



Government of Western Australia  
Contaminated Sites Committee

Your ref: CEO1557/13; DER2013/006841-1  
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Mr Jason Banks  
A/Director General  
Level 4, Atrium  
Department of Environment Regulation

**By internal mail**

Dear Mr Banks

**SUBMISSION IN RESPONSE TO DISCUSSION PAPER ON REVIEW OF CONTAMINATED SITES ACT 2003**

As you know, the Contaminated Sites Committee (Committee) is a tribunal established under the *Contaminated Sites Act 2003* (Act) "to make decisions for the purposes of this Act", which does not include an advisory role. Nevertheless, since the Committee is closely involved in the implementation of the Act it has a direct interest in the Act Review.

In recent months the Committee has engaged in an ongoing exchange of letters discussing various matters related to the Review of the Act. Some of this exchange has included the period during which submissions were invited on the Discussion Paper published in November 2013. This submission presents the major points raised by the Committee in its ongoing exchange with the Department of Environment Regulation (Department).

1. The effect of section 16 to prevent the CEO from reclassifying a *possibly contaminated – investigation required (PC-IR)* site as *report not substantiated (RNS)* is too constraining and can lead to land being unfairly labelled contaminated when there is no evidence of contamination. The constraint should be eased.
2. The body established under section 33 is named the "Contaminated Sites Committee". However, it has become clear that the body is actually a tribunal with both original (e.g. responsibility decisions) and review (e.g. appeals against classifications) jurisdictions, whose decisions are final except for appeal on a question of law to the Supreme Court, similar to those of the State Administrative Tribunal (SAT), though confined to just one Act. The name "Committee" carries misleading connotations of an advisory board that are entirely at odds to the body's statutory decision making role. The name should be changed to Contaminated Sites Tribunal.
3. In 2009, the Legislative Council Standing Committee on Legislation (Standing Committee), in its review of the operation of SAT recommended that the Committee's original jurisdiction (mainly responsibility decisions under Part 3) which are now final except for appeal to the Supreme Court on a question of law, should be subject to a merit review by SAT.

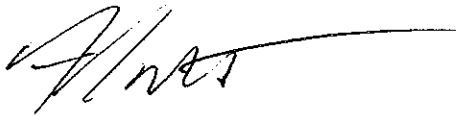
The Committee considers that this would potentially double the time taken for such decisions. It would also be inconsistent with the Parliament's clear intention expressed by the former Minister for Environment in the second reading debate, "for people to be able to have the site looked at by the committee and, rather than a lot of money being spent on legal challenges or remedies, the Government wants people to carry out the clean-up". The former Minister's further observation that the appeals in the Act "are quite limited, but the thinking behind that was to try to have a fairly straightforward system that has as its sole focus cleaning up contaminated sites and using the dollars for that purpose, rather than getting bogged down for months on end in appeals".

4. The Standing Committee also recommended that the Committee's review jurisdiction of decisions of the CEO should be transferred to SAT. The Standing Committee's report did not directly address the purpose of this recommendation, but the establishment of SAT was intended to address perceptions of a lack of independence of reviews in which Ministers had a direct involvement. This does not apply to this Act. The Committee has, since its establishment, been able to act with complete independence in accordance with the Act. Further, the technical nature of some appeals requires the specialised knowledge already in place on the Committee.
5. The Committee agrees it may be helpful to consider amending the Act to enable the curtailing of the exchange of submissions and counter-submissions (by time or number) without compromising the Committee's decisions under Part 3, or the requirements of procedural fairness.
6. It may be helpful to make a specific provision, with agreement of the parties, for mediation.
7. There should be a fee associated with a request by an interested person under s36(2)(a) for a decision as to responsibility for remediation.
8. There is need to clarify the point in time, and hence the contamination, to which the Committee's decision under Part 3 of the Act relates, regarding responsibility for remediation.
9. It should be clearly open to the Committee to consider works and expenses already undertaken in investigating and remediating a site when making its decision under Part 3, in addition to any remedy available pursuant to section 56.
10. It may be helpful where there is doubt or a need to break an impasse (e.g. in relation to a site classified as *PC-IR*) for the Committee to be able to make a decision on the responsibility for investigation.
11. The Committee agrees with the addition of a new classification of *contaminated – (further) investigation required*, although notes that this is not currently being recommended by the Department. The Committee considers that if such a classification is introduced, it would be logical to also enable the Committee to determine responsibility for investigation for this classification, if necessary.
12. The Committee notes and endorses the possible change of "extending the offence of providing 'false and misleading information'" to include information provided to the Committee. A further change is required to provide an effective deterrent to failing to provide information to the Committee. At present there is no such offence in the Act and so the penalty, under the *Contaminated Sites Regulations 2006* is a maximum of \$1,000 – which is insignificant in comparison to the costs of remediation that may be involved.

13. The definition of "interested person" should be extended to include the owner or occupier of an affected site. This will assist in the Committee's consideration of responsibility for remediation of a source site, and allow affected site owners to receive all relevant documentation, as well as the result of a determination for responsibility of a source site.
14. There should be a requirement for the CEO to publish the Committee's decisions (and reasons) on responsibility for remediation.
15. The provisions of Part 6 Division 3 of the Act regarding Disclosure Statement applications should be reconsidered and possibly re-instated. The Act clearly contemplated that all reported sites would be classified within the first two years after commencement, however this did not occur, which means that the intent of this section has not been properly implemented.
16. There should be clarification of the term "without lawful authority" in section 5(b)(ii) as to whether the listed forms of agreement relate to private agreements.

If you have any queries regarding this matter, please contact the office of the Contaminated Sites Committee on (08) 6467 5201.

Yours sincerely



*PP* **Jim Malcolm**  
Chairman  
Contaminated Sites Committee

10 February 2014

cc

Mr Andrew Miller  
A/Manager, Contaminated Sites Branch  
Department of Environment Regulation