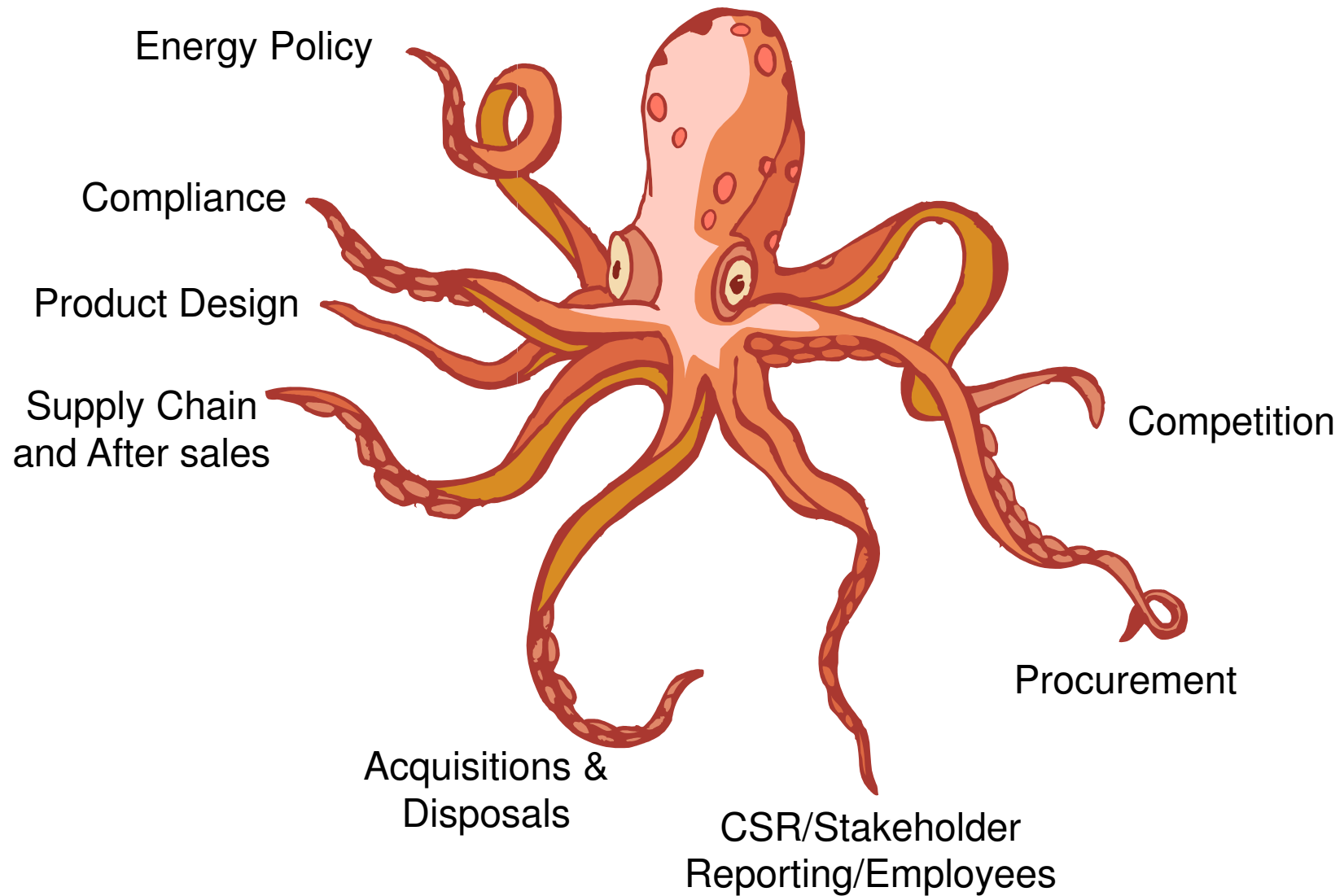


Corporate Acquisitions & Disposals Environmental Liabilities

Ross Fairley
Environment and Energy Law Team
Burgess Salmon LLP
One Glass Wharf
Bristol
BS2 0ZA
0117 902 6357
Ross.fairley@burgess-salmon.com





Corporate Acquisitions & Disposals
Environmental Liabilities



Transactions: What do you need to know?

If you are the Buyer:

- that you can continue to run a business lawfully and without additional costs
- that you are not buying a bundle of liabilities which will have an impact on value

If you are the Seller:

- that you are not selling a business without being aware of potential future liabilities

What types of deal are affected?

- Both share and asset deals
- Affects the full range of industries and businesses, from heavy manufacturing to light/high-tech/service industries
- There are potential pitfalls of assuming only heavy industrial processes carry potential environmental liabilities

Adopting an approach which furthers business objectives

- Anticipating and addressing lender concerns
- Taking into account your future intentions for the business
- Determining your priorities
- Balancing your evaluation of risks
- Negotiating tactics

Trends in Environmental Law

- More enforcement/higher fines
- More market mechanisms/financial instruments
- Willingness by parties to use indemnities/warranties
- More professional negligence claims
- Tighter environmental standards
- EU Regulation
- Reporting and confessing



Some Key Environmental Issues

- Upgrade conditions in authorisations
- Future legislative requirements
- Compliance
- Existing environmental agreements
- Permits – and transfers of them
- Existing contracts
- No data no market!
- Not just contamination but...



Contaminated land – why is it important?

- Potentially high value
- Hidden and difficult to evaluate
- Uncertainty – as to incidence and attribution of liability
- May not be a “breach of environmental law”
- Previously owned sites – share deals
- Opportunity to transfer/danger of assuming liability *in law*

Contaminated land: what is it?

- May not simply be the presence of substances – whatever the concentrations
- UK: significant harm/likelihood of significant harm or of significant water pollution
- Trend to risk evaluation – price is less certainty

Contaminated land: who is liable?

The options:

- Polluters
- Owners and occupiers
- Anyone connected
- UK policy is that ‘the polluter pays’, but the reality is less comforting

Contaminated land: attributing and apportioning liability

- Exclusionary rules based on conduct/culpability
- In theory no 'Deep pocket liability'
- Apportionment
- The importance of statutory guidance

Attributing liability: an example

Statutory guidance under UK legislation specifies that where:

- *Prima facie* both the seller and buyer are liable for clean up;
- Buyer knew or was deemed to know of presence of substances at time of acquisition;
- Seller retains no connection with land after sale;

the buyer assumes seller's liability, as well as his own

If you get it wrong...

- Losses/damages
- Prosecution/fines
- Revocation of operating permits
- CSR/PR/Environmental Management Systems
- Director and Officer Liability
- Loan agreements/effects on investors



Director and Officer Liability

- Criminal penalties:
 - consent connivance neglect
- Clean-up liability?



Identifying the Issues

- Vital to identify environmental issues at an early stage so that they are properly addressed, via the due diligence process and possible commissioning of environmental reports
- Asking the right questions – what would you expect to see?
- Check definitions of environmental matters or laws in contractual documentation

Due Diligence

- The information provided during the due diligence process of searches, enquiries and site visits allows or assists an analysis of the environmental liability risks



Environmental Audits

- Site search/desktop (e.g. Groundsure, SiteCheck)
- Phase I
- Phase II

Shares or Assets?

- An asset sale severs the Buyer's link with the company's historical environmental liabilities
- In a share sale, the company in which the environmental liabilities reside is transferred

Overcoming Obstacles

- Price adjustment
- Warranties
- Indemnities
- Other contractual provisions
- Insurance



Warranties

- In a share sale, the Buyer is inheriting liabilities and required detailed assurance and disclosure in respect of these
- In an asset sale, the Buyer requires less assurance regarding past events. The Buyer is concerned with the present condition of the property/plant

Warranties (continued)

Typical warranties include:

- Compliance with licences and laws
- Licences and consents will not be modified/revoked because of sale
- There have been no environmental claims and there are none expected
- No disposal, generation or storage of dangerous substances has taken place

Indemnities

- Protects the party benefiting from it from clean-up liabilities and other matters
- Clean-up liability can be imposed even when no breach of law has occurred

Indemnities (Continued)

Define scope:

- *Length of indemnity*
- *What triggers a claim*
- *Define “liabilities”*
- *Set notice periods and requirements*



Indemnities (Continued)

Define scope:

- *de minimis and maximum aggregate liability*
- *Conduct of claims which are indemnified*
- *Standards or remediation which apply*



Indemnities (continued)

- Consider covenants from the Buyer
 - (a) no exacerbation or change of use
 - (b) duty to mitigate
 - (c) no reporting to authorities

What to Guard Against – A Summary

- Believing that environmental law does not apply to you/the sector you are entering
- Appointing consultants without thinking through terms and scope
- Just because a substance is in the ground does not mean “contamination”
- Linking clean up liability to a breach of laws
- “The polluter is the first port of call for clean up in the UK”
- Too much focus on CLR – watch out for Water Resources Act 1991
- Conduct and contractual clauses can alter your liability more than you think

But most issues can be overcome



This presentation gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.