



Government of **Western Australia**  
Department of **Environment Regulation**

# Review of the *Contaminated Sites Act 2003*



**November 2013**

*Discussion paper*

## **Review of the *Contaminated Sites Act 2003***

Western Australia's *Contaminated Sites Act 2003* (Act) and Contaminated Sites Regulations 2006 (Regulations) took effect in December 2006 and are now due for the statutory five-year review (Review). It is now time to ask:

**Has the legislation delivered?**

**Is the legislation meeting the expectations of stakeholders and the wider community in effectively identifying, recording, managing and remediating contaminated sites?**

**Is the legislation fulfilling its objective of protecting people's health and the environment?**

**Cover photos:** Historic aerial view of East Perth's 19<sup>th</sup> century gasworks and the same site as it looks today. Claisebrook Village is 137.5 hectares of prime riverfront land, but was once an industrial wasteland with a legacy of numerous contaminating industries including scrap yards, brick works, stables, warehouses, railway yards and the gasworks itself. This once contaminated land has been extensively remediated for residential housing, shopping and commercial buildings and some 22 hectares of parks and public open spaces.

## Foreword



The review of Western Australia's *Contaminated Sites Act 2003* is entering its final phase of public consultation.

I would like to acknowledge the contribution of all those who made submissions to the first round of consultation on this state's contaminated sites legislation. Your comments have helped inform the second stage of public consultation and the content of this discussion paper.

After the separation of the Department of Environment and Conservation, the administration of the *Contaminated Sites Act 2003* is now the responsibility of the Department of Environment Regulation (DER). This new agency aims to advise

on and implement strategies for a healthy environment, benefiting all Western Australians, both now and in the future.

Sound contaminated land legislation is vital to protect community health and the environment. Contaminated sites can have major economic, legal and planning implications and it is important that they are appropriately investigated and, where necessary, cleaned up.

I encourage you to participate in this final stage of the consultation process and seek your feedback on the potential changes to the *Contaminated Sites Act 2003*.

**Hon Albert Jacob MLA**  
**Minister for Environment**

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## The approach

### Scope of the review

This review aims to improve and update WA's contaminated sites legislation and associated administrative procedures. Although there are no major issues requiring legislative change, we are aware of areas that require fine tuning so that the Act continues to deliver the benefits of the current legislation and process but is:

- **simpler**—we want communication with the public on matters relating to the Act to be straightforward and easy to understand.
- **more transparent**—there needs to be greater predictability and certainty for people affected by contamination. We want clearer communication on our expectations for timeframes for investigating and cleaning up contamination.
- **more proportionate**—investigations and clean-up should be proportional to the risk posed to people's health and the environment.

### Consultation timetable – key dates

<b>Phase 1</b>	<b>Consultation paper released for public comment</b> Submissions closed (12 weeks)	<b>June 2012</b> <b>28 September 2012</b>
<b>Phase 2</b>	<b>Feedback analysed, issues identified and policy positions developed for discussion paper</b>	<b>October 2012 – October 2013</b>
<b>Phase 3</b>	<b>Discussion paper released for public comment</b> Submissions close (12 weeks)	<b>November 2013</b> <b>February 2014</b>
<b>Phase 4</b>	<b>Analyse feedback, finalise policy positions and draft review report</b>	<b>March – June 2014</b>
<b>Phase 5</b>	<b>Forward review report to Minister for Environment</b>	<b>July 2014</b>

*Note: Dates for phases 4 – 5 are provisional.*

## Response to the consultation paper

Responses to the consultation paper closed on 28 September 2012. Thirty-one written submissions and 30 online survey responses were received, so we would like to thank all those agencies, organisations, groups and individuals that took the time to share their views, suggestions and expectations in relation to the *Contaminated Sites Act 2003* (the Act) and how it is administered and managed by DER. Feedback on the consultation paper and online survey results have helped us to identify changes which may need to be made to the Act and Regulations.

To promote engagement with the review, the consultation paper was made available via the former Department of Environment and Conservation website. An invitation to participate in the consultation was sent electronically to representatives and individuals from environmental consultants, industry, peak bodies and academia together with state government agencies and local governments. In addition, 1,000 postcards were distributed throughout the State via regional departmental offices and included with letters to site owners notifying them of the classification of their property. Printed copies of the consultation paper were distributed to major stakeholders, including state government agencies and the Western Australian Local Government Association (WALGA). The review was promoted in the media, including by advertisements in the West Australian, community newspapers and rural newspapers throughout the state.

All feedback received has been considered in the development of this discussion paper. A summary of responses to the consultation paper is available on DER's website, [www.der.wa.gov.au/contaminatedsites/csactreview](http://www.der.wa.gov.au/contaminatedsites/csactreview).

*Many of the issues raised in the responses to the consultation paper related to process matters rather than the legislation itself. We recognise that improvements to our procedures could result in more effective and efficient implementation of the Act. Consequently, we are developing improvements to all our process-related materials in parallel with the review of the Act. Further information is provided in **Appendix 1**.*

## Getting involved

Please use the template provided for your response. The template is available at [www.der.wa.gov.au/contaminatedsites/csactreview](http://www.der.wa.gov.au/contaminatedsites/csactreview). Use of the template is the preferred format for responses as this helps us collate and evaluate feedback received. However, written submissions will also be accepted in other formats.

### **Comments must be received by 9am Monday 24 February 2014.**

All submissions will be treated as public documents and posted on DER's website. Any information respondents wish to provide in confidence should be submitted separately.

All submissions will be considered when developing recommendations to be included in the review report for the Minister for Environment.

Send your submission by email or post to:

Email: [consitesreview@der.wa.gov.au](mailto:consitesreview@der.wa.gov.au)

Post: Contaminated Sites

Department of Environment Regulation

Locked Bag 33

CLOISTERS SQUARE

PERTH WA 6850

## Background

The Act was designed to identify, record, manage and clean up contamination. Under the Act, known or suspected contaminated sites must be reported to DER, investigated and, if necessary, cleaned up (remediated). The Act and Regulations are available from the State Law Publisher's website and should be referred to for the detail and specific wording of the legislation.

A general overview of the Act contents is included as **Appendix 2**. The Regulations provide essential supporting detail to allow the Act to function. The matters in respect of which regulations may be made are set out in Schedule 2 of the Act, and include details of fees payable, procedures for accessing the contaminated sites database and records and certain appeal procedures.

Without limiting the scope of the review we asked in the consultation paper for feedback on:

- the duty to report contaminated sites by site owners and others
- the site classification scheme
- the clarity of the DER letter notifying a classification to site owners and others
- the hierarchy of responsibility for cleaning up contaminated sites
- the availability and usefulness of information provided under the Act
- mandatory disclosure requirements
- timeframes for investigation and remediation
- source sites and notification of affected sites
- the role of contaminated sites auditors and the audit process
- the Contaminated Sites Committee process for making decisions on responsibility for remediation.

## Consultation issues

We have considered the range of issues identified by stakeholders during the first round of public consultation and identified several areas of the Act which may need some modification. This discussion paper has been prepared to obtain feedback on the possible changes.

We are seeking specific feedback on four issues:

1. the duty to report
2. the site classification scheme
3. mandatory disclosure arrangements
4. the role and procedures of the Contaminated Sites Committee.

We are also considering a number of other, straightforward, changes to improve the functioning of the Act. A provisional list of these changes is provided in **Appendix 3**.

## (1) Duty to report

In order to protect people’s health and the environment, information on all known and suspected contaminated sites is recorded on DER’s electronic contaminated sites register. Information on known contaminated sites is publically available via the contaminated sites database. The classification of reported sites enables us to track the identification of known and suspected contaminated sites and to monitor the progress of investigation, remediation and management of contamination at these sites.

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.

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

**What you said:** The 22 responses to this question were split, with 50 per cent agreeing that a person with professional knowledge to identify contamination should have a statutory duty to report it. However, it was apparent that the meaning of ‘person with professional knowledge’ was unclear and that this would need to be clearly defined should a new reporting requirement be introduced.

Other issues regarding this question which were raised are summarised below:

Issue	DER comment
Reporting will <b>improve knowledge of the location of contamination.</b>	Early reporting is consistent with the objectives of the Act and would be beneficial for the community.
Risks to human health/environment may be <b>addressed in a shorter timeframe.</b>	Agree.
Owners and polluters may be <b>reluctant to seek professional advice</b> from a contaminated land or environmental consultant if they believe their site may be reported.	If owners and polluters do not report known or suspected contamination, they commit an offence under the Act.
While the establishment of known contamination is quite clear, suspected contamination is open to interpretation and may lead to <b>over-reporting</b> . This may have significant cost and resourcing issues for site owners.	<b>Updated guidance on reporting of suspected contamination to be provided in the Contaminated Sites Management series of guidelines.</b>

Issue	DER comment
Issues may arise with <b>confidentiality agreements</b> and <b>contract conditions</b> established between the proponent/owner and the consultant.	A new duty to report would not be applied retrospectively to ‘persons with professional knowledge’. New contracts should be compliant with the revised Act obligations.

### 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.

***Q.1 Do you support the proposed change? If your answer is no, why do you not support the proposed change?***

## (2) Site classification scheme

Almost half of all sites classified since the commencement of the Act have been classified as *possibly contaminated—investigation required*. These sites are recorded on DER’s electronic contaminated sites register and are searchable on written application to DER. However, details of these sites are not available on the public database and they do not have to be disclosed by landowners during land transactions (‘buyer beware’ applies as in any other aspect of a land transaction such as flood potential or presence of termite damage).

In practice, sites remain classified as *possibly contaminated—investigation required* until sufficient investigation has been carried out to enable a risk assessment to determine whether the identified contamination requires remediation or management to protect human health, the environment or environmental values.

**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 such as *contaminated—investigation required* be helpful? Would such a classification prompt more timely investigations at a site?

**What you said:** There were 25 responses to this question and 72 per cent of respondents agreed that a new classification may be appropriate. This new classification would indicate that some investigation had been carried out and contamination identified, but that further investigation was required to determine the risk to both human health and the environment, and to what extent remediation (or management) was required. It was suggested that *contaminated—further investigation required* may be a better description.

Other issues regarding this question which were raised in the responses are summarised below:

Issue	DER comment
<b>Supportive of change</b>	
An additional classification <b>may assist site owners to manage priorities for investigations</b> and apply more urgent timeframes for investigations where contamination is identified rather than suspected.	We have revised the letter template used to notify site owners/occupiers etc. when a site has been classified. The revised letter includes information on ‘action required’ to address the suspected or known contamination.  In addition, we have implemented a program of following up sites classified as <i>possibly contaminated – investigation required</i> which we consider to be high priority sites for action.
Introducing this classification will allow <b>for known contaminated sites</b> (although risk not quantified) <b>to be listed on the publicly available database.</b>	Listing of all sites with known contamination would be consistent with the objectives of the Act.

Issue	DER comment
<b>Supportive of change</b>	
<p>The <i>possibly contaminated—investigation required</i> classification is too vague ...the suggested new classification provides clear instruction.</p>	<p>Sites remain classified as <i>possibly contaminated—investigation required</i> until sufficient investigation has been carried out to determine whether the identified contamination requires remediation or management. The new ‘action required’ section in the notification of site classification letter provides clearer instruction to interested parties on the investigations expected.</p>
<b>Concerns raised</b>	
<p><i>Contaminated—investigation required</i> should be clearly defined as should under what circumstances it would be used. A site should not be classified as <i>contaminated—investigation required</i> where contamination has not been proven.</p>	<p><i>Contaminated—investigation required</i> would need careful consideration to define when it would be used.</p> <p>The decision to classify as <i>contaminated—investigation required</i> rather than <i>possibly contaminated—investigation required</i> would require a risk assessment to confirm contamination was present and likewise, whether to classify as <i>contaminated—remediation required</i> rather than <i>contaminated—investigation required</i> would require a risk assessment concluding that the risk was unacceptable and that remediation was required.</p> <p>If the number of risk assessments undertaken increases, this could result in increased costs and timeframes for the persons responsible.</p>
<p>The definition of <b><i>contaminated—remediation required</i></b> could be broadened to indicate that further investigations are required as part of the remediation process, rather than creating a new classification.</p>	<p><i>Contaminated—remediation required</i> can be applied when it is evident that remediation is necessary but further investigation may be required to refine the extent of the remediation. In many cases, there is insufficient information to determine whether remediation is required, so <i>contaminated—remediation required</i> is not appropriate.</p>
<p>How would this new classification affect <b>DER timeframes</b>? Would it mean that all <i>possibly contaminated—investigation required</i> sites would need to be reassessed?</p>	<p>We would not propose to revisit all sites classified <i>possibly contaminated—investigation required</i> as a matter of course. If the Act is amended to include this new classification, it would be considered when sites are classified or re-classified (after more information is submitted) from that time onwards.</p>
<p>There would be a <b>loss of protection for innocent landowners</b> which the classification <i>possibly contaminated—investigation required</i> currently provides. Sites classified <i>contaminated—investigation required</i> would be published on the Contaminated Sites Database and information on them made freely available to the public.</p>	<p>The loss of anonymity for some landowners is recognised. However it is consistent with the objectives of the Act for details of known contamination to be made publicly available on the Contaminated Sites Database.</p>

Issue	DER comment
<p>If this new classification of <i>contaminated—investigation required</i> does not incur obligations to undertake investigation works within a certain timeframe, or attract penalties if investigations are not completed, then it is <b>unclear what benefit</b> this classification will have over the existing classifications.</p>	<p>The situation with respect to enforcement would be the same, as an investigation notice may be given in respect of a site classified as possibly <i>contaminated—investigation required</i> and it is an offence not to comply with the requirements of the notice in the specified timeframes.</p>
<p>The <b>number of classifications should be reduced</b> not expanded —there are already too many classifications which creates confusion.</p>	<p>A substantial overhaul of the site classification system would have significant cost and resource implications. (We note that this course of action does not appear to have widespread support at this time.)</p>

From the submissions it appears that the application of a *contaminated—investigation required* classification could be contentious and could result in an increased number of site classifications being appealed; this would adversely affect our timeframes for classifying and following up sites.

The merits of introducing a new classification of *contaminated—investigation required* also need to be considered in the context of the significant cost implications involved in modifying our IT infrastructure used to manage classifications and the processing charge incurred for withdrawal and registering of new memorials (currently \$320 per parcel of land).

We recognise the consultation response indicated there was considerable support for introducing a new classification of *contaminated—investigation required or contaminated—further investigation required*. The responses indicated that the new classification could:

- drive action to determine whether clean-up was necessary
- assist site owners in managing priorities for investigation
- provide improved knowledge on the occurrence of contamination by listing additional contaminated sites on the publicly available database.

We also recognise that the consultation paper response indicated that there was widespread concern that site owners and others were not provided with clear guidance on our expectations for timeframes and priority for action. In some cases, site owners and others were unsure what their responsibilities were which has contributed to delays.

### Way forward — process improvements — no change to classification system

In response, we have initiated substantial improvements to our internal procedures to provide clearer guidance on what a site classification of *possibly contaminated—investigation required* means.

We will accomplish this by:

- timely follow up of sites classified *possibly contaminated—investigation required* based on potential risk to human health and the environment<sup>1</sup>
- providing clearer guidance on the actions required and indicative timeframe for completion when notifying site owners (and other interested persons) of the classification of a site
- clarifying the location of the land which has been classified by attaching a site map to the letters notifying the classification of a site
- developing a ‘traffic light’ system to indicate the relative urgency for action (in progress).

**Q.2 Do you support no change to the classification system? If not, what modifications or alternative course of action do you propose?**

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<sup>1</sup> We are currently targeting sites classified as *contaminated—remediation required* and high priority *possibly contaminated—investigation required* sites. Other sites classified *possibly contaminated—investigation required* will be followed up as resources permit.

### (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.

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

**What you said:** Feedback indicated that while disclosure requirements were clear, the meaning of some terms and the specified timeframe were not.

#### 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 follows:

##### Owner

The owner for the purposes of s.68 is the owner who is a party to a transaction that would result in another person becoming the owner, mortgagee or lessee. We recognise that there may be circumstances that prevent an owner from providing notification at least 14 days before completion of a relevant transaction. Examples include:

- where an owner is first notified that their site has been classified *contaminated—remediation required*, *contaminated—restricted use* or *remediated for restricted use*, less than 14 days before a transaction is due to be completed; or
- where a person becomes the owner less than 14 days before completion of another transaction that would require disclosure; for example, a buyer disclosing to a mortgagee.

In response, we propose that the disclosure requirement in these cases must be made as soon as reasonably practicable after the owner has been first notified or becomes the new owner.

##### Completion of a transaction

- settlement date for a sale
- the date the mortgage is registered for a mortgage
- the date the lease is signed for a lease.

**Q.3 Do you support the proposed change to the definitions of “owner” and “completion of a transaction”? If not, what modifications or alternative course of action do you propose?**

## (4) The Contaminated Sites Committee

The Contaminated Sites Committee is an independent body established under s.33 of the Act to:

- make statutory decisions on responsibility for remediation of sites classified *contaminated—remediation required*
- grant, cancel, amend or transfer exemption certificates
- determine appeals against classifications and regulatory notices given by DER under the Act.

The Contaminated Sites Committee is appointed by the Minister for the Environment and is independent of DER in its decision-making role. The committee aims to manage the application and appeal processes efficiently, effectively and fairly and without legal technicality or formality.

Only the decisions by the committee where it is the original (primary) decision-maker can be appealed (i.e. the committee's decisions on appeals against classifications or investigation, clean-up or hazard abatement notices cannot be appealed). These appeals are on a point of law only and are made to the Supreme Court. To date, two matters regarding responsibility for remediation have been appealed to the Supreme Court<sup>2</sup>.

More information on the role and procedures of the committee can be found at <http://www.consitescommittee.wa.gov.au/index.php>.

### (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. One contributory factor may be that the motivation to undertake a 'once and for all' comprehensive search for relevant information may be low because the penalty for not providing all the information upfront is fairly modest (\$1,000 reg.25(7)) when compared with the potential remediation costs (possibly in excess of \$100,000).

**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?**

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<sup>2</sup><http://decisions.justice.wa.gov.au/supreme/supdcns.nsf/byRespondent.xsp#>. Go to 'C', then 'CO' and the cases that have Contaminated Sites Committee or The Contaminated Sites Committee as the first party.

**What you said:** The response to this question indicated that there was a clear majority supporting the introduction of a time limit for providing relevant documents to the committee. Most respondents favoured a three-month time limit for parties to present relevant documents, with some suggesting that there should be provision to negotiate an extension if necessary, particularly in complex cases.

Other suggestions to expedite decision-making included increasing the committee's resources, including staff and giving the committee access to independent expert advice (e.g. remediation and petroleum experts and chemists) when appropriate.

We note the suggestions regarding increasing the resources available to the committee. However, this may not reduce the time taken for a decision to be made as the critical factor in many cases is the time taken up in multiple rounds of circulating information to all parties to ensure 'natural justice'.

## 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 (as an indication, 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).

### ***Q.4.1 Do you support the proposed changes to the Act? If not, what modifications or alternative course of action(s) do you propose?***

***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.***

## (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.

### The State Administrative Tribunal

A wide range of matters can be brought before SAT but they all depend on laws, referred to as 'enabling laws' that specifically empower SAT to make decisions. SAT has both review and original jurisdiction under the *State Administrative Tribunal Act 2004* (SAT Act). An application under SAT's review jurisdiction includes where a person applies to SAT under an enabling law for the review of a decision of a public official that is affecting them. An application under SAT's original jurisdiction includes where a person applies to SAT for a decision regarding a matter: in these instances, SAT is the primary decision-maker.

SAT's approach is intended to be informal, flexible and transparent. SAT:

- aims to make the correct and preferable decision based on the merits of each application
- is not a court and, therefore, strict rules of evidence do not apply
- encourages the resolution of disputes through mediation
- enables parties to conduct the proceedings themselves, or with the assistance of a lawyer or a person with relevant experience
- holds hearings in public in most cases, provides reasons for all final decisions and publishes written reasons on its website.

Given its broad jurisdiction, SAT matters are divided into four streams that enable procedures to be adapted to suit the type of matter and the needs of different people who use SAT. The tribunal is constituted for each case having regard to the background of the SAT member or members chosen to ensure that, as far as possible, the background is suited to the nature of the issues in the particular case.

The development and resources stream determines applications on development, fisheries, water, land valuations, soil and land conservation and related matters under more than 30 Acts. Applications in this stream are usually listed for a first direction hearing. The matter may then be sent to final hearing or referred to mediation or a compulsory conference. Some matters may be dealt with on documents only. More information can be found at [www.sat.justice.wa.gov.au](http://www.sat.justice.wa.gov.au).

In 2009, the Legislative Council Standing Committee on Legislation<sup>3</sup> (LCSC) identified as an issue for consideration by government, transferring to SAT the Supreme Court's function of reviewing the Contaminated Sites Committee's primary decisions, as provided for in ss. 40,

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

55(6) and 67, as read with s.77 of the Act. These sections provide for appeals to the Supreme Court against or in relation to:

- Contaminated Sites Committee decisions on responsibility for remediation
- notices from the committee regarding responsibility for remediation and liability for costs in certain circumstances
- exemption certificates.

After consulting widely with stakeholders, the LCSCL formed the view that:

- *‘With respect to the review of the Contaminated Sites Committee’s original decisions, the LCSCL was of the view that people who are aggrieved by these decisions should have a right to seek a merits review of the decisions, and this review should be conducted by the SAT.*
- *The LCSCL also considered that the SAT should exercise the Contaminated Sites Committee’s existing merits review function.<sup>4</sup>*

Under s.77 of the Act, the Supreme Court may only review the committee’s primary decisions on a question of law. This is a narrow ground of appeal. The question of law is resolved by the court applying and interpreting legal principles or a law, which does not involve the determining of the factual situation. By comparison merits review is broader and involves analysis of the fact finding and often policy choices involved in the decision under review (having regard to the relevant law).

The reference above to “the Contaminated Sites Committee’s existing merits review function” is to the committee’s power under s.79 of the Act to hear appeals against site classifications or notices (e.g. clean up notices) issued by DER. With respect to these types of appeals, the committee has a merits review function where it may consider issues of fact and law. Under s.82 the Contaminated Sites Committee may, among other things, set aside the DER decision and make the decision it thinks just (e.g. determine a different site classification is appropriate).

LCSCL recommended in its report that the Act be amended to:

- (a) ‘empower the State Administrative Tribunal to review the decisions of the Contaminated Sites Committee which are made pursuant to the committee’s original jurisdiction under the Act*
- (b) transfer the Contaminated Sites Committee’s existing merits review jurisdiction under the Act to the State Administrative Tribunal.’*

The background and rationale for the LCSCL recommendations can be found in its 2009 report<sup>5</sup>. The Government has deferred its response to the LCSCL recommendations

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<sup>4</sup> LCSLC 2009, p334

<sup>5</sup> LCSLC 2009, pp. 327-334.

regarding the committee, until the statutory review of the *Contaminated Sites Act 2003* has been completed<sup>6</sup>.

Although SAT's approach is intended to be informal and flexible, DER officers participating as 'expert witnesses' in planning appeals have experienced SAT's procedures as more 'legally formal' than the committee's procedures. DER considers that transferring the committee's appeal (merits review) jurisdiction to SAT may potentially disadvantage those appellants who do not have the financial resources to engage legal representation. With regard to a possible merits review by SAT of the committee's original decision on responsibility for remediation, this has the potential to further delay actual clean-up of the site. There is also the potential for further appeal against a merits review decision by SAT, as Part 5 of the SAT Act provides that a party to a proceeding may seek leave from the relevant court to appeal a decision on a question of law.

The issue of resourcing SAT to perform any additional functions is a policy matter for consideration by government. Notwithstanding this, we would like your feedback on:

***Q.4.2.1 Do you support SAT review of the Contaminated Sites Committee's primary decisions (e.g. the committee decisions on responsibility for remediation), assuming that SAT is appropriately resourced to perform this task?***

***Q.4.2.2 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?***

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<sup>6</sup> *Response of the Western Australian Government to the Western Australian Legislative Council Standing Committee on Legislation Inquiry into the Jurisdiction and Operation of the State Administrative Tribunal*, September 2009, p6

## APPENDIX 1 Improvements to DER procedures

In response to the first round of public consultation on the Act review, we received a significant number of comments requesting that we provide greater transparency on decision-making in relation to the classification of known and suspected contaminated sites. Feedback indicated a need for more guidance on our expectations for specific actions and timeframes for the investigation and remediation of contaminated sites. These issues generally do not require changes to the legislation and can be addressed by reviewing our policies and revising our internal procedures.

**More detailed basic summaries of records (BSRs)**— in response to requests for more information to be included in BSRs, we now attach maps and aerial photographs of the land in question, where possible. In addition, we are working with Landgate towards providing an online service for ordering BSRs. This will dramatically reduce turnaround times, providing the ability to order and pay for contaminated sites information online and receive a report almost instantaneously.

**Notification of classification letter**—there was some feedback regarding the letter we send owners/occupiers when a property has been classified under the Act. Comments indicated that people thought the letter could be clearer and provide better guidance on what they needed to do next.

In response, we are making improvements to the content and layout of the notification letter including, where possible, a site location map. In an effort to make the actions required clearer, we now include an ‘action required’ section and are also considering a ‘traffic light’ approach using green, amber, or red to indicate the urgency for action at any given site (e.g. red indicating urgent or immediate action required). Specific expectations may be included in the “reasons for classification”. We also plan to include contact details for the DER officer who classified the site, making it easier to follow up and ask specific, site-related questions.

**Guidelines**—the DER Contaminated Sites Management Series (CSMS) of guidelines were based on the principles and guidance in the National Environment Protection (Assessment of Site Contamination) Measure 1999 (ASC NEPM). The DER guidelines are being reviewed in combination with the revisions required to implement the 2013 amendment of the ASC NEPM<sup>7</sup>. We propose to adopt many of the ASC NEPM schedules in their entirety. Some of the changes detailed in the ASC NEPM have already been adopted in WA. Where necessary, we will produce brief guidance notes covering specific WA issues and how they relate to the ASC NEPM guidelines.

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<sup>7</sup> Information on the ASC NEPM and how to access copies of the technical guidelines and related documents is available through the website for the Commonwealth of Australian Governments Standing Council of Environment and Water: <http://www.scew.gov.au/nepms/assessment-site-contamination>

**Fact sheets**—look out for a revised set of fact sheets under the DER logo. Several new fact sheets are being developed, including one detailing how to access information on contaminated sites and one on our expectations for investigations and timeframes.

**Auditors**—we are reviewing the auditor guidelines and considering a number of changes/improvements to the accredited auditor scheme. These include requiring auditors to submit an annual report to DER listing their current audits and status plus a template to be completed when submitting reports.

**Enforcement and penalties**—In order to improve transparency and to support DER expectations for investigation and remediation timeframes, we intend to prepare a policy document on statutory notices that may be issued under Part 4 of the Act. The document will explain the different types of notices and the circumstances when they may be issued.



## APPENDIX 2 Act contents

**Table 1: Contents of the Contaminated Sites Act 2003**

Part	Title	Description
1	Preliminary	Definition of terms used in the Act, objects and principles of the Act and relation with other laws, exemptions from the Act.
2	Reporting, classifying and recording sites	Reporting requirements, the classification process including appeals. Records to be kept by CEO and how to access information on reported sites.
3	Remediation of contaminated sites	Responsibility for remediation hierarchy—who is responsible for clean up? The Contaminated Sites Committee ( <i>an independent body set up under the Act to make certain decisions</i> ) and framework for decisions on responsibility for remediation.
4	Investigation, clean up and hazard abatement notices	Notice procedures, requirements and appeals.
5	Provisions relating to remediation and notices	DER powers in respect to remediation, investigation and ensuring compliance with notices. Also covers recovery of costs, lodging of memorials when a notice is given or land is classified in certain categories and the Contaminated Sites Management Account ( <i>a fund set up under the Act to investigate and remediate certain State sites</i> ).
6	Certificate of contamination audit, exemption certificates and disclosure statements	Certificate of contamination Audit provisions, disclosure statements and exemption certificates, and disclosure requirements for site owners before change of ownership.
7	Contaminated sites auditors	Power for CEO to accredit auditors, authority of accredited auditors, requirements for mandatory auditors' reports and related offences.
8	Appeals	Appealing decisions of the committee (responsibility for remediation and granting of exemption certificates) to the Supreme Court on point of law only. Appealing to the committee against decisions by the CEO on classification and issuing of investigation, clean up and hazard abatement notices. CEO power to publish details of appeal decisions by the committee.
9	Enforcement	Provisions for prosecuting offences under the Act and applicable penalties, appointment, functions and powers of Inspectors and authorised officers, court powers – powers under the <i>Environmental Protection Act 1986</i> (EP Act) Part VIA Division 4 apply.

Part	Title	Description
10	General	Delegations, other provisions of the EP Act which apply (court orders on payment of investigation expenses, proof of documents, liability of bodies corporate and directors etc. of body corporate and restrictions on disclosure of certain information, protection from personal liability). Other offences under the Act—not supplying information or providing false or misleading information; victimisation provisions, confidentiality requirements, guidelines under the Act, power to make regulations and Act review requirements.
-	Schedule 1	Classification categories and their criteria for application.
-	Schedule 2	Matters in respect of which regulations may be made: <ul style="list-style-type: none"> <li>• disclosure statements, fees, facts and circumstances to be taken into account by the committee in making a decision on responsibility for remediation, procedures regarding access to information, procedures for appeals (s.18 notice of classification or s.52 investigation or clean up notices).</li> <li>• Auditors and audits</li> </ul>

## APPENDIX 3 Proposed legislative changes

Table 2 Summary of proposed changes to the Act<sup>8</sup>

Section of Act	Issue	Proposed change/addition
s.16	Reclassification of <i>possibly contaminated — investigation required</i> sites	Amend to include ability to reclassify sites as <i>report not substantiated</i> where a clerical mistake or unintentional error or omission is made in the reported information
Part 3, Division 3	Decision on responsibility for remediation	Include fee for making decision on responsibility for remediation Insert power to publish details and reasons for decisions by the Committee on responsibility for remediation
s.59	Persons to whom notice of a memorial is to be given	At request of the Department of Health, remove CEO of the Health Department from the list of parties that are notified
s.62(3)(e)	Certificate of contamination audit (CCA)	Allow potential owners to apply for a CCA
s.68	Disclosure wording	Clarify meaning of ‘owner’ and ‘completion of a transaction’ (refer main text)
s.82(1)	Decision of committee	Include fourth option to remit the matter to the CEO for a new decision in circumstances where new information is available
s.97	Guidelines	Insert ability for CEO to adopt guidelines

<sup>8</sup> This list is provisional and is indicative of the changes being considered at the time of publication.

**Table 3 Summary of proposed changes to the CS Regulations<sup>9</sup>**

Regulation	Issue	Change
reg.4	One fee unit = \$15	Revise in line with government policy
reg.15	Holding of ordinary and special committee meetings	Repeal in line with commitment to the Joint Standing Committee on Delegated Legislation (as under s33(4), the committee is to determine its own procedures)
reg.23	Definition of interested person for purposes of s.36(3) of the Act	
reg.23(a)	Owner or occupier of land	Clarify that this refers to both a source site and its affected site(s)
reg.23(g)	Interested person in the opinion of the CEO	Repeal in line with commitment to the Joint Standing Committee on Delegated Legislation  Note: a person with an interest in the matter who qualifies under 23(a) to (f) may approach the committee and petition them to make a decision on the committee's own initiative under s.36(2)(b).
Reg.25	Requirement to provide information to the committee	Clarify that the expense of providing information to the committee is not a 'reasonable excuse' under reg.25(7)
Schedule 2	Fee units	Review number of fee units in the context of time taken/resources required based on experience to date  Include fee for decision on responsibility for remediation

<sup>9</sup> This list is provisional and is indicative of the changes being considered at the time of publication.