



## What is the impact of the *Contaminated Sites Act 2003 (WA)* (“the Act”)?

### 1. Impact of the Act

This legislation provides a statutory framework for the reporting, investigation and remediation of contaminated sites. Some of the important obligations created by the Act, and discussed below, are:

- the obligation to report known or suspected contaminated sites;
- the obligation to remediate certain sites;
- the obligation to inform the purchaser of a site of contamination in certain circumstances; and
- the obligation to comply with investigation, clean up and hazard abatement notices given under the Act.

Further, another major impact of the Act is the introduction of a public database and the maintenance of other, more detailed, publicly accessible records. Records of the report, investigation and classification of a site may be retained indefinitely and viewed by members of the public.

### 2. The object of the Act

The object of the Act is to protect human health, the environment and environmental values by providing a system for the identification, recording, management and remediation of contaminated sites in Western Australia.

Three principles are used to define the object of the Act, s8:

1. The polluter pays principle

Those who generate pollution and waste should bear the cost of containment, avoidance or abatement.

2. The principle of full life cycle costs

The users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes.

3. The principle of waste minimisation

All reasonable and practicable measures should be taken to minimise the generation of waste and its discharge into the environment.

### 3. “Contaminated” sites

S4: Land, water or a site is contaminated where a substance is present at a level of concentration “that presents, or has the potential to present, a risk of harm to human health, the environment or any environmental value”.

### 4. Reporting requirements

#### 4.1 The duty to report

S 11(4) lists the people who have a duty to report a contaminated site:

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

An ‘owner’ is a person who in relation to freehold land holds ownership of the freehold or is a mortgagee in possession. (s.5), whilst an ‘occupier’ is a “person in occupation or control of the land, whether or not the person also owns the land” (s.3).

If a person, with a duty to report, knows that a site is contaminated they must report the site to the CEO within 21 days (s11(3)(a)).

If a person, with a duty to report, suspects a site is contaminated they must report the site to the CEO as soon as practicable s11(3)(b).

## 4.2 Contents of the report

S11(2): A report must describe the information on which the person bases their knowledge or suspicion that the site is contaminated and the location of the site (the report must also be in the prescribed Form 1 (r.6) (see Schedule 1 of the Contaminated Sites Regulations 2006 (WA) (Regulations)). A person will be liable to a penalty of \$250,000 if they report a site maliciously or without reasonable grounds (s11(9)).

## 5. Penalty for failure to report a site

For a period of six months after the commencement of the Act, a person who fails to report a site will not be liable to a penalty.

Failure to report a site carries a penalty of up to \$250,00.00 and a further daily penalty of up to \$50,000.00 will apply for everyday that the offence continues past the limit for reporting the site (see s11(3) & s87). As discussed above a person must report a site they know to be contaminated within 21 days; if a person only suspects a site is contaminated, then they must report it "as soon as practicable."

Therefore, a person who has a duty to report a contaminated site will be liable to a penalty if they fail to report that site. Unless the person has a defence; s11(5) provides that a person has a defence to a prosecution for failing to report where:

- (a) the site had already been reported to the CEO;
- (b) the contamination, or suspected contamination, was caused by a discharge of waste of which the CEO had already been notified under s72 of the EP Act; or
- (c) The site was, or was to be, reported under a programme approved by the CEO under section 12.

## 6. Classification of sites

S14 provides that the CEO is to classify a site within 45 days after a report is received under s11/12 (with provision for extension for such further time as the CEO decides is necessary). The CEO may also classify a site at any other time (s13(1)). In doing so the CEO must take into account any relevant guidelines, currently accepted industrial standards and any other information that the CEO thinks relevant (s13(4)). The classification of a site may change over time (s13(2)). Schedule 1 indicates that a site or part of a site may be classified as either:

- Report not substantiated – a report under section 11 or 12 provides no ground to indicate possible contamination of the site.
- Possibly contaminated – investigation required - there are grounds to indicate possible contamination of the site.
- Not contaminated – unrestricted use – after investigation, the site is found not to be contaminated.
- Contaminated – restricted use - the site is contaminated but suitable for restricted use.
- Remediated for restricted use – the site is contaminated but has been remediated so that it is suitable for restricted use.
- Contaminated – remediation required - the site is contaminated and remediation is required.
- Decontaminated – The site has been remediated and is suitable for all uses.

## 7. Notice of classification

### 7.1 Persons notified of classification

The CEO is obliged to give written notice of the classification within 10 days of classification (15(1)). Notification of classification must be given to:

- the landowner(s);
- an occupier of the site;
- any relevant public authority;
- any other person whom, in the opinion of the CEO, there is particular reason to notify;
- the person who reported the site; and
- if the site is classified as contaminated –remediation required any person who, in the opinion of the CEO, is responsible for the remediation of a site.

## 7.2 The contents of the notice

Notice may be given by way of a clean up, hazard abatement or investigation notice as referred to in Part 4 of the Act (s15(2)(a)). A certificate of contamination audit as contained at prescribed Form 4 of the Regulations (r.30) will only satisfy the notice requirements where the site has been classified “not contaminated - unrestricted use, contaminated – restricted use, remediated for restricted use, contaminated – remediation required or decontaminated” and where the certificate has been requested pursuant to s62 (s15(3)). Otherwise, a written notice stating the site which has been classified, the classification, brief reasons for the classification and details of any appeal pending against the classification will be sufficient (s15(5)). This notice does not require any action to be taken (unless the site is classified as contaminated-remediation required).

## 8. Appeal against classification

A classification can be appealed (s18). Where a site is classified as report not substantiated, this classification can be appealed by the person who reported the site under s11 or s12. Where site is classified as contaminated-remediation required, contaminated-restricted use or remediated for restricted use an owner, occupier or person responsible for remediation may appeal the classification. Further, an owner or occupier may appeal against a classification of possibly contaminated-investigation required, decontaminated or not contaminated –unrestricted use. As records of classification are available to the public, the classification of a site will be important.

## 9. Reporting programmes

There are some companies and government agencies with such large land holdings that it would be impossible to investigate and report all contaminated sites within the 21 day period required by s11(3) of the Act. Therefore, that Act allows such organisations to submit a reporting programme to the CEO for approval within 6 months of the commencement of the Act (s12(1)&(2)). The programme must specify the sites that it applies to, the methods that will be used to identify sites to be reported, the timetable for identification and reporting of such sites and the reasons why a programme is necessary (s12(3)). The CEO may amend an approved programme but cannot make the programme more onerous without the landholder’s consent (s12(4)&(5)). Failure to comply with an approved programme is an offence with a maximum penalty of \$250,000 (s12(6)).

## 10. The database

As soon as practicable after a site is classified, and not more than 10 days after doing so, the CEO is to ensure that the database and records are adjusted to reflect the classification (s17). The CEO is to maintain a contaminated sites database which is accessible to the public, containing (s19(1)):

- (a) a list of all sites classified as contaminated-remediation required, contaminated-restricted use or remediated for restricted use;
- (b) a description of the location and extent of the site; and
- (c) a description of the nature and extent of known contamination.

The CEO must also keep other accurate and up-to-date records containing more detailed information, for example reports made on known or suspected contaminated sites under s11 and 12, reporting programmes (s12), classification notices, Part 4 notices, memorials lodged under s58 and other information and documents that the CEO thinks appropriate (s20(1)). Members of the public can access a summary of these more detailed records where they make a request, relating to a particular area of land, and pay a fee (s21). The request must be made in the prescribed Form 2 (r.8). The CEO can retain records as long as he/she thinks fit (s20(3)).

## 11. Remediation

The only land that needs to be remediated is land that is classified as contaminated – remediation required (s23).

## 12. Responsibility for remediation

### 12.1 Extent of responsibility for remediation

More than one person can be responsible for the remediation of a site and if more than one person is responsible, they will be held responsible to the extent that it is provided for under the Act (ss22(1)&(2)).

### 12.2 S24(1) of the Act sets up an “hierarchy of responsibility” which is applied to determine who is responsible for the remediation of a site:

#### 12.2.1 Person who causes or contributes to the contamination

A person who causes or contributes to the contamination of a site after the commencement of the Act is responsible

for remediation of the site to the extent that they cause or contribute to the contamination (s25(1)). Further, a person who caused or contributed to the contamination of a site, without lawful authority, before the commencement of the Act is responsible for remediation of the site to the extent that they caused or contributed to the contamination (S25(3)). An act of contamination is done without legal authority where the act constituted an offence for which the person was convicted or where the act contravened any written law, contract, permit, lease, licence, policy, direction, exemption, authority, approval or requirement (s25(5)).

#### 12.2.2 Changing the use of land and thereby requiring remediation

Where a person changes the use of land, after the commencement of the Act, that person will be responsible for any remediation required as a result of the change (s26(1)).

#### 12.2.3 The landowners

Where a contaminated site is acquired, before the commencement of the Act, the landowner is only responsible for remediation of the site to the extent that the person knew or suspected that the site was contaminated at the time they became the owner (s27(1)). However, even if the landowner did not know or suspect the site was contaminated when they acquired it, they will be responsible for remediation if the person who caused or contributed to the contamination cannot be located or that person is insolvent (s27(2)). The landowner will also be responsible for the remediation of a site which has been affected by the migration of contamination from their land (s27(2a)). These provisions apply to land acquired before or after the commencement of the Act.

12.3 S24(2) states that the “Hierarchy of Responsibility,” discussed above, is subject to 4 exceptions:

##### 12.3.1 Insolvency

Where a company is responsible for remediation but that company is insolvent the Contaminated Sites Committee (the “Committee”) may deem that the directors of the company are responsible for remediation and the extent of that responsibility (s28(2)).

##### 12.3.2 State responsibility

The State will be responsible for remediation in a number of circumstances, including where contamination resulted from a direction given by a local authority, where no other person is responsible for remediation under the Act or where a site is incorrectly classified (s29).

##### 12.3.3 Transfer of responsibility

The responsibility for the remediation may be transferred to another person, under a written agreement and with approval of Minister (s.30).

##### 12.3.4 Where access to a site is restricted

A person responsible for the remediation of a site will require access to the site in order to remediate it. If entry to the site is unreasonably refused by the owner or occupier of the land then the Committee or the CEO may decide that the owner or occupier of the land is liable for remediation, instead of the person who was initially considered responsible (s.54).

### 13. The Contaminated Sites Committee (the “Committee”)

Where an interested party makes a request, the Committee will decide who is responsible for the remediation of a site by applying the “Hierarchy of Responsibility” discussed above (s35/36.)

If the Committee proposes to make a decision in accordance with s25 or s26, the Committee must give written notice to the person it believes is responsible, setting out the reason for this belief. That person will have an opportunity to disagree, in writing, within the time specified (s37.) The Committee must then give notice of its decision to each person responsible for remediation (s39(1)(a).) A Committee decision may be appealed (s40.)

### 14. Part 4 Notices

#### 14.1 Recipients of notice

The CEO may give notice to a person who is responsible, or who is believed to be responsible, for a site classified as contaminated-remediation required or the owner/occupier of a site to which the notice relates (s42(1).)

#### 14.2 The types of notice the CEO may give:

##### 14.2.1 Investigation notice

An investigation notice can be given by the CEO if he/she believes that a site is possibly contaminated

and the appropriate action to investigate or monitor the site has not been taken. The notice sets out the requirements to be complied with to ensure that a site is investigated, monitored and assessed (s49(1)&(2).)

#### 14.2.2 Clean up notice

Where a site has been classified as contaminated-remediation required and the CEO believes, on reasonable grounds, that appropriate action to remediate the site has not been taken, the CEO may issue a clean up notice. This notice sets out requirements to be complied with to remediate the site (s50(1)&(2)).

#### 14.2.3 Hazard abatement notice

This notice is given where in the opinion of the CEO there is an immediate threat to human health, the environment or environmental value (s51(1)).

#### 14.3 Penalty for failure to comply with a notice

Failure to comply with a notice in the time specified has a penalty of \$500,000 and a further daily penalty of \$100,000 (s43(1)).

#### 14.4 Power of the CEO to ensure compliance with notices

If a person is convicted of an offence under s43(1) by failing to comply with a notice or if a person has not complied with a hazard abatement notice in the time specified, the CEO may enter the land and ensure that the notice is complied with (ss43(2) & 53(1)). The CEO may then recover reasonable costs associated with this action (s55(1)).

### 15. Application to a vendor

S68 of the Act provides that at least 14 days before the completion of a transaction that would result in another person becoming the owner, mortgagee or lessee, if the land is listed as either contamination – remediation required, contaminated - restricted use, remediated for restricted use or is land in respect of which a notice has been issued (see paragraph 7 Notices), written disclosure in the prescribed Form 6 (r.34) must be given to each party of the transaction and to the CEO.

Failure to disclose by the prospective vendor, mortgagor or lessor would result in a maximum penalty of \$125,000 in addition to entitling the affected owner, mortgagee, and lessee to take action for a breach of statutory duty (s68(1)(c) & s68(2)). However even if the vendor gives notice of the relevant classification, they will still be responsible for the remediation of the site if they had caused or contributed to the contamination under s25.

### 16. Application to a purchaser

Notwithstanding the above provision, it will be important for any purchaser to be careful when entering into land transactions. A person who becomes an owner of land after the commencement of the Act will be responsible for remediation of the land to the extent that, after reasonable attempts have been made, the person responsible cannot be found or where that person is insolvent (s27(2)).

A purchaser of land will need to be wary of the previous use of the land. If an owner or an occupier changes the way that the land is used and this change requires the land to be remediated, then they will be responsible for this remediation to the extent that it is required as a result of this changes(s26).

A purchaser may benefit from the prescribed public records database. This allows a purchaser to search for sites that may be listed as contaminated (ss19 & 21). As discussed above the public will be able to access the contaminated sites database which will contain a summary of information about contaminated sites and sites which have been remediated for restricted use. Further, on request and after the payment of a fee, the public can access the more comprehensive records kept by the CEO which will demonstrate any investigation, reports or suspicions that have been raised regarding a particular site.

### 17. Exemption certificates

#### 17.1 Obtaining an exemption certificate

If a landowner has innocently acquired a site that is contaminated they may, by making a disclosure statement to the Committee, apply to the Committee to obtain an exemption certificate:(s65).

A landowner, as at the commencement of the Act, can make a disclosure statement, in the prescribed Form 5 (r.33(1)), within 2 years of commencement of the Act (s64(1)). Where a landowner gives written notice within the 2 year period that they intend to make a disclosure statement, they have 12 months in which to make that disclosure statement (s64(2)(a)).

A disclosure statement must be accompanied by, among other things, a report detailing the nature and extent of contamination on the land; all information pertaining to the use of the land which may have caused the contamination; details as to why the person became the owner of the land; and why the person believes they are entitled to an exemption certificate (r.33(2) & (3)).

A disclosure statement may be lodged more than two years after the commencement of the Act where a programme for reporting sites has been established under s12.

#### 17.2 When an exemption certificate will be granted

A person who obtains an exemption certificate will not be responsible for remediating a site.

The exemption certificate is granted by the Committee if in the opinion the land is:

1. contaminated;
2. the contamination was not caused or contributed to by the action of the person seeking the certificate;
3. the person did not fail to prevent the contamination of the land, as far as it was reasonably within the person's control;
4. the land was contaminated at the time the person became an owner of the land and at that time, the person did not know, or suspect and could not have reasonably suspected that the land was contaminated (s65(1)).

### 18. Contaminated Sites Regulations 2006

The Regulations detail the processes referred to in the Act and contain the prescribed Forms in Schedule 1. An overview of the Regulations is as follows:

Regulation	Title	Detail	Relevant section of CSA
4	Fees	Fee amounts are expressed in units. One unit equals \$15.00.	
5	Land, water and sites that are not contaminated	Limiting the definition of a contaminated site- for example, a site is not contaminated where the contaminating substance is contained within a building.	
6	Reporting of known, or suspected, contaminated sites	Report using Form 1. Includes provision for details about the site, type and source of contamination and details of investigations undertaken.	11
7 - 12	Summary of records	Public may request access to records using Form 2. A basic summary will include the category of classification, any clean up or hazard abatement notice and restrictions associated with the site.	21
13 - 28	Contaminated Sites Committee	Establishing and running Contaminated Sites Committee including specific provisions as to responsibility for remediation decisions.	33(1), 36(2)(a), 27(3)
29 - 30	Certificates of contamination audit	Request a certificate of contamination audit using Form 3, detailing site, relationship to site etc. Certificate to be in the prescribed Form 4.	62

31 - 32	Mandatory auditor's reports	Mandatory auditor's report to be provided when a request for a certificate of contamination audit is made. Report should include, among other things, information pertinent to the monitoring and investigation of the site, make recommendations regarding remediation and recommendations as to the classification of the site.	62 and 73
33 - 34	Disclosure statements	Disclosure statement to be in the prescribed Form 5. Needs to be accompanied by certificate of title of the land; report regarding the nature and extent of contamination; and any other relevant information. Disclosure to potential owners should be in the prescribed Form 6.	64 and 68
35 - 62	Auditors	Accreditation of auditors, including how auditors may be appointed, term of appointment, cancellation of appointment. Functions of auditors described at Division 2, including reference to Code of Conduct and dealing with a conflict of interest.	70(1)
63	Transfer of responsibility for remediation to the State	Circumstances in which a person responsible for remediation of a site may transfer a responsibility to the State.	30(1)(b)
64	Prescribed rates of interest	Rate of interest as contained in the Civil Judgments Enforcement Act 2004 or 6% per annum.	54(3), 55(1) and (2) and 56(1)
65	Appeal to committee	Appeal under s79(1) must be written and accompanied by the prescribed fee.	79(1)
66 - 67	Publication of decision of an appeal	Appeal decision may be published on an internet website maintained by the committee.	83(2)

For further information please contact:



**Graham Goerke**

Partner

Tel: (08) 9426-6756

Email: [ggoerke@jacmac.com.au](mailto:ggoerke@jacmac.com.au)

Jackson McDonald  
1 December 2006