



# Global M&A Series

## Environmental Law in Australia

<p><b>Seller Liability on Sale</b></p>	<p><b>In what circumstances can a buyer inherit pre-acquisition environmental liability in an asset sale/the sale of a company (share sale)?</b></p> <p><b>Asset sale</b></p> <p>Most liability for environmental harm or other contraventions of environmental laws attaches to the responsible person or entity. Therefore, in many cases, the buyer of assets does not inherit the environmental liabilities of the seller.</p> <p>However, some liability may be passed to the buyer by contract. One important example is responsibility for contaminated land. Although principal liability rests with the entity that caused the contamination, an occupier or owner may, in various circumstances, be deemed to be liable, which could expose a buyer to liability.</p> <p><b>Share sale</b></p> <p>The acquisition of shares means that the buyer acquires the company with all of its assets and liabilities, including the company's pre-acquisition environmental liability. The position can be altered by contract, although it is not possible to completely contract out of statutory duties. The seller continues to be responsible for the contamination of any land and continues to be the subject of any orders issued by the relevant regulator.</p> <p>Although indemnities can be used to recover the costs of some liabilities from the seller, in most cases public policy forbids the use of an indemnity to protect a person from criminal liability and as such, criminal liability remains with the company.</p> <p><b>In what circumstances can a seller retain environmental liability after an asset sale/a share sale?</b></p> <p><b>Asset sale</b></p> <p>In an asset sale, a seller generally retains liability for any pre-disposal breaches of environmental laws or environmental permits as such liabilities are personal to the seller. The position can be altered by contract, but it is not possible to completely contract out of statutory duties. The seller continues to be responsible for the contamination of any land and continues to be the subject of any orders issued by the relevant regulator.</p> <p><b>Share sale</b></p> <p>In a share sale, liabilities incurred by the company pre-sale (or post sale but relating to acts or omissions occurring pre-sale) remain with the company. This is, however, subject to the terms of the contract, and it is common in Australia for transaction documents to include an indemnity in relation to specific environmental issues.</p>
<p><b>Obligations to Disclose</b></p>	<p><b>Does a seller have to disclose environmental information to the buyer in an asset sale/a share sale?</b></p> <p><b>Asset sale</b></p> <p>In all jurisdictions in Australia, there are requirements for contracts for the sale of land to disclose whether the land is the subject of certain orders or other instruments under the legislation in that state or territory. More extensive obligations apply in some other jurisdictions such as Queensland.</p> <p>Consumer protection legislation prohibits misleading or deceptive conduct (such as making false or misleading representations concerning certain matters in connection with the sale land). Silence as to a matter within a party's knowledge, for example whether land is contaminated, can be regarded as misleading or deceptive conduct. Additionally, where a party is silent as to whether land is contaminated, there may also be liability under common law.</p>

## Environmental Law in Australia (continued)

	<p><b>Share sale</b></p> <p>The principles regarding disclosure in respect of asset sales also apply to share sales (<i>see above, Asset sale</i>).</p>
<p>Due Diligence</p>	<p><b>Is environmental due diligence common in an asset sale/a share sale?</b></p> <p><b>Scope</b></p> <p>Environmental due diligence is commonly carried out in both share sales and asset sales. Environmental due diligence assessments allow opportunities and constraints to be identified. It typically extends to:</p> <ul style="list-style-type: none"><li>■ Historical and current land uses</li><li>■ Environmental approvals and current zonings</li><li>■ Aboriginal and European heritage sites</li><li>■ Pollution and contamination from prior and existing land use and</li><li>■ Native title (that is, the recognition by Australian law that some Indigenous people have rights and interests to their land that come from their traditional laws and custom)</li></ul> <p>Environmental due diligence processes in Australia have not generally seen an increase in the focus on climate change and sustainability issues.</p> <p><b>Types of assessment</b></p> <p>There are various types of environmental assessments available, which may be relevant at different stages of a project or for different types of projects. They include:</p> <ul style="list-style-type: none"><li>■ Environmental assessment for statutory purposes (Environmental Audit)</li><li>■ Environmental due diligence assessments</li><li>■ Contamination assessments and remediation</li><li>■ Groundwater resource assessments</li><li>■ Asbestos in soils assessments and</li><li>■ Waste classification assessments</li></ul> <p><b>Environmental consultants</b></p> <p>Whether an environmental consultant is used depends on the nature and complexity of the due diligence. When instructing an environmental consultant the main issues that should be covered in an engagement letter include:</p> <ul style="list-style-type: none"><li>■ The scope of the services the consultant is to provide</li><li>■ Confidentiality and legal professional privilege</li><li>■ Conflicts of interest</li><li>■ Fees</li><li>■ Intellectual property and</li><li>■ Public liability and professional indemnity insurance</li></ul>

## Environmental Law in Australia (continued)

<b>Warranties and Indemnities</b>	<p><b>Are environmental warranties and indemnities usually given and what issues do they usually cover in an asset sale/a share sale?</b></p> <p><b>Asset sale</b></p> <p>In both asset sales and share sales, it is common for transaction documents to include warranties and indemnities in relation to environmental issues including responsibility for remediation of contaminated land, past contamination incidents and the existence of any regulatory enforcement actions.</p> <p>Public policy dictates that warranties and indemnities cannot protect a person against criminal liability, and a court may declare such warranties and indemnities to be void.</p> <p><b>Share sale</b></p> <p>The position is the same as for asset sales (<i>see above, Asset sale</i>).</p>
<b>Limits on Warranties and Indemnities</b>	<p><b>Are there usually limits on environmental warranties and indemnities?</b></p> <p>There are no statutory limits on environmental warranties and indemnities. Whether limits apply, and the nature of the limits, depends on the contractual terms agreed between the parties.</p> <p>While environmental warranties and indemnities are negotiated between the parties, it is common for limits to be placed on them including time limits and financial caps. There may also be trigger events that must occur before a buyer can make a claim under an environmental indemnity. Environmental insurance is also common.</p>

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