

29 September 2011

The Hon Bill Marmion MLA  
Minister for the Environment  
29<sup>th</sup> Floor, Allendale Square  
PERTH WA 6000

Dear Minister

**PROPOSAL FOR AMENDMENT - SECTION 68 OF CONTAMINATED SITES ACT 2003**

The Law Society of Western Australia has become concerned about difficulties in the interpretation and effect of section 68 of the *Contaminated Sites Act 2003*.

The penalties for non-compliance are severe: \$125,000 and a daily penalty of \$25,000.

Taking these penalties into account, the Society strongly recommends that appropriate amendments be made to the section.

**Background**

Section 68 is intended to require owners to disclose the existence of contamination affecting their land before entering into a significant transaction.

The transactions referred to are:

- a sale
- a mortgage
- a lease

While the general intention is clear, the exact circumstances under which disclosure is required are not clear.

In the Society's view the uncertainties could cause an inadvertent breach, resulting in the risk of very severe penalties being potentially imposed unfairly.

**Uncertainties**

The uncertainties include these:

1. **Definition of "owner"**

The word "owner" is relevantly defined in section 5(1) as "a holder of the freehold". However at law this could be either a legal (registered) owner or more broadly a person who has a *right* to ownership (beneficial owner).

It is therefore not clear whether the disclosure obligation falls only on a person who is at the relevant time registered as the legal owner or whether a person who is a beneficial owner is also caught.

For example, if a contract of sale is entered into, under which the buyer is required to grant a lease to a third party, is it only the seller who has a disclosure obligation, or only the buyer, or both?

The meaning of "owner" is also unclear in the case of a mortgage given in relation to a sale.

Is the seller (the then current owner) required to give disclosure to the mortgagee? Arguably not, because the seller will not be a party to the mortgage transaction.

But is the buyer required to give disclosure to the mortgagee? The buyer does not yet "own" the land (in the sense of being registered) but the buyer is a beneficial owner. In principle it may be inappropriate for a party who has not yet acquired legal ownership of the land to be under a disclosure obligation relating to the land (instead of the current legal owner).

## 2. 14 Day Period

Sometimes arrangements are made for a mortgage to be given in less than 14 days.

Disclosure within the 14 day period cannot then be given. Is there a breach of the section in that situation? It is not clear.

## 3. Completion of a Transaction

The expression "completion of a transaction" is not defined.

In the case of a sale, completion is normally taken to occur on the day of settlement.

However, in the case of a mortgage or a lease there is no settlement and so "completion" must presumably be taken to be the date on which the relevant agreement is signed.

In principle there seems no logical reason why in the case of a sale the disclosure obligation relates to an event which is usually well after signing, but in the case of a mortgage or lease, the disclosure obligation relates to a period before signing.

Further, circumstances can often result in a lease being entered into well before a formal lease document is signed. There might, for example, be a preliminary agreement for lease signed, or there might simply be an informal exchange of correspondence, or even verbal arrangements.

In any of these circumstances it will not be certain when the 14 days disclosure period applies.

### **Memorial on Title**

In circumstances where a memorial has been placed on the certificate of title by the Department, consistent with the site clarification, it appears unnecessary for the seller of the land to be required to satisfy the requirements of section 68. The memorial is notice to a potential buyer, lessee or mortgagee.

### **Recommendation**

In view of such uncertainties, and, as mentioned, in view of the severity of the monetary penalties, the Society recommends that section 68 be amended.

The Society proposes that the amendments could be as follows:

1. Limit the meaning of "owner" in the section to only the registered proprietor of the land.
2. Clarify that a buyer is not obliged to give disclosure to a mortgagee.
3. Define "completion of a transaction" to mean:
  - in the case of a sale, the date of settlement;
  - in the case of a mortgage the date the mortgage is registered (and there is no disclosure obligation if the mortgage is not registered);
  - in the case of a lease, the date a written lease is signed (and there is no disclosure obligation if a written lease is not signed).
4. Clarify that a party to a sale or mortgage transaction is not required to comply with the section if the relevant sale contract or mortgage agreement was not signed more than 14 days before the date of completion.
5. That the obligation to comply with section 68 be removed in a situation where a memorial as to the site classification has been registered against the land in question.

### **Severity of Penalties**

In addition to the clarification issues raised above, the Society also recommends that the severity of the penalties be reconsidered.

In the Society's view the penalties are unduly harsh, particularly in the context of the required disclosure to a mortgagee or lessee.

Mortgagees and lessees will often be sophisticated business entities advised by lawyers and quite capable of undertaking title investigations which will reveal the existence of memorials registered on the relevant title. In contrast, a potential mortgagor or lessor may be unsophisticated and not advised by a lawyer. A failure to give the required disclosure could result in very severe penalties being imposed on such persons in circumstances where there will be little or no prejudice to the relevant mortgagee or lessee.

The Society considers the current penalties are disproportionately high taking into account the relevant circumstances, with the potential for injustice to occur.

The Society therefore recommends that the penalties be substantially reduced.

In the Society's view reduced penalties will not diminish the effectiveness of the relevant provisions.

The Society asks that you give consideration to these matters and I look forward to your response in due course.

Yours sincerely

A handwritten signature in cursive script, appearing to read "H. Quail".

Hylton Quail  
President