

JULY 2022

M&A INSURANCE SPECIALISTS

Key Considerations on Renewable Energy Transactions: **A W&I Perspective**



L I V A

1. INTRODUCTION

In this article we set out and explore key considerations when placing a warranty and indemnity (“W&I”) insurance policy in the context of renewable energy transactions. In 2021, renewable energy transactions accounted for a large percentage of our portfolio. As such, we draw on our extensive experience in this sector, having placed bespoke policies in connection with international solar, wind (onshore and offshore), battery storage and biomass projects – regularly negotiating initiative, risk-transfer based commercial solutions for our clients.

With renewable energy transactions continuing to comprise a significant percentage of M&A activity in 2022, broker selection – and ultimately insurer selection – is of paramount importance.



2. VALUATION OF TAX ASSETS

A “tax asset” covers a range of items from losses to refunds – in short, it’s anything that is shown as an “asset” in a company’s accounts. In the context of renewable energy transactions, the term “tax asset” principally refers to:

I *Trading / Tax Loss:* a company’s ability to carry forward a trading loss against the company’s future total income.

II *Capital Allowances:* a company’s ability to obtain tax relief on certain types of capital expenditure, which is treated as a business expense and therefore reduces a company’s taxable profit.

Generally speaking, tax assets are excluded under W&I policies as they relate to future tax events. However, we regularly work with insurers that will remove this exclusion on renewable energy transactions and provide cover for related warranties.

The insured may wish to remove this exclusion where a valuation has been placed on the availability of a tax asset, which has formed part of the purchase price calculation (although, we would note that there doesn't need to be a specific warranty on tax assets in order for the insured to suffer loss due to non availability of a tax asset; rather, loss could be captured under other financial/tax warranties and/or a tax covenant).

Some insurers will simply remove the exclusion where there has been appropriate and specific due diligence on the matter, analysing the financial impact resulting from the non availability of a tax asset. Alternatively, other insurers will refer to the insured's valuation of the tax asset in the W&I policy itself (usually set out in an appendix), which constitutes part of the insured's recoverable loss. We would note, however, that the latter approach is suitable only where the W&I policy is not being shared with the seller; where the W&I policy is shared between all parties, the W&I Policy can instead cross-refer to the insured's financial model containing the relevant calculation (shared only between the insured and the insurer).

3. ENVIRONMENTAL LIABILITIES

It is common for environmental liabilities to be excluded as standard under W&I policies. Most insurers are willing to remove this exclusion where either: (i) there is confirmation that the site is a greenfield site; or (ii) a clean phase 1 environmental report has been carried out.

With regard to (ii), commissioning a phase 1 environmental report is not always appropriate on renewable energy transactions. As such, we are seeing certain insurers willing to remove this exclusion simply where external due diligence has been performed on the site and expert commentary has been given. We would note that this does not need to be environmental due diligence – we have, for example, seen this exclusion removed where only the technical due diligence opines on environmental matters.



4. DEVELOPMENT STAGE ASSETS

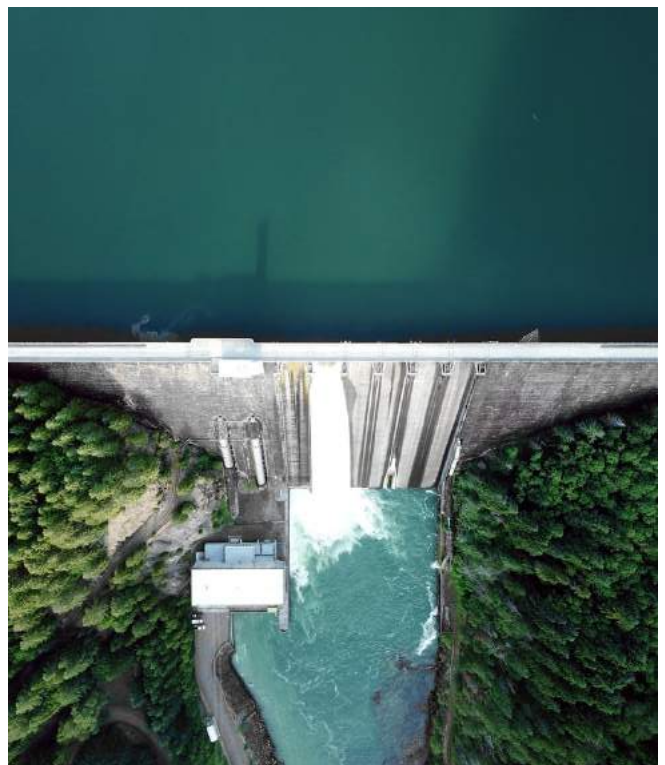
As with environmental liabilities, most W&I policies will contain a condition of assets exclusion (on the basis that insurers would expect other insurance policies to be in place that cover such liabilities). Indeed, for certain insurers this will be a mandated exclusion.

However, in the context of development stage or “shovel ready” renewable energy projects, this exclusion bears little relevance where the target being acquired will have no material physical assets. It is therefore important to ensure that this exclusion can be removed (which speaks, again, to the importance of insurer and broker selection for renewable energy projects).

Moreover, where the project is in development stage, insurers will be keen to understand the nature of the assets and the interaction with the signing and closing warranties (if applicable) – i.e. whether development will occur pre or post closing and which party is taking on the development risk. We note that there are specific policies available that look to cover specific risks relating to the future development of the project – for example, relating to: (i) future loss of profits; and/or (ii) judicial review of permit challenges. It is important to involve LIVA as early as possible so we can help identify any such risks and factor this into discussions with insurers from the outset.

5. INTERNAL DUE DILIGENCE

We have recently managed to secure the placement of a number of W&I policies on renewable energy transactions where no external due diligence has been performed. External due diligence is invariably a pre-requisite for most W&I insurers, however we have frequently got insurers comfortable with internal due diligence only. Where this is able to be achieved, it is critical to clearly set out the scope and findings of the internal due diligence performed. Based on our experience in this approach, we are able to offer tailored advice and assistance to clients with the drafting and presentation of internal due diligence.





6. SUBSIDY BENEFITS

Subsidy benefits constitute a potentially profitable revenue stream for any subsidised renewable energy project. As such, it is vitally important at the outset to understand whether it is standard for insurers in the relevant jurisdiction to cover any loss arising from the unavailability of such subsidies upon any breach of warranty. Certain insurers in certain jurisdictions will not offer such cover. With LIVA's international renewable energy experience across the UK and Europe, we are well placed to tailor any W&I placement to those insurers able to offer the broadest cover on such issues.

7. CONCLUSION

While renewable energy transactions are generally lower risk for insurers (compared to other sectors), there are a number of key complexities to consider and navigate when placing a W&I policy.

This is particularly relevant for portfolio transactions, which may contemplate multiple sale and purchase agreements and/or a mix of development and operational assets. In light of LIVA's extensive experience in this sector, we are well placed to assist and advise at all stages of the transaction.



8. ABOUT LIVA

LIVA is a market-leading, M&A insurance broker with specialist knowledge and experience in the renewable energy sector. LIVA is part of the Ecclesia Group, one of the largest European commercial insurance brokers. Together with our associated offices, we offer a full and global M&A insurance offering.

9. BIOGRAPHIES

Prior to joining LIVA, Matt was a lawyer at Ashurst LLP, where he was an associate in the Corporate Projects team. Matt has experience across infrastructure, renewables and project finance transactions, advising clients on the acquisition, development and financing of power projects (conventional, renewables and energy from waste). Matt has in-depth experience of drafting, reviewing and negotiating a broad array of project agreements. Clients which Matt has advised include energy companies and funds, government entities, and global investment and commercial banks.



MATT GILLAM

ASSOCIATE DIRECTOR

+44 20 3970 0935

 m.gillam@livapartners.com

 [linkedin.com/in/matthewgillam](https://www.linkedin.com/in/matthewgillam)