



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.
PLEASE DO NOT SEND PDF DOCUMENTS**

Submissions will be published on the DER webpage, however, personal contact details will not be made public.

Email to: consitesreview@der.wa.gov.au

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

Please indicate which best describes you / your organisation:

Academic	<input type="checkbox"/>	Member of the public	<input type="checkbox"/>	Professional association	<input type="checkbox"/>
Auditor	<input type="checkbox"/>	Industry	<input type="checkbox"/>	Real estate	<input type="checkbox"/>
Community group	<input type="checkbox"/>	Legal practitioner	<input type="checkbox"/>	State agency	<input type="checkbox"/>
Developer	<input type="checkbox"/>	Local government	<input type="checkbox"/>	Other (specify)	<input type="checkbox"/>
Environmental consultant	X	Planning consultant	<input type="checkbox"/>		<input type="checkbox"/>
Contact person					
Position	Australian Contaminated Land Consultants Association (ACLCA) WA				
Email			Fax		
Phone			Mobile		
Postal address			State		
Suburb / city			Post code		
Number of pages (including this cover sheet)	1 of 8				

Review of the
Contaminated Sites Act 2003
Discussion paper

Response template

To get the most out of your feedback, **please provide examples and relevant data to support your view (e.g. how the issue affects you, information regarding costs incurred and how frequently the issue arises)**. Comments are most helpful if they:

- contain a clear rationale;
- provide evidence to support your view;
- describe any alternatives we should consider; and
- where possible provide data which could inform a costs and benefits analysis of the issue such as how often the issue arises and what direct and/or indirect costs or savings would be incurred if the change was made.

What will happen to the information I provide?

After the comment period has closed (24 February 2014), we will review and consider all stakeholder feedback and produce a detailed report for consideration by the Minister for the Environment. The review report will be tabled by the Minister in Parliament. All submissions received will be published on the DER website (personal contact details will not be made public).

Thank you

We would like to thank you for your time in contributing to this review process. This stakeholder consultation will provide valuable information for us to consider and incorporate into improving the operation of the CS Act and Regulations and the way we do our business.

(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.

<p>1.1</p>	<p><i>Do you support the proposed change?</i></p> <p>Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.</p>
<p>1.1</p>	<p>ACLCA WA members have indicated they are generally NOT in favour of the proposal to extend formal obligations to report a known or suspected contaminated site.</p>
<p>1.2</p>	<p><i>If your answer is no, why do you not support the proposed change?</i></p>
<p>1.2</p>	<p><i>Under the Act in its current form, an environmental consultant providing contaminated site investigation services would advise its client of reporting responsibilities where contamination is known or suspected (contamination being the definition as defined in the Act), noting that there are already provisions in the Act to penalise responsible parties who do not meet their reporting obligations.</i></p> <p><i>ACLCA WA make the follow comments:</i></p> <ul style="list-style-type: none"> • <i>By extending formal reporting obligations to ‘environmental consultants’, there may be a hesitation by the owner to provide important historical site information, currently provided in the spirit of client-consultant commercial privilege.</i> • <i>An affect of extending reporting responsibilities to environmental consultants (and associated liability) may be an increase in conservative over-reporting of trivial issues.</i>

(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.

2.1	<i>Do you support the proposed way forward?</i> Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.
2.1	<i>ACLCA WA generally SUPPORT the proposed way forward. ACLCA WA considers process improvements, as proposed in the November 2013 Discussion Paper, will aide in prompting more timely investigations.</i>
2.2	<i>If not, what modifications or alternative course of action do you propose?</i>
2.2	

(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.

3.1	<i>Do you support the proposed way forward?</i> Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.
3.1	<i>ACLCA WA generally SUPPORT the proposed changes to the Act including definitions around ‘owner’ and ‘transaction’.</i>
3.2	<i>If not, what modifications or alternative course of action do you propose?</i>
3.2	

(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.

4.1	<i>Do you support the proposed changes?</i> Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.
4.1	<i>ACLCA WA generally SUPPORT the proposed changes to the Act including publication by the committee of its reasons for each decision around responsibility for remediation. ACLCA WA note the need to prepare guidelines that articulate the submission process.</i>

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	<i>ACLCA WA note that a three month submission timeframe may not be adequate for particularly complex sites and it is suggested that the amended Act include some mechanism that enables committee consideration for an extension to this timeframe.</i>
	<i>If not, what modifications or alternative course of action do you propose?</i>
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. Further information on this issue is provided in the Discussion paper.

4.2.1	<p><i>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?</i></p> <p>Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.</p>
4.2.1	<p><i>ACLCA WA generally SUPPORT SAT review of the Contaminated Sites Committee’s primary decisions. ACLCA notes that although in part some existing transparency issues around the committees decision reporting may be resolved via other slated changes to the Act (as per Section 4.1) ACLCA WA consider that the SAT is presently a more open and merits-based forum that enable parties the opportunity to directly present their case.</i></p>
4.2.2	<p><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> <p>Please remember to provide specific examples and information on the possible financial consequences of making or not making the proposed change. You may also wish to offer an alternative solution.</p>
4.2.2	<p><i>ACLCA WA generally SUPPORT SAT performing the function of decision-maker for appeals against classification and notices served under the Act. As per previous statements ACLCA WA consider SAT is well versed in delivering vigorous, transparent, and merits-based decisions.</i></p>