



# Review of the *Contaminated Sites Act 2003*

## *Discussion paper*

### SUBMISSION COVER SHEET

Complete and email this form with your submission by

**Monday 24 February 2014.**

To assist us in collating stakeholder responses, please submit in Word format.  
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Email to: [consitesreview@der.wa.gov.au](mailto:consitesreview@der.wa.gov.au)

This submission is written on behalf of (individual or organisation name):

The Law Society of Western Australia

Please indicate which best describes you / your organisation:

Academic	<input type="checkbox"/>	Member of the public	<input type="checkbox"/>	Professional association	<input checked="" type="checkbox"/>
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Environmental consultant	<input type="checkbox"/>	Planning consultant	<input type="checkbox"/>		<input type="checkbox"/>

<b>Contact person</b>	Joanna Blackley		
<b>Position</b>	Policy Lawyer		
<b>Email</b>	jblackley@lawsocietywa.asn.au	<b>Fax</b>	08 9324 8699
<b>Phone</b>	08 9324 8647	<b>Mobile</b>	
<b>Postal address</b>	Level 4, 160 St Georges Tce	<b>State</b>	WA
<b>Suburb / city</b>	PERTH	<b>Post code</b>	6000
<b>Number of pages (including this cover sheet)</b>	7		

## (1) Duty to report

Under s.11(4) of the Act, the following persons have a duty to report a site:

- an owner or occupier of the site
- a person who knows, or suspects, that he or she has caused, or contributed to, the contamination
- an auditor engaged to provide a report that is required for the purposes of this Act in respect of the site.

If any other person becomes aware of a known or suspected contamination, they **may** report it, but are **not** obliged to do so.

**In the Consultation paper we asked: Should a person with the professional knowledge or ability to identify contamination have a duty to report it?**

### Proposed way forward – include an ‘environmental consultant’ in the persons with a duty to report under s.11

The intent here is that the reporting obligation would apply to environmental consultants engaged for investigation or remediation purposes [an appropriate definition of ‘environmental consultant’ would need to be included in the Act]. It is suggested that for an environmental consultancy, the onus would be on the project manager to ensure that known/suspected contamination is reported to DER in the appropriate timeframe. It is not intended that a reporting obligation would apply to other professionals such as a field technician sampling wells, a laboratory technician conducting laboratory analyses or to someone conducting a survey at the site.

<b>1.1</b>	<b><i>Do you support the proposed change?</i></b>
<b>1.2</b>	<b><i>If your answer is no, why do you not support the proposed change?</i></b>
	<p>In relation to 1.1 and 1.2:</p> <p>The Law Society of Western Australia (the Society) does not support the proposal to include an ‘environmental consultant’ in the persons with a duty to report under section 11 of the <i>Contaminated Sites Act 2003</i> (WA) (the Act).</p> <p>Whilst the Society agrees with the tenet that a person with professional knowledge to identify contamination should have a statutory duty to report, this duty must be balanced against the considerable conflicts that may arise for associated parties as a result.</p> <p>A non-exhausted list of conflicts includes:</p> <ol style="list-style-type: none"> <li>i. Where a lawyer engages an environmental consultant, the issue of legal professional privilege may arise which could then be in conflict with the environmental consultants duty to report;</li> <li>ii. Confidentiality issues for prospective purchasers who have engaged an environmental consultant; and</li> <li>iii. The creation of a disincentive to provide assistive information about the environment, potentially creating a public detriment.</li> </ol>

	<p>In the alternate, the Society proposes:</p> <p>If there is to be a duty to for an environmental consultant to report a site, to minimise the impact of conflicting interests, that the duty be limited to sites where offsite pollution is created contemporaneously.</p>
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## (2) Site classification scheme

**In the Consultation paper we asked: In circumstances where contamination has been identified but requires further investigation to determine whether clean-up is necessary for the current or proposed land use, would a new classification, *contaminated—investigation required* be helpful? Would such a classification prompt more timely investigations at a site?**

### Proposed way forward — process improvements — no change to classification system

We have initiated substantial improvements to our internal procedures to provide clearer guidance on what a site classification of *possibly contaminated— investigation required* means. A summary of the planned improvements is provided in the Discussion paper.

<b>2.1</b>	<b><i>Do you support the proposed way forward?</i></b>
<b>2.2</b>	<b><i>If not, what modifications or alternative course of action do you propose?</i></b>
<b>2.2</b>	<p>In relation to 2.1 and 2.2:</p> <p>The Society does not wish to comment on this proposal.</p>

## (3) Mandatory disclosure

Under s.68 of the Act, landowners must provide written disclosure to any new or potential owners if selling or transferring land that is classified *contaminated—restricted use*, *contaminated—remediation required* or *remediated for restricted use* or land that is subject to a regulatory notice.

**In the Consultation paper we asked: Are the mandatory disclosure requirements clear? Have you encountered difficulties in knowing when to make a disclosure?**

### Proposed way forward—minor changes to the Act

The definition of ‘owner’ is provided in s.5 (1) of the Act. For the purposes of s.68, we propose to clarify the meaning of ‘owner’ and ‘**completion of a transaction**’ as described in the Discussion paper.

<b>3.1</b>	<b><i>Do you support the proposed way forward?</i></b>
<b>3.2</b>	<b><i>If not, what modifications or alternative course of action do you propose?</i></b>
<b>3.2</b>	<p>In relation to 3.1 and 3.2:</p> <p>The only comment the Society wishes to make in relation to this proposal is with regard to ‘<b>completion of a transaction</b>’.</p> <p>Currently the proposed meaning for <b>completion of a transaction</b> is:</p> <ul style="list-style-type: none"> <li>• Settlement date for a sale</li> <li>• The date the mortgage is registered for a mortgage</li> <li>• The date the lease is signed for a lease</li> </ul> <p>The Society supports this proposal subject to changing the third dot point ‘the date the lease is signed for a lease’ to ‘the date the lease <b>commences</b>’.</p> <p>This change is consistent with the legal principle that a lease may commence by conduct, obviating the need for the lease to be signed where conduct may satisfy the test regarding completion of a transaction.</p>

## **(4) The Contaminated Sites Committee**

### **(4.1) Improved timeframes for decisions on responsibility for remediation**

It was originally anticipated that most committee decisions on responsibility for remediation would be made within six months of a request being filed with the committee (reg. 27). However, these decisions are taking much longer in practice. In many cases this is because relevant information is submitted after material has been circulated by the committee, resulting in multiple rounds of consultation prior to the committee making its final decision.

**In the Consultation paper we asked: Should there be a time limit and requirement for all relevant documents to be sent to the committee to decide on the responsibility for remediation? What time limit (e.g. three months) would be fair to all parties? Can you suggest other ways to expedite the decision making process?**

#### **Way forward – possible changes to the Act**

The possible changes to the Act to improve the timeliness of committee decision-making could include:

- a timeframe of three months in the Act to complete the circulation of all information submitted to the committee. For example, a three-month timeframe would mean that

parties would have about 10 weeks from the call for submissions to provide all relevant information for circulation to the other parties. The process would need to be clearly articulated in supporting guidelines to avoid claims that the process lacked procedural fairness if exchange of information was curtailed.

- extending the offence of providing ‘false or misleading information’ (s. 94) to include making a written submission to the committee in connection with a decision on responsibility for remediation (penalty \$125,000, and a daily penalty of \$25,000).
- the authority (or ‘headpower’) in the Act for the committee to publish its reasons for each decision on responsibility for remediation. (Reference to published decisions may help parties to identify the types of documentation which will be required by the committee and may also help parties to come to an agreement on responsibility without applying to the committee for a formal decision).

***Please also consider the next section on the role of the committee and whether you would support the possible transfer of some committee functions to the State Administrative Tribunal before finalising your response to Q.4.1.***

<b>4.1</b>	<b><i>Do you support the proposed changes?</i></b>
<b>4.1</b>	<p>The Contaminated Sites Committee (the Committee) is obliged to provide the parties to a dispute with natural justice and natural justice requires that a party be given adequate time to respond to allegations against it.</p> <p>The Society respectfully points out that it is already open to the Committee to require responses within a limited period of time, <i>Contaminated Sites Regulations 2006</i> reg 25(5).</p> <p>The imposing of strict time limits may involve a denial of due process.</p>
	<b><i>If not, what modifications or alternative course of action do you propose?</i></b>
<b>4.1</b>	<p>The Society perceives that the significant problem so far as time is concerned, is in the time it takes for the Committee to make its determinations and some consideration might be given to proposing a time limit on that process.</p>

#### **(4.2) Role of the Contaminated Sites Committee and the State Administrative Tribunal**

When the Act was being drafted, the State Administrative Tribunal (SAT) did not exist so Parliament did not address the question of whether or not all or part of the role of the committee should be performed by SAT. Further information on this issue is provided in the Discussion paper.

<b>4.2.1</b>	<b><i>Do you support SAT review of the Contaminated Sites Committee’s primary decisions (e.g. the committee decisions on responsibility for remediation),</i></b>
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	<i>assuming that SAT is appropriately resourced to perform this task?</i>
4.2.2	<i>Do you support SAT becoming the review decision-maker in place of the Contaminated Sites Committee for appeals against classification and notices served under the Act, assuming that SAT is appropriately resourced to perform this task?</i>
	<p>In relation to 4.2.1 and 4.2.2:</p> <p>The Committee was established under section 33 of the <i>Contaminated Sites Act 2003</i> (the Act) and may:</p> <ul style="list-style-type: none"> <li>• Make decisions regarding who is responsible for remediation, or the cost of remediation, of a contaminated site, and deciding to grant, cancel, amend or transfer an exemption certificate;<sup>1</sup> and</li> <li>• Hear and decide appeals against decisions of the Chief Executive Officer of the DER made under the Act, for example, section 18 appeals against the classification of a site and section 52 appeals from investigation notices or clean up notices.</li> </ul> <p>Therefore the Committee’s role and function includes both original and review jurisdiction.</p> <p>Currently, it is only the original decisions made by the Committee, pursuant to sections 40, 55(6) and 67 of the Act that may be appealed.<sup>2</sup> These appeals may be made to the Supreme Court of Western Australia on questions of law only and are regulated by Part 8, Division 1 of the Act.</p> <p>Following the 2009 Legislative Council’s Standing Committee on Legislation <i>Inquiry into the jurisdiction and operation of the State Administrative Tribunal</i> (LCSCCL) report, the transfer of the Supreme Court’s function of reviewing the Committee’s original decisions to the State Administrative Tribunal (the Tribunal) was recommended.<sup>3</sup> The LCSCCL report also recommended that a right to seek a merits review of the original decision be afforded.<sup>4</sup></p> <p>The LCSCCL also considered and then recommended that the Committee’s merits review jurisdiction be transferred to the Tribunal.<sup>5</sup></p> <p>In keeping with the LCSCCL recommendations, the Society strongly supports the view that the Act should be amended to:</p> <ul style="list-style-type: none"> <li>(a) Empower the State Administrative Tribunal to review the decisions of the Committee which are made pursuant to the Committee’s original jurisdiction under the Act; and</li> <li>(b) Transfer the Committee’s existing merits review jurisdiction under the Act</li> </ul>

<sup>1</sup> *Contaminated Sites Act 2003* (WA), ss 27(3), 28(1)-(2), 28(4), 29(1)(d), 36(2), 54(1)(c), 55(3), 64(4), 65(5), 66.

<sup>2</sup> *Ibid* ss 77, 82.

<sup>3</sup> Legislative Council Standing Committee on Legislation 2009 Report 14 *Inquiry into the jurisdiction and operation of the State Administrative Tribunal*, May 2009, Legislative Council of Western Australia, 327.

<sup>4</sup> *Ibid* 334.

<sup>5</sup> *Ibid* 334.

	<p style="text-align: center;">to the State Administrative Tribunal.</p> <p>The Society respectfully submits further advantages that the Tribunal may offer to parties involved in disputes under the Act:</p> <ul style="list-style-type: none"><li>• No perception of bias as the adjudicative body is independent of the Minister;</li><li>• An open and transparent process;</li><li>• The Tribunal is sufficiently well resourced with persons of appropriate expertise;</li><li>• Matters will proceed more expeditiously;</li><li>• The Tribunal offers the parties opportunities for expert mediation;</li><li>• The tribunal publishes detailed reasons for its decisions; and</li><li>• The hearings and associated processes of the Tribunal are consistent with the rules of natural justice and would dispel any concern of lack of procedural fairness.</li></ul>
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