



# 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](mailto:consitesreview@der.wa.gov.au)**

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

Kirsa Environmental

**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 checked="" 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	<input type="checkbox"/>	Planning consultant	<input type="checkbox"/>		<input type="checkbox"/>

<b>Contact person</b>			
<b>Position</b>			
<b>Email</b>		<b>Fax</b>	
<b>Phone</b>		<b>Mobile</b>	
<b>Postal address</b>		<b>State</b>	
<b>Suburb / city</b>		<b>Post code</b>	
<b>Number of pages (including this cover sheet)</b>			

**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><b>1.1</b></p>	<p><b><i>Do you support the proposed change?</i></b></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><b>1.1</b></p>	<p>I support the proposed change and the intent to include the full range of professionals involved in a site having an obligation to notify. Bearing in mind one of the broad objectives of the review is to bring more sites into the system that warrant the attention to protect human health and the environment, I suggest it would be helpful if there is some discussion or context provided (perhaps in accompanying guidelines) so that some don't take the obligation too literally and burden the system with what might be considered 'frivolous' or 'trivial' items. An example might be a situation with a few random / isolated fragments of asbestos cement sheet being identified on the surface of a site intended for commercial / industrial type development. The consideration of what is trivial or frivolous should be left to professional judgement, and if the impacts were to be found to more significant at a later date (and had in retrospect warranted notification), then of course the person who made that call should be held to account.</p>
<p><b>1.2</b></p>	<p><b><i>If your answer is no, why do you not support the proposed change?</i></b></p>
<p><b>1.2</b></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>  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.
<b>2.1</b>	I support the rationale behind DER’s proposed way forward, noting the approach is reliant on improvements to DER’s internal procedures. It seems fair and reasonable to allow DER the opportunity to address the concerns around this issue via this approach, and perhaps review again at the next review period.
<b>2.2</b>	<b><i>If not, what modifications or alternative course of action do you propose?</i></b>
<b>2.2</b>	

### (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>  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.
<b>3.1</b>	I support the proposed way forward. No other comments or suggestions.
<b>3.2</b>	<b><i>If not, what modifications or alternative course of action do you propose?</i></b>
<b>3.2</b>	

### (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	<p><b><i>Do you support the proposed changes?</i></b></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>
4.1	<p>I support the proposed time frame for provision of information 3 months seems fair and reasonable.</p> <p>I support the proposal for extending the offence of providing “false or misleading information”.</p> <p>I support the proposal for CS Committee decisions to be published, so that precedents can be established and for improved transparency in the process.</p>
	<p><b><i>If not, what modifications or alternative course of action do you propose?</i></b></p>
4.1	

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## **(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>	<p><b><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></b></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>
<b>4.2.1</b>	<p>I support the proposal for the SAT to replace the Supreme Court as the authority for hearing appeals against the CS Committee’s primary decisions, under a broader basis of merits review (as opposed to the current process where the Supreme Court hears appeals only based on points of law).</p>
<b>4.2.2</b>	<p><b><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></b></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>
<b>4.2.2</b>	<p>I do not support this proposal. I believe the Contaminated Sites Committee is a more appropriate body under its current format to address these matters. From my viewpoint as an accredited CS Auditor I cannot see how the SAT could fulfil this role any better than the current CS Committee, and I can see more potential for unintended ‘poor’ outcomes from a technical viewpoint if the process becomes more legally formalised under the SAT (ie. people with better resources as advocates / representatives getting better outcomes from such a process, which would not be desirable).</p>