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Tax insurance transfers known tax issues to the insurance market, providing certainty and unlocking capital.

What Is Tax Insurance?

Tax Insurance, also known as tax liability insurance or tax indemnity insurance, protects against a specific tax risk from crystallising. Each tax insurance policy is bespoke tailored to the specific, underlying tax position in question, whether historic or forward-looking. Tax insurance can be particularly valuable where legislation or tax authority practice is unsettled, or where a complex structure raises questions without clear precedent.

Policies can be structured to fund any amount the tax authority requires upfront before a dispute or appeal can proceed. The policy period is generally aligned to the relevant statute of limitations, removing the need to revisit the risk year after year.

What Can Be Insured?

Deal issues

Covers known tax positions identified in due diligence. These are usually excluded from a warranty and indemnity (W&I) insurance policy and, while defensible, are not free from uncertainty. A policy can avoid a price reduction, escrow or specific indemnity that a seller may be unwilling or unable to provide.

Non-deal issues

Protects positions a taxpayer and its advisers consider supportable, but which could create a significant liability if challenged. A policy gives the taxpayer a counterparty to call on and may also avoid the need to seek a ruling from the relevant tax authority.

Who Can Be Insured?

Listed & private corporates

An ASX-listed company undertaking a restructure, or a company preparing for an initial public offering.

Private equity, infrastructure & real estate funds

A fund completing a platform or bolt- on acquisition, or preparing for an exit.

Buyers

A buyer looking to de-risk an investment in sectors such as data centres or renewables, where tax rules are evolving.

Targets

A healthcare or pharmaceutical target where due diligence has flagged a known tax exposure.

Sellers & founders

Founders selling a software or manufacturing business, or vendors seeking a clean exit.

Investors

Ultimate beneficial owners and limited partners protecting their after-tax returns.

Risks Commonly Insured

Cross-border & international

Non-resident income tax, permanent establishment, residency, source, treaty eligibility, (non-resident) withholding tax, transfer pricing, application of the thin capitalisation rules.

Classification

Debt vs equity, revenue vs capital, contractor vs employee, capital gains vs employment income, residential vs commercial residential premises, taxable Australian property status.

Transactions & reorganisations

Tax consequences of pre-sale reorganisations or demergers, applicability of rollover relief.

Tax attributes & reliefs

Carried-forward losses under the continuity of ownership and business continuity tests, franking and other tax credits.

Anti-avoidance

Whether Part IVA of the Income Tax Assessment Act 1936 (ITAA36) applies to unwind an otherwise valid position.

Fund-level risks

Carried interest, tax treatment of income and gains for limited partners, economic substance, interest/dividend upstreaming.

Real estate & indirect taxes

Stamp duty, landholder duty, other property-related taxes, GST, employment taxes.

Trusts, grouping & status tests

Deemed dividends under Division 7A of the ITAA36, associate and related-party status, application of the income tax consolidation rules, qualification as a real estate investment trust, managed investment trust or trading trust.

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Practical Examples

Sector: Data centres
Tax issue: Foreign resident capital gains tax (CGT)
Policy limit: A$20m

The issue

A foreign fund sold an 8% stake in an Australian data centre operator whose value lay mainly in land and buildings and two funds advised by the same manager sold a further 6%. Advice flagged a risk that the Australian Taxation Office (ATO) could treat the funds as associates, so that their combined 14% interest exceeded the 10% non-portfolio interest threshold, bringing the sale within foreign resident CGT under Division 855 of the Income Tax Assessment Act 1997 (ITAA97).

The defences

Each fund had separate investors and its own investment committee, deciding independently of the manager and the other funds. Representations to this effect were made in the insurance policy.

How tax insurance helped

The fund selling the 8% stake obtained a policy covering the tax if the combined stake was found to exceed the threshold and, on a look-through basis, any loss suffered by its ultimate beneficial owners.

Sector: Infrastructure
Tax issue: Section 128F public offer exemption
Policy limit: A$65m

The issue

A target operating in the infrastructure sector had borrowed from a group of offshore lenders to fund construction of a new toll road. For the three years preceding the sale, it paid interest to those lenders without withholding tax, relying on the public offer exemption in section 128F of the ITAA36. Due diligence flagged a low risk that the public offer test was not met, given a small lender group and a later refinancing, and the seller refused to give a specific indemnity.

The defences

Advice commissioned at the time of the financing concluded that the public offer test was met, and the insurer's counsel reached the same conclusion on its independent review.

How tax insurance helped

The policy removed the need for a seller indemnity, covering the unwithheld tax and any lost interest deductions. The buyer had protection, the seller had a clean exit and the deal proceeded on the agreed terms.

Sector: Technology services
Tax issue: Permanent establishment (PE)
Policy limit: A$5m

The issue

A Singaporean private equity fund was acquiring an offshore technology company. Shortly before the sale, the company sent overseas staff to work on-site at an Australian client, via a local employer of record, on a multi-year project. Due diligence flagged a risk that this could create an Australian PE in the years ahead.

The defences

The company had no premises or other presence in Australia, and its staff were supervised by the client and could not conclude contracts on its behalf.

How tax insurance helped

The policy covered the tax on any PE profits. As the risk was forward-looking, the policy included conduct provisions governing the company's Australian presence and substance over the life of the policy. The deal proceeded at the agreed price, with no seller indemnity and the target's ongoing business model intact.

Sector: Renewables
Tax issue: Scrip-for-scrip rollover relief
Policy limit: A$150m

The issue

Two privately owned renewable energy developers, founded by the same team, merged under a new holding company, relying on scrip-for-scrip rollover relief under Subdivision 124-M of the ITAA97 to defer CGT on the share exchange. Given the material tax benefit, there was a risk that the ATO could apply the anti-avoidance provisions in Part IVA of the ITAA36 to deny the rollover.

The defences

The merger was commercially driven: one management team, shared systems, lower costs from operating as a single group and a stronger platform for future funding.

How tax insurance helped

As the merger generated no cash to meet a potential tax liability, the founders insured the risk for a premium of cents on the dollar, rather than paying for a Senior Counsel opinion or a private ruling with no guarantee of a favourable outcome.

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Key Policy Terms

TYPICAL POLICY LIMITS

A$1m–A$200m+

Covers tax/duty, interest, penalties, defence costs and tax gross-up

TYPICAL PREMIUM

1.5%–8%+

One off cost as a % of the policy limit

POLICY PERIOD

Up to 10 years

Aligned to the statute of limitations

The Process

1	**Identify the risk**	A specific tax exposure is flagged where the position is defensible but not free from risk. We review the position and any supporting analysis and provide an initial steer on insurability and pricing.
2	**Brief the market**	To present a tax risk to insurers, we require a tax memorandum, steps paper or tax due diligence report extract. We analyse and interpret the underlying issues before liaising with tax underwriters to explain the insured's position and the coverage requirements. We work with local underwriters and with London- and Singapore- based insurers.
3	**Insurer appetite & indicative terms**	Within 2-3 days, insurers assess the position, often with their own tax counsel. Where it falls within appetite, we request non-binding terms setting out pricing, key policy mechanics/exclusions, underwriting focus areas and key documents required.
4	**Our recommendation**	We review all non-binding indications and provide a comprehensive Heads of Terms report recommending which insurer to proceed with. The client then selects an insurer and signs an expense agreement covering the insurer's external counsel fees.
5	**Underwriting & policy negotiation**	We liaise between the insurer and the potential insured to provide all information the insurer requires. In parallel, we advise the insured on the policy and negotiate with the insurer. Underwriting is completed within 1-3 weeks, but can be expedited to meet transaction timetables.
6	**Bind**	Underwriting is finalised and the wording is agreed to meet the insured's timetable.
7	**Claims & beyond**	A policy is only as good as its ability to pay out on a valid claim. If the tax authority challenges or enquires into the position, we notify and manage the claim alongside the insured and their counsel. We also remain available to assist with any post- inception matters for the life of the policy.

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