http://www.cliffordchance.com)