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Department of **Environment Regulation**

REPORT

Review of the *Contaminated Sites Act 2003*

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Executive summary

Sound legislation is vital to protect public health and the environment from the effects of contamination of land. The *Contaminated Sites Act 2003* (the Act) and the associated *Contaminated Sites Regulations 2006* (the Regulations), came into effect on 1 December 2006. The Act complements the *Environmental Protection Act 1986* (EP Act) and addresses contamination and legacy issues not regulated under the EP Act. The Department of Environment Regulation (DER) has primary responsibility for the administration of the Act.

The Act requires that known or suspected contamination is reported to DER, investigated and, if necessary, remediated. The Act's site classification process and associated contaminated sites database ensure that information on contaminated sites – where these sites are, the contaminants involved and their location – is recorded and made available to the public. The Act also introduced a hierarchy of responsibility for cleaning up contaminated sites based on the principle that the “polluter pays”.

This review has been carried out by the Department in accordance with s 99 of the Act which requires the Minister to review the Act as soon as practicable after five years since commencement. The Minister is to consider and have regard to:

- the effectiveness of the scheme established by this Act in identifying, recording, managing and remediating contaminated sites; and
- any other matter that appears to the Minister to be relevant to the operation and effectiveness of this Act.

As part of the review, the Department carried out a stakeholder engagement process, publishing two consultation documents which invited submissions. There were 31 submissions to the consultation paper, 30 responses to a related online survey and 40 submissions to the follow-up discussion paper. The respondents are listed in Appendix A.

The review found that, overall, the Act is working well. Some minor improvements have been identified which will increase the effectiveness of the scheme set up by the Act to identify, record, manage and remediate site contamination.

Issue: Requiring environmental consultants to report known or suspected contamination

Under the Act, certain people have a duty to report to DER sites that the person knows or suspects are contaminated. These people include an owner or occupier of the site, a person who knows or suspects that they have caused, or contributed to, the contamination, and the auditor for the site, if one has been appointed. If any other person becomes aware of known or suspected contamination, he/she may report it, but is not obliged to do so.

When potential contamination of soil and/or groundwater is identified in an environmental investigation, environmental consultants will usually provide a recommendation to their clients advising them of their duty to report the site. However, significant contamination issues may remain unreported for many months because important information has not been formally communicated to the owner or occupier and triggered the duty for the owner or occupier to report the site to DER.

The review found that earlier reporting would be facilitated by providing clearer guidance to environmental professionals regarding their role in ensuring that public health and environmental risks are identified in a timely manner.

Issue: Increasing access to contaminated sites information for local and state government agencies.

Sites with confirmed contamination are listed on the public contaminated sites database. Information on sites where contamination has not been confirmed, or where land has been decontaminated, is recorded on the contaminated sites register (the register). The register also includes details of sites reported but not yet classified. Information regarding sites listed on the register is only available upon written request to DER and payment of a prescribed fee.

Stakeholder responses regarding ease of access and use of the database and provision of information were generally positive. However, a recurring comment, particularly from local government authorities (LGAs) and state government agencies, was that the public website did not provide information on all reported sites. LGAs in particular requested electronic access to all sites in their area of jurisdiction, as they lacked the capacity to collate and interrogate the written notifications currently provided by DER. Improved access to contaminated sites information currently held on the register could facilitate better decision-making on planning and strategic issues. In response, DER is investigating the feasibility of providing decision-making authorities (such as LGAs and state government agencies) with electronic access.

Issue: Clarifying obligations to disclose contamination at sale

Under s 68 of the Act, landowners must provide written disclosure of contamination present and any restrictions on the use of the site if selling or transferring land that is known to be contaminated or when a regulatory notice has been served. The review found that additional guidance on disclosure requirements is required to provide confidence that landowner obligations are clear and that notification is made in accordance with the Act requirements.

Issue: Clarifying the site classification scheme and time frames

The review found that the existing site classification scheme works well overall, but clarification of the expectations related to actions required and expected time frames is needed. DER is updating guidance on these matters and implementing process improvements to address the concerns raised through the review process.

Issue: Hierarchy of responsibility for remediation

The Act introduced a hierarchy of responsibility for remediation based on the 'polluter pays' principle. However, a person who caused, or contributed to, the contamination of a site before the commencement of this Act is responsible only to the extent that the person caused, or contributed to, that contamination by '**an act that was done without lawful authority**'.

The review found that the publication of further information regarding the Committee's decision-making with respect to determining responsibility for remediation would be helpful to stakeholders in understanding the application of the hierarchy of responsibility.

Issue: Defining the role of the Contaminated Sites Committee

The Contaminated Sites Committee (the Committee) is an independent, statutory body established by the Act. The Committee comprises a panel of experts appointed by the Minister for Environment.

The Standing Committee on Legislation's 14th report *Inquiry into the jurisdiction and operation of the State Administrative Tribunal* (Legislative Council 2009) made one recommendation in relation to the Act:

Recommendation 45: empower SAT to review the decisions of the Contaminated Sites Committee and transfer the Contaminated Sites Committee's existing merits review¹ jurisdiction to SAT.

The review considered the Standing Committee recommendations with respect to the Committee and whether this would result in improved outcomes.

Unlike the State Administrative Tribunal (SAT), the Committee does not conduct hearings or use mediation sessions to clarify the issues in contention and provide applicants with an opportunity to directly participate in the proceedings. This is because the Committee is not charged with balancing interests to reach an acceptable compromise, but with evaluating technical evidence to reach an expert judgment.

The potential benefits of SAT merits review of the Committee's decisions need to be weighed against incorporating an additional review stage. This could potentially double the time taken for such decisions to be finalised, during which time action to investigate and/or remediate a site would be delayed, potentially resulting in harm to human health or the environment. The delay in reaching a decision on responsibility may also be detrimental to the interests of some landowners.

The consultation outcomes identified that many stakeholders valued the knowledge and experience of the Committee. The relatively low number of appeals against decisions of the Committee suggests that the Committee's decisions are reliable.

From the review undertaken, the Committee is generally valued and its decisions are reliable. Introducing SAT merits review of the Committee's decisions will require additional resources and skills for SAT, and duplicate expertise (with resulting cost implications) without providing a clear overall benefit. The review found no compelling case for a role for SAT.

The review did find that increased transparency in the Committee's procedures would increase public confidence in the decision-making process.

The consultation undertaken indicated that most stakeholders supported changes that would assist the Committee in making more timely decisions on responsibility for remediation. Measures aimed at streamlining the decision-making process would be consistent with the intent to provide a relatively straightforward system for

¹ Merits review is the process by which a person or body, other than the original decision-maker, reconsiders the facts, law and policy aspects of the original decision and determines what the correct and preferable decision is. The reviewer considers both the information available to the original decision-maker and any new information in making its decision.

determining responsibility, so that sites could be investigated and cleaned up in a timely manner.

The review also notes that clarification of some aspects of the Regulations pertaining to the Committee would be beneficial. Several of these clarifications are aimed at reducing the time taken for the Committee to make a decision on responsibility for remediation.

Recommendations

Five specific recommendations are made. The review also identified a number of process issues which are being addressed administratively by DER.

No.	Recommendation
1	Make no amendment to the Act regarding the role of the Contaminated Sites Committee in determining appeals and its jurisdiction for original decision-making under the Act.
2	Publish detailed procedures for determining responsibility for remediation.
3	Review the effectiveness of the detailed procedures for determining responsibility for remediation in reducing the time taken for the Contaminated Sites Committee to reach a decision on responsibility for remediation after two years of operation.

In the course of the review, the Committee identified the need to clarify and refine a number of matters relating to its decision-making with regard to responsibility for remediation. DER makes the following recommendations in relation to these matters:

No.	Recommendation
4	Amend the Regulations regarding the facts and circumstances to be taken into account by the Contaminated Sites Committee when making a decision as to responsibility for remediation.
5	Amend the Regulations to clarify that in regulation 23(a) 'site' refers to both a source site and its affected site(s).

Abbreviations

Act	<i>Contaminated Sites Act 2003</i>
BSR	Basic summary of records
CEO	Chief Executive Officer (DER)
CSMA	Contaminated Sites Management Account
DER	Department of Environment Regulation
DoH	Department of Health
DSR	Detailed summary of records
EP Act	<i>Environment Protection Act 1986</i>
LGA	Local government authority
Regulations	<i>Contaminated Sites Regulations 2006</i>
s	Section of the <i>Contaminated Sites Act 2003</i>
SAT	State Administrative Tribunal
WALGA	Western Australian Local Government Association
WASC	Supreme Court of Western Australia

1 Introduction

1.1 Background

Sound contaminated land legislation is vital to protect public health and the environment. Contaminated sites can have major economic and planning implications and it is important that these sites are appropriately investigated and, where necessary, cleaned up. Common sources of contamination include landfills, service stations, power stations, asbestos and gasworks. Generally, contamination has been caused by spills or leaks, such as from fuel or chemical storage tanks, or poor management practices.

Western Australia's *Contaminated Sites Act 2003* (the Act) and the associated *Contaminated Sites Regulations 2006* (the Regulations), came into effect on 1 December 2006. The Act complements the *Environmental Protection Act 1986* (EP Act) and addresses contamination and legacy issues not regulated under the EP Act. The Department of Environment Regulation (DER) has primary responsibility for the administration of the Act.

The object of the Act is to protect human health, the environment and environmental values. The Act requires that known or suspected contamination is reported to DER, investigated and, if necessary, remediated. The Act's site classification process and associated contaminated sites database ensures that information on contaminated sites – where these sites are, the substances involved and their location – is recorded and made available to the public. Public access to information on contaminated sites provides property professionals and the community in general with a greater degree of confidence when making important land use and development decisions.

The Act also introduced a hierarchy of responsibility for cleaning up contaminated sites based on the principle of "polluter pays".

Since the Act commenced on 1 December 2006, DER has received almost 3500 reports of known or suspected contaminated sites and classified over 2700 sites. The Department has provided over 15,000 responses in the form of basic and detailed summaries of records and responded to over 14,000 enquiries on the contaminated sites information line.

Overall, the Act is working well and the information resources administered by DER are being accessed by the public.

This report summarises the results of a stakeholder engagement process undertaken for the review of the Act and proposes changes to the legislation to improve its operation and effectiveness.

1.2 Terms of reference

This review has been carried out in accordance with s 99 of the Act which requires the Minister to consider and have regard to:

- the effectiveness of the scheme established by this Act in **identifying, recording, managing** and **remediating** contaminated sites; and
- any other matter that appears to the Minister to be relevant to the operation and effectiveness of this Act.

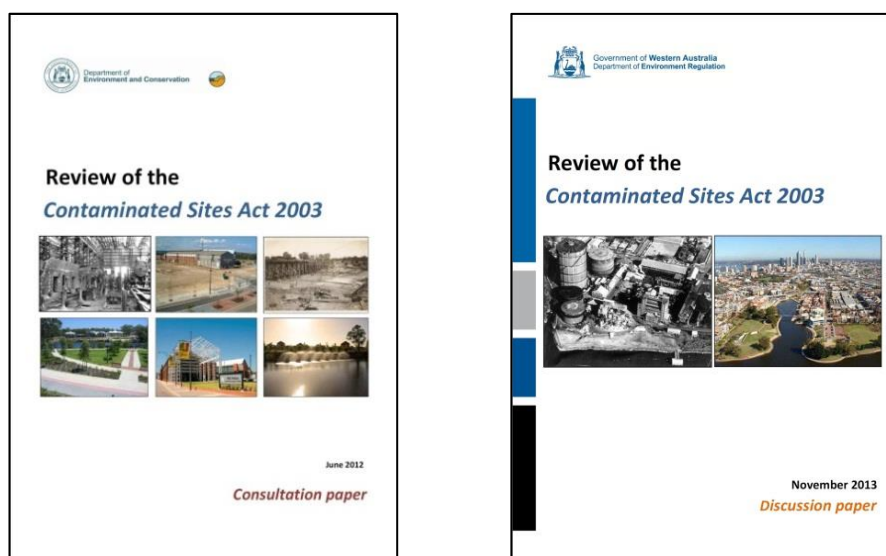
1.3 Review procedure

DER carried out a stakeholder engagement process involving the publication of two consultation documents aimed at encouraging people to share their views, suggestions and expectations of the Act and how it is administered. This process was started by the then Department of Environment and Conservation and continued by DER following the establishment of the agency on 1 July 2013.

The first round of engagement was initiated with a consultation paper which was published on 29 June 2012 for a 12-week comment period. Stakeholders were invited to contribute to the review through email alerts, printed flyers and advertisements in *The West Australian* and community and rural newspapers. A media release was also run by a number of media outlets, including ABC Radio.

Thirty-one submissions were received to the consultation paper and a further 30 responses to a related online survey. The feedback informed the second phase of stakeholder engagement and the publication of a discussion paper which was released on 29 November 2013, again for a 12-week comment period.

Figure 1.1 Consultation documents released as part of the review



There were 40 submissions to this final phase of public consultation. The respondents are listed in Appendix A.

1.4 Organisation of this report

The sections of this report are organised according to the Review's Terms of Reference (see 1.2)

2 Identifying contaminated sites

2.1 Reporting requirements for known and suspected contaminated sites

2.1.1 Issue and discussion

Under the Act, certain people have a duty to report a site that they know or suspect to be contaminated. These people include an owner or occupier of the site, a person who knows or suspects that they have caused, or contributed to the contamination and the auditor for the site, if one has been appointed. If any other person, for example a contaminated land consultant, becomes aware of known or suspected contamination, he/she may report it, but is not obliged to do so. It is an offence to report suspected contamination maliciously or without reasonable grounds of suspicion (fine up to \$250,000).

When potential contamination of soil or groundwater is identified in an environmental investigation, environmental consultants will usually provide a recommendation to their clients advising them of their duty to report the site. However, a long time can pass between conducting the field work and the submission of the report to the client. DER is aware of examples where sites with significant contamination issues have remained unreported for many months because important information has not been formally communicated to the owner or occupier. The review considered expanding the duty to report sites to include environmental consultants, as this could ensure that sites posing an immediate risk to human health or the environment are reported more promptly.

2.1.2 Consultation feedback

Most respondents confirmed that the existing duty to report known and suspected contaminated sites was clear. However, feedback from industry respondents and some state agencies indicated that 'suspected' contamination was sometimes difficult to define and suggested that more guidance should be provided in this area.

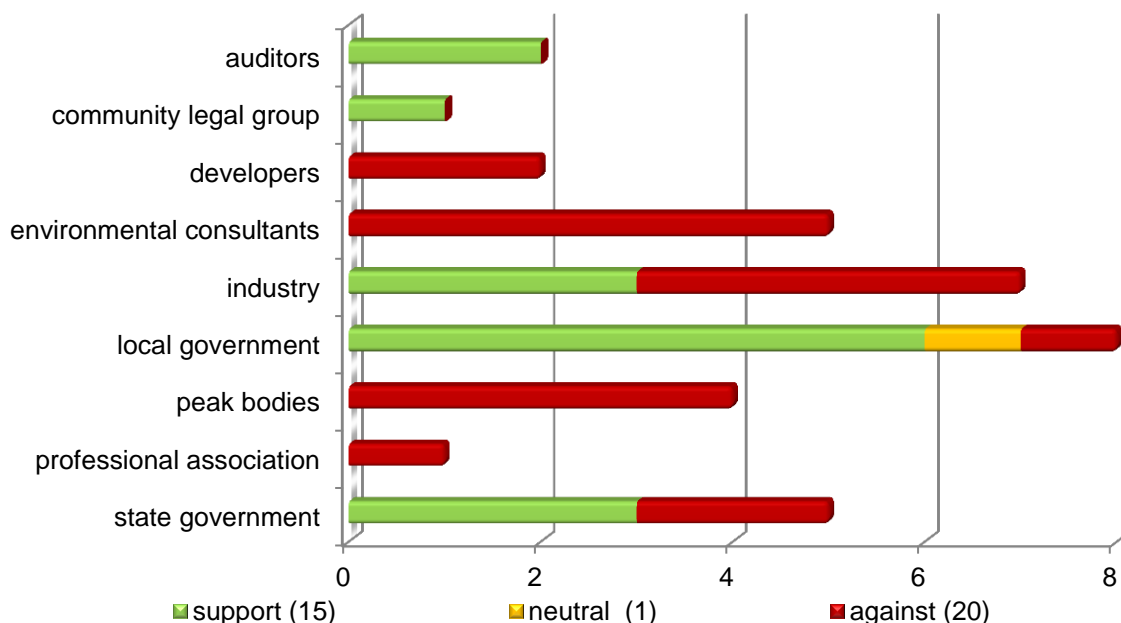
Submissions were divided on whether the duty to report should be extended to include environmental consultants. State government agencies and LGAs were mostly supportive, and submissions from industry representatives were evenly split. Submissions supporting the proposal highlighted the need for decision-making bodies (State and local government) to have access to comprehensive information about potential health and environmental risks. Most respondents noted that an unambiguous definition of 'environmental consultant' would be essential for the proposed amendment to be workable.

Peak bodies and environmental consulting firms were not supportive of the proposed amendment, on the basis that consultants already have a professional duty to act in the best interests of the client, and they considered this is sufficient to ensure that consultants advise owners and occupiers if a site needs to be reported. It was claimed that introducing a legal duty for environmental consultants to report sites could lead to potential conflicts of interest. It was also pointed out that, as there are no nationally-agreed qualification standards for environmental consultants, defining 'environmental consultant' would be problematic.

Environmental consultants also expressed concern that if the duty were to be introduced, clients may not provide their consultants with all relevant information such as previous site investigation reports or may not divulge historical information

which would be required to ensure a complete assessment of the contamination status of the site.

Figure 2.1 Breakdown of stakeholder responses to the question ‘Are you supportive of including an environmental consultant in the persons with a duty to report under s 11 of the Act?’



Industry and peak bodies commented that there were concerns that environmental consultants would take a conservative approach and adopt a broad interpretation of ‘suspected’ contamination in order to ensure that they met their obligations to report under the Act.

2.1.3 Inter-jurisdictional comparison

Comparison with other jurisdictions shows that relevant legislation in all States and Territories, with the exception of Victoria, includes a duty to report contamination (refer Table 2.1 below). There are no mandatory reporting obligations for owners or occupiers of contaminated land in Victoria and the Northern Territory. In South Australia, the duty to report contamination extends to environmental consultants who are engaged for the purpose of making a determination or assessment of site contamination where the contamination affects or threatens groundwater.

Table 2.1 Inter-jurisdictional comparison of “duty to report” contamination

State/Territory	WA	NSW	Vic	Qld	Tas	SA	ACT	NT
Duty to Report	Y	Y	N	Y	Y	Y*	Y	Y
Owner/Occupier	✓	✓		✓	✓	✓	✓	
Polluter	✓	✓		✓		✓		✓
Auditor	✓					✓		
Consultant						✓		

*South Australian legislation applies the duty to report only in the case of contamination that affects or threatens groundwater.

2.1.4 Outcomes

Responses have indicated that there is a degree of uncertainty about circumstances where reporting of 'suspected' contamination is warranted. While the Act clearly specifies the parties which have a duty to report contamination, agencies and organisations are concerned that they may not correctly identify cases of suspected contamination. Comments received from several stakeholders indicate that there is insufficient awareness of existing guidance on reporting of contamination and circumstances where contamination could be suspected.

The proposed extension of the duty to report was clearly favoured by government agencies and some industry representatives. Industry concern about over-reporting is not substantiated by experience to date, as fewer than 10 per cent of sites classified have been classified as *report not substantiated* because the report provides insufficient evidence to suggest that the site could be contaminated. Most agencies believe that broader reporting requirements would provide greater confidence that health and environmental risks were being identified in a timely manner.

Consultants' misgivings about the proposed amendment relate mainly to perceived conflicts with their responsibility to act in the interests of their client and that some clients would not provide them with all the relevant information.

Updated guidance is being developed by DER to address these issues, including:

- guidance on example circumstances which would indicate suspected contamination;
- providing a clearer warning in guidance that it is an offence not to provide, or cause not to be provided, all materially relevant information when making a report of known or suspected contamination under s 11 of the Act; and
- guidance to consultants regarding the timing of their advice to clients regarding the presence of contamination.

Consequently, no legislative amendments are proposed in relation to extending the duty to report known and suspected contamination to environmental consultants or any other professional.

3 Recording and managing contaminated sites

3.1 The contaminated sites register and database

3.1.1 Issue and discussion

One of the principal objectives of the Act is to make information on contaminated land available to interested parties, such as prospective purchasers and lending institutions, workers undertaking intrusive maintenance or utility works, and relevant government agencies (such as environmental and health regulators and planning authorities).

Sites with confirmed contamination are listed on the public contaminated sites database. Information on sites where contamination has not been confirmed, or where land has been decontaminated, is recorded on the contaminated sites register (the register). The register also includes details of sites reported but not yet classified. Information regarding sites listed on the register is only available upon written request to DER and payment of a prescribed fee. The rationale for controlling access to information held on the register is to provide some level of protection to the relevant landowners and to minimise potential ‘property blighting’ effects where contamination has not been confirmed to be present.

Two levels of information are available to members of the public under the Act provisions (summarised in Table 3.1). Information not included in the basic or detailed summary of records can be accessed by the public via a freedom of information request.

Table 3.1 Summary of information provided in a basic and detailed summary of records

Basic summary of records (BSR)	Detailed summary of records (DSR)
<ul style="list-style-type: none"> •location/address •site classification with reasons for classification •restrictions on use •applicable notices <p>•\$30 fee or free online</p>	<ul style="list-style-type: none"> •location/address •site classification with reasons for classification •restrictions on use •applicable notices •Certificate of contamination audit •access to investigation reports, site management plans and other technical information where held by DER <p>•\$300 fee</p>

3.1.2 Consultation

The response regarding ease of access and use of the database and provision of information was generally positive. The level of detail provided in a BSR was thought to be sufficient by a third of responders while a further third considered the BSR was useful but could be improved and several suggestions for improvements were made. Some comments indicated that additional guidance was required on interpreting the information provided.

The response from local government was positive on the whole and indicated that the public website was considered easy to use. This was echoed in responses from state agencies, utilities and consultants. A recurring comment, particularly from LGAs and state agencies, was that the public website did not provide information on all reported sites. Some of these respondents acknowledged that they were provided with written notice of classifications, however, they would prefer electronic access via the online contaminated sites database as they lacked the capacity to collate and interrogate the written notifications provided by DER. Suggestions were made to either provide LGAs with all the classifications within their area of jurisdiction or make these publicly available free of charge. It was claimed that improved access to contaminated sites information currently held on the register would facilitate better decision-making on planning and strategic issues.

3.1.3 Outcomes

Improvements to the information provided via a search of the public database are under consideration by DER.

The information held on DER's public contaminated sites database is now available via Landgate's ['property interest report'](#). The Landgate property interest report includes all common interests (including 'Dial Before You Dig') affecting a property. DER is investigating the feasibility of providing all BSRs via Landgate's online systems.

DER will also investigate the feasibility of providing decision-making authorities (such as LGAs and state agencies) with electronic access to all classification information.

No legislative amendments are proposed at this time in relation to access arrangements to information on known and suspected contaminated sites.

3.2 Site classification scheme

3.2.1 Issue and discussion

The Act establishes a site classification scheme to facilitate appropriate investigation, clean-up and monitoring of contamination and to ensure information regarding known and suspected contamination is recorded and available for access by decision-making authorities and the public.

After receiving a report of a 'known or suspected contaminated site', DER assigns one of seven possible classifications (listed in Table 3.2) to the site in consultation with the Department of Health (DoH). The site classification is based on the risk or potential risk that the contamination poses to human health and the environment.

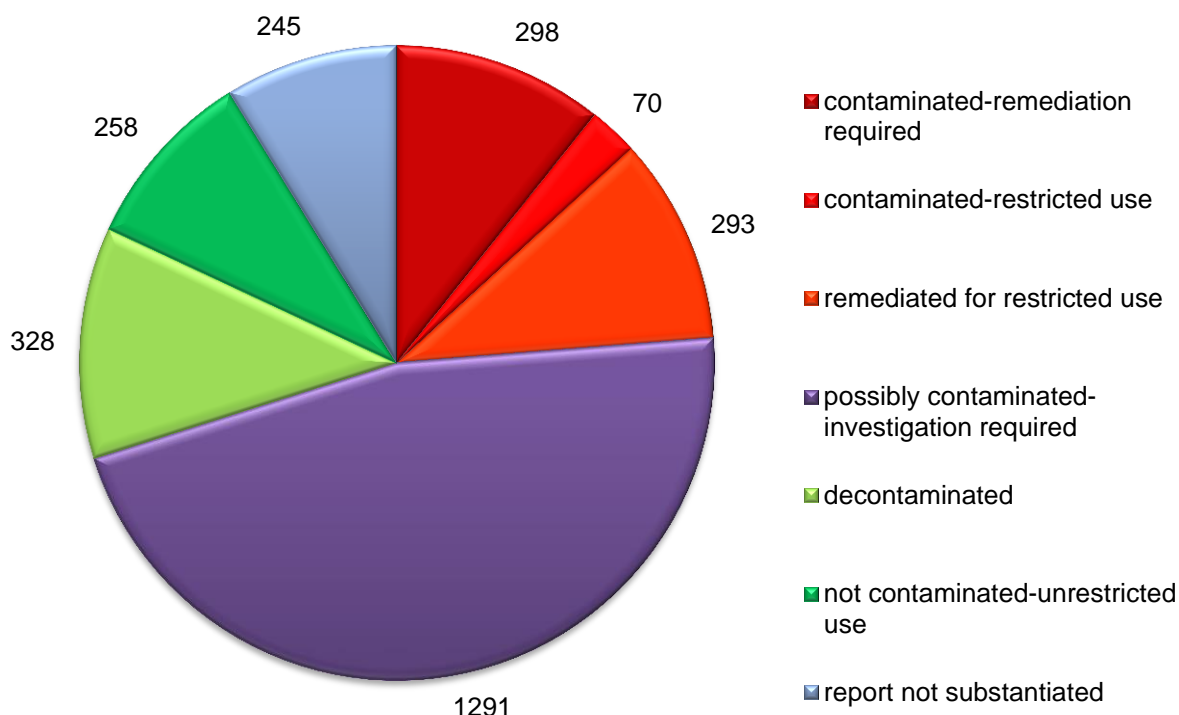
Table 3.2 Classification of sites²

Classification	Criterion
<i>Report not substantiated</i>	A report under s 11 or 12 provides no grounds to indicate possible contamination of the site.
<i>Possibly contaminated – investigation required</i>	There are grounds to indicate possible contamination of the site.
<i>Not contaminated – unrestricted use</i>	After investigation, the site is found not to be contaminated.
<i>Contaminated – restricted use</i>	The site is contaminated but suitable for restricted uses.
<i>Remediated for restricted use</i>	The site is contaminated but has been remediated so that it is suitable for restricted use.
<i>Contaminated – remediation required</i>	The site is contaminated and remediation is required.
<i>Decontaminated</i>	The site has been remediated and is suitable for all uses.

Figure 3.1 illustrates the classification of sites as at 30 June 2014. The figure shows that just under half of all classified sites are classified as *possibly contaminated – investigation required*. Approximately one quarter of *possibly contaminated – investigation required* sites are considered by DER to be high priority sites which require urgent investigation and/or management to address risks to the environment or human health, while investigation at many other sites may reasonably be deferred to such time that a change to a more sensitive land use is proposed and hence these sites are considered low priority for investigation at present.

² Schedule 1 of the Act.

Figure 3.1 Breakdown of classified sites by site classification as at 30 June 2014



For a given classification, the degree of risk associated with the contamination at the site and the time frame required to address that risk can vary a great deal. The review process examined whether modifications to the site classification scheme could provide owners and occupiers with greater clarity about the actions required and the expected time frames for those actions to be carried out.

Currently, a site remains classified as *possibly contaminated – investigation required* after contamination has been confirmed to be present if further investigation is required to determine whether remediation or management is required. It was suggested in the first round of consultation that a new classification, *contaminated – investigation required*, could be helpful in clarifying the status and could prompt a more timely investigation of such sites.

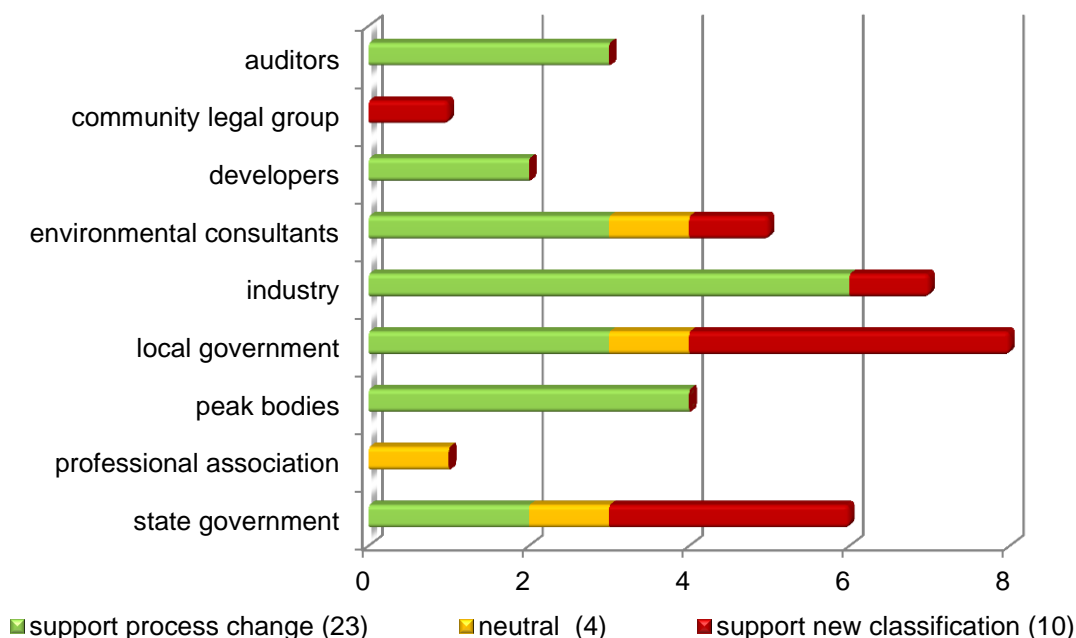
3.2.2 Consultation

Many stakeholder comments indicated general uncertainty surrounding the requirements and time frames for action associated with the classification *possibly contaminated – investigation required* and, initially, the majority of respondents were supportive of the proposed new classification. Supportive responses indicated that the new classification would result in a greater proportion of sites being listed on the public database, and that this could provide more comprehensive information about sites with known contamination. In addition, some respondents thought that this would drive faster and more satisfactory action from site owners. Other respondents, however, noted that simply adding a new classification did not address the uncertainty over time frames for action.

After evaluating the first round of feedback, DER proposed that providing greater clarity on specific actions required and associated time frames would be better addressed through administrative measures rather than through amendments to the Act.

Stakeholders generally agreed with the proposed approach, with only 11 of the 39 respondents indicating continued support for a new classification. Support for an administrative approach to this issue was spread across all sectors. The majority of respondents supporting the new classification comprised state or local government agencies and reflected that the increased availability of information online was a crucial factor for many of these parties³.

Figure 3.2 Breakdown of responses on the question of whether to introduce a new classification of *contaminated – investigation required* or to address the need for greater clarity through administrative improvements (process change)



³ Further information regarding provision of information under the Act is provided in section 3.1.

3.2.3 Outcomes

There was general support from stakeholders for a '*contaminated – investigation required*' classification, and the consultation process identified some positive aspects to introducing this classification. However, it is unlikely that the perceived benefits of a new classification would justify the cost of implementation and, as many stakeholders indicated, the proposed classification would not directly address the need for clarity in regard to required actions and time frames.

The review found that the existing site classification scheme works well overall, but clarification of the expectations related to required actions and expected time frames is required. DER has implemented a number of administrative changes in response and will continue to develop process improvements to address the concerns raised through the review process, consequently no legislative amendments are proposed.

3.3 Land transactions – disclosure of information

3.3.1 Issue and discussion

Under s 68 of the Act, landowners must provide written disclosure at least 14 days before the completion of a relevant transaction using a prescribed form to all potential owners, lessees and mortgagees (interested parties) if selling or transferring land that is known to be contaminated⁴ or when a regulatory notice⁵ has been served. This formal disclosure process provides the interested parties with information on the nature and extent of contamination present and any restrictions on the use of the site.

The Act's disclosure requirements do not replace the need for an interested party to make prudent enquiries (due diligence) prior to entering into a land transaction. For example, a land title search will identify whether the land is known or suspected to be contaminated as a memorial will be registered on the certificate of title⁶. However, information on sites reported to DER but not yet classified, is only available by purchasing a summary of records. This request for information will trigger the classification of the site and subsequent provision of the summary of records.

3.3.2 Consultation

The initial feedback across all groups of respondents indicated that although the general intention was clear, there were some difficulties in practice. For example, The Law Society identified that it was unclear whether the disclosure obligation applies to beneficial owners as well as registered legal owners and the time frame of '*14 days before the completion of the transaction*' as being problematic as mortgages can be arranged in less than 14 days. In addition, The Law Society

⁴ Sites with known contamination are classified as *contaminated – restricted use*, *contaminated – remediation required* or *remediated for restricted use* under the Act. Sites where the presence of contamination is suspected are classified as *possibly contaminated-investigation required*.

⁵ A notice served under Part 4 of the Act and in respect of which a memorial is registered.

⁶ Only applies to sites classified under the Act.

indicated that mortgages and leases do not have settlement dates on which the relevant agreement is to be signed.

Clarifications of the applicable transaction date for a sale, lease or mortgage and also the meaning of owner within the context of s 68 were considered in the second phase of consultation. All responders indicated they either supported the proposed changes or did not provide an opinion. Four respondents provided more detailed comments qualifying their support including suggestions for refining the wording.

One respondent (Kimberley Community Legal Services) proposed that the obligation for disclosure should be extended to include disclosure of the presence of any asbestos at a site or in a building to new and potential occupiers. Under the Act, an owner has an obligation to disclose the presence of asbestos at a site where known asbestos contamination is present, however, this obligation does not extend to asbestos in buildings, which is excluded from the definition of 'contamination' under the Act. WorkSafe legislation requires that workplaces have an asbestos register if asbestos is present⁷.

3.3.3 Outcomes

The review found that additional guidance is necessary to provide confidence that the Act's disclosure obligations are clear and that potential owners, lessees and mortgagees are notified at least 14 days before the completion of the relevant land transaction. The changes proposed in the discussion paper (settlement date for a sale, the date a mortgage is registered and the date a lease is signed) were supported. DER guidance to clarify the Act's disclosure requirements will be released in early 2015.

No legislative amendments are proposed in relation to disclosure requirements.

⁷ *Occupational Safety and Health Regulations 1996*, regulation 5.43

4 Investigation and remediation of contaminated sites

4.1 Hierarchy of responsibility for remediation

4.1.1 Issue and discussion

The Act introduces a hierarchy of responsibility for remediation, which lists the order of persons who can be held responsible for investigating and cleaning up a site. As far as possible, the person who caused or contributed to the contamination (the polluter) will be held responsible, however, responsibility can also fall to other people in the hierarchy, including the current owner (who may also include a mortgagee in possession), an owner or occupier who changes the land use (to the extent that the change in use requires additional clean-up) or, as the last resort, the State.

The hierarchy also introduces a degree of retrospectiveness:

25(3) A person who caused, or contributed to, the contamination of a site before the commencement of this Act is responsible for remediation of the site only to the extent that the person caused, or contributed to, that contamination by an act that was done without lawful authority.

The term '**an act that was done without lawful authority**' is to be determined by the natural meaning of those words in the context of the Act and the definition provided in s 25(5):

25(5) In this section —

an act that was done without lawful authority without limiting the meaning of the expression, includes an act —

- (a) that constituted an offence for which the person was convicted; or
- (b) that contravened —
 - (i) any written law in force at the time the act occurred; or
 - (ii) any contract, permit, lease, licence, standard, policy, direction, exemption, authority, approval or requirement, however described, that was given or made under a written law in force at the time the act occurred.

The meaning of **an act that was done without lawful authority** in the context of the Act was considered by Chief Justice Wayne Martin AC in *BP Australia Pty Ltd v Contaminated Sites Committee* [2012] WASC 221. Chief Justice Martin indicated a tentative view that it did not include a breach of a private contract in his reasons [pp 28-29], however, he declined to resolve the question as it was not critical to the resolution of the case.

4.1.2 Consultation

The review considered whether the hierarchy of responsibility for remediation was sufficiently clear and helpful to stakeholders. The majority of feedback indicated that the hierarchy was helpful, with 60 per cent of responders agreeing, one disagreeing (no details provided) and the remainder indicating it was not applicable to their circumstances.

Submissions were evenly split as to whether the hierarchy was sufficiently clear. One LGA commented that responsibility for remediation as defined in the Act was overly complicated for someone with a non-legal background to understand. The Law Society commented that it considered the current wording of s 25(5) to be too broad, particularly in view of its retrospective effect.

Suggestions to improve understanding and application of the hierarchy were provided by LGAs, DoH, industry and The Law Society. Suggestions included provision of a fact sheet incorporating a decision tree, simplifying the wording of the hierarchy by removing all reference to events that occurred prior to commencement of the Act (within legal restraints) and providing clarification of the meaning and application of '***an act done without lawful authority***' in s 25 of the Act.

4.1.3 Outcomes

It is acknowledged that the hierarchy of responsibility can be difficult for a layperson to understand and apply, however, DER is unable to provide site-specific guidance on the application of the hierarchy. Persons who are potentially responsible for remediation are advised by DER to seek legal advice on their particular circumstances and, if appropriate, apply to the Contaminated Sites Committee for a decision on who is responsible and to what extent.

The review found that the publication of further information (refer to ss 5.4.3 and 5.4.4) regarding the Committee's decision-making with respect to determining responsibility for remediation would be helpful to stakeholders in understanding the application of the hierarchy of responsibility.

No legislative amendments are proposed in relation to the hierarchy of responsibility for remediation at this time, however, clarification may be reconsidered as part of future amendments to the Act.

5 Contaminated Sites Committee

5.1 Introduction

The Contaminated Sites Committee (the Committee) is a statutory body established under Part 3 of the Act for the purposes of determining appeals, decisions as to responsibility for remediation and granting exemption certificates⁸. The role of the Committee involves both review and original decision jurisdiction and is summarised in Table 5.1.

Table 5.1 Summary of the role of the Committee in the administration of the Act

Sections of the Act	Committee role	Original decision maker	Appeals body
ss 18, 79	Deciding appeals against site classifications.	CEO of DER	Committee (no further appeal)
ss 52, 79	Deciding appeals against the issuing and requirements of investigation and clean-up notices.		
ss 36, 40, 77	Determining responsibility for remediation of sites classified as <i>contaminated – remediation required</i> .	Committee	Supreme Court (on a point of law only)
ss 55(6), 77	Determining responsibility for remediation to facilitate recovery of State costs incurred at orphan sites.		
ss 64(4), 66, 67, 77	Receiving and assessing disclosure statements and deciding whether the criteria for exemption certificates are met.		

The Committee comprises a panel of experts who are appointed by the Minister for Environment. Currently, the Committee comprises two contaminated sites auditors, a legal practitioner and a town planning expert, in addition to the Chair. Under s 34(b) of the Act, the Committee is *'to act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms, is*

⁸ The period for lodging a disclosure statement has expired. Under the hierarchy for responsibility for remediation, responsibility can lie with the current site owner if the polluter cannot be found. Landowners who believed they were 'innocent' had two years from the commencement of the Act to submit a disclosure statement providing details of the contamination at their site. If after considering this information the Committee agreed that the landowner was 'innocent', the landowner was issued with an exemption certificate. As at 30 June 2014, nine exemption certificates had been issued by the Committee and a further two applications were still being considered.

*not bound by the rules of evidence and is to conduct its inquiries in any manner it considers appropriate*⁹.

As indicated in Table 5.1, only the decisions where the Committee is the original (primary) decision-maker can be appealed. These appeals are judicial, not merit-based, and are made to the Supreme Court. The Committee's decisions on appeals against classifications or investigation, clean-up or hazard abatement notices are final and cannot be appealed.

The greater portion of the Committee's business is associated with making decisions on responsibility for remediation, as appeals against classifications are generally straightforward and resolved within a few weeks of submission. As at 30 June 2014, the Committee had received 113 appeals against classifications, from more than 2700 classifications issued by the Department. The Committee upheld six of these appeals and 38 appeals were withdrawn. This issue is discussed further in s 5.3.

As at 30 June 2014, the Committee had received 25 applications for a decision on responsibility for remediation, of which 13 had been decided and two found to be invalid. Four of the 13 decisions on responsibility for remediation decided by the Committee have been appealed to the Supreme Court⁹. This issue is discussed further in s 5.4.

More information on the role and procedures of the Committee can be found at www.consitescommittee.wa.gov.au.

5.2 Role of the Contaminated Sites Committee

5.2.1 Issue and discussion

When the Act was being drafted, the State Administrative Tribunal (SAT) did not exist. Consequently, Parliament did not address the question of whether all or part of the role of the Committee should be performed by SAT.

Parliament's clear intention, as expressed by the then Minister for Environment in the Second Reading debate on the Contaminated Sites Bill, as to the role of the Committee under the Act was:

'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 then Minister made a 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'.

The Standing Committee on Legislation's 14th report *Inquiry into the jurisdiction and operation of the State Administrative Tribunal* was tabled in the Legislative Council on 20 May 2009. This report made one recommendation in relation to the Act:

Recommendation 45: empower SAT to review the decisions of the Contaminated

⁹ Three of the appeals relate to the same source site and have been brought by the same appellant.

Sites Committee and transfer the Contaminated Sites Committee’s existing merits review¹⁰ jurisdiction to SAT.

The effect of this recommendation on the jurisdiction and administration of the Act, if implemented, is summarised in Table 5.2.

Table 5.2 Standing Committee’s recommendations on review jurisdiction for the Act

Section of the Act	Action	Original decision maker	Appeal /review proposed by the Standing Committee	
ss 18, 79	Deciding appeals against site classifications.	CEO (DER)	SAT Merits review of DER decision (SAT to replace the Committee)	Supreme Court (on a point of law only)
ss 52, 79	Deciding appeals against the issuing and requirements of investigation and clean-up notices.			
ss 36, 40, 77	Determining responsibility for remediation of sites classified as <i>contaminated – remediation required</i> .	Committee	SAT Merits review of Committee decision	Supreme Court (on a point of law only)
ss 55(6), 77	Determining responsibility for remediation to facilitate recovery of State costs incurred at orphan sites.			
ss 64(4), 66, 67, 77	Receiving and assessing disclosure statements and deciding whether the criteria for exemption certificates are met.			

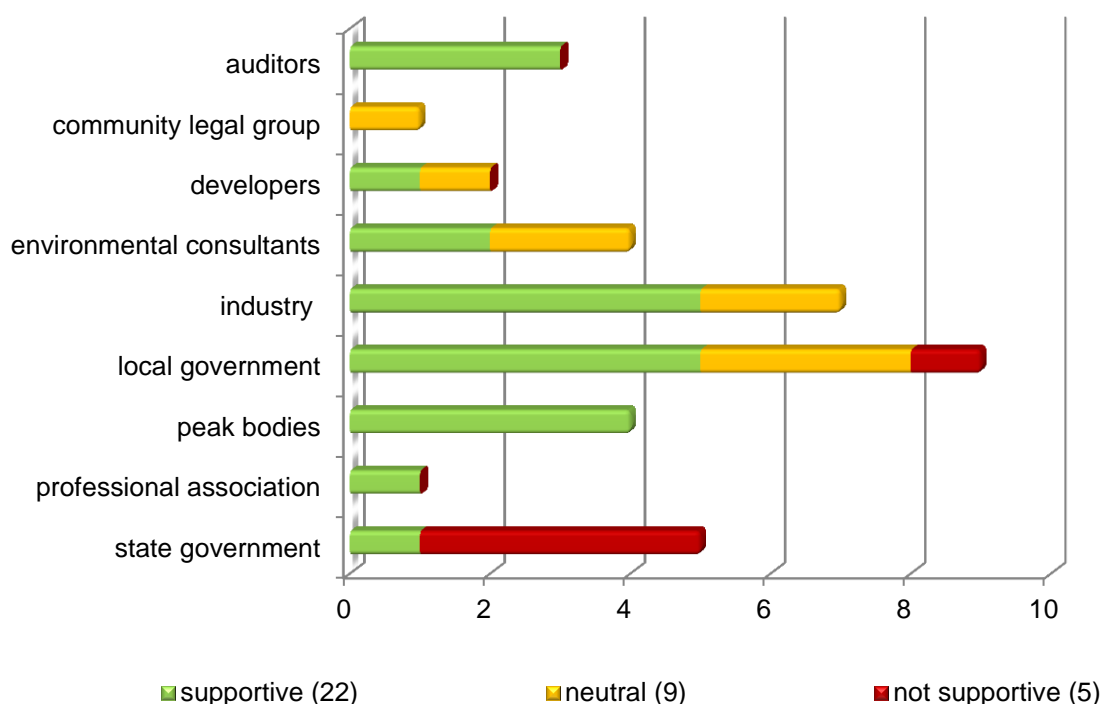
¹⁰ Merits review is the process by which a person or body, other than the original decision-maker, reconsiders the facts, law and policy aspects of the original decision and determines what the correct and preferable decision is. The reviewer considers both the information available to the original decision-maker and any new information in making its decision.

The Government deferred its response to Recommendation 45 pending the outcome of the statutory review of the Act¹¹.

Stakeholders were asked to provide their views on the recommendations of the Standing Committee in the review process. The responses are summarised in Figures 5.1 and 5.2.

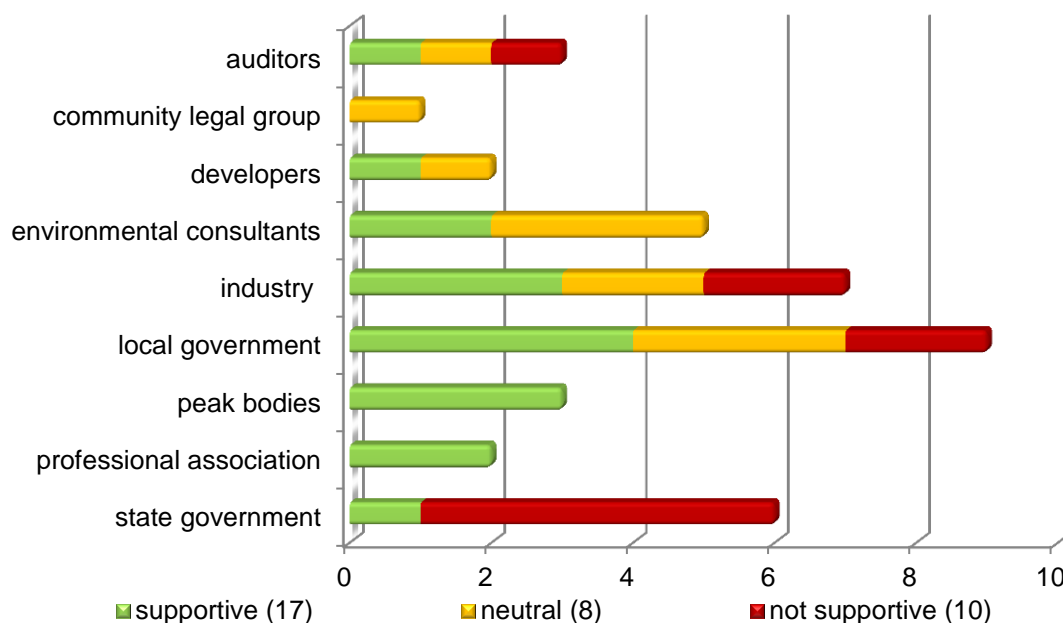
Feedback from stakeholders during the review process indicated a high level of support across most sectors (with the exception of state government agencies) for SAT to undertake a merits review of the Committee’s decisions.

Figure 5.1 Breakdown of stakeholder responses to the question ‘Do you support SAT review of the Committee’s primary decisions?’



¹¹ *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.

Figure 5.2 Breakdown of stakeholder responses to the question ‘Do you support SAT becoming the review decision-maker in place of the Committee for appeals against classifications and notices under the Act?’



The feedback regarding appeals against classifications and notices indicated that there was broad-based support for transferring this role to SAT, although it was less conclusive than having SAT review the Committee’s decisions on responsibility for remediation.

The positive aspects of SAT specifically mentioned by stakeholders included timely decision-making, and the transparency of the SAT decision process, including the publishing of its reasons for decisions (comments by WALGA and others). It was also noted that SAT has additional powers over and above those available to the Committee to conduct hearings, issue subpoenas and employ mediation to come to the preferable decision based on the merits of the case. Mediation is a central part of the SAT process and approximately 70 per cent of applications in the Development and Resources stream finalised by SAT in 2012–13 were referred to mediation¹².

Unlike SAT, the Committee does not conduct hearings or use mediation sessions to clarify the issues in contention and to provide applicants with an opportunity to directly participate in the proceedings. This is because the Committee is not charged with balancing interests to achieve an acceptable compromise, but with evaluating technical evidence to reach an expert judgment.

The Committee’s decisions on responsibility are based on expert interpretation and judgment of technical reports and written submissions provided by the applicant(s). Critical gaps can be present in the information provided (for example in the site

¹² SAT Annual Report 2012-2013.

history regarding the timing of events leading to the development and subsequent spread of contamination), which are evaluated by expert judgment.

A recurring theme in the feedback, regardless of whether stakeholders supported SAT jurisdiction or not, was that a high level of technical expertise was required in the decision-making process. The Committee's specific contaminated sites knowledge and experience to undertake its decision and merits review functions were recognised and frequently commented on favourably by respondents. Likewise, stakeholders frequently noted that SAT would need to be sufficiently resourced to undertake these roles.

Feedback from state agencies indicated that resourcing was a significant issue. For example, DoH indicated that it had considerable experience of participating in SAT proceedings and noted that resourcing demands were significant for resolving issues, including attending pre-hearing mediation sessions. DoH further noted that it was not resourced to undertake frequent SAT cases in relation to contaminated sites. DER's experience with SAT proceedings is comparable with DoH's and suggests that demands on agency resources to resolve contamination issues via SAT processes could be significant, even for relatively straightforward cases.

The review also considered the penalties for providing false or misleading information with respect to submissions as this could influence the timeliness and completeness of submissions. Although SAT has a more extensive suite of powers, the monetary penalty for not complying is low (penalty \$5,000 - \$10,000 depending on the offence) compared with that for providing false or misleading information to the Committee (penalty \$125,000, and a daily penalty of \$25,000). SAT, however, may issue an arrest warrant to detain a person who disobeys a summons to attend the SAT in person, or who fails to provide a document or other material.

A SAT merits review was identified by some industry respondents as being more timely and cost-effective than an appeal to the Supreme Court. These factors could result in a significant number of Committee decisions on responsibility being referred for SAT merits review if this were introduced which was not the original intention of Parliament as evidenced in the Second Reading Debate.

Although the Act provides for appeals against classification to be published, it does not currently provide for the publication of the Committee's decisions on responsibility for remediation unless the decision is appealed. Consequently, there is no body of decision-making on responsibility for remediation to which interested parties can refer.

5.2.2 Outcomes

The review considered the Standing Committee recommendations with respect to the Committee and whether this would result in improved outcomes.

The perceived benefits of SAT merits review of the Committee's decisions (such as the opportunity for the parties to participate directly in the proceedings) need to be weighed against incorporating an additional review stage. This could potentially double the time taken for such decisions to be finalised, during which time action to investigate and/or remediate a site would be delayed, potentially resulting in harm to human health, the environment and environmental values. The delay in reaching a decision on responsibility may also adversely affect the landowners of affected sites.

The consultation outcomes identified that many stakeholders valued the knowledge and experience of the Committee. The relatively low number of appeals against decisions of the Committee suggests that the Committee's decisions are reliable, however, its credibility is undermined by its inability to publish its reasons for decisions on responsibility for remediation.

The review found that increased transparency in the Committee's procedures would increase public confidence in the decision-making process.

From the review undertaken, the Committee is generally valued and its decisions are reliable. Introducing SAT merits review of the Committee's decisions will require additional resources and skills for SAT, and duplicate expertise (with resulting cost implications) without providing a clear overall benefit.

5.2.3 Recommendation

- 1. Make no amendment to the Act regarding the role of the Committee in determining appeals and its jurisdiction for original decision-making under the Act.**

Further discussion and specific recommendations with respect to improving the transparency and efficiency of Committee decision-making are included in ss 5.3 (Appeals against classifications and notices) and 5.4 (Decisions on responsibility for remediation).

5.3 Appeals against classifications and notices

5.3.1 Issue and discussion

When the Committee considers an appeal against classification, it considers all the information available at that time, which may include new information which was not considered by DER in classifying the site.

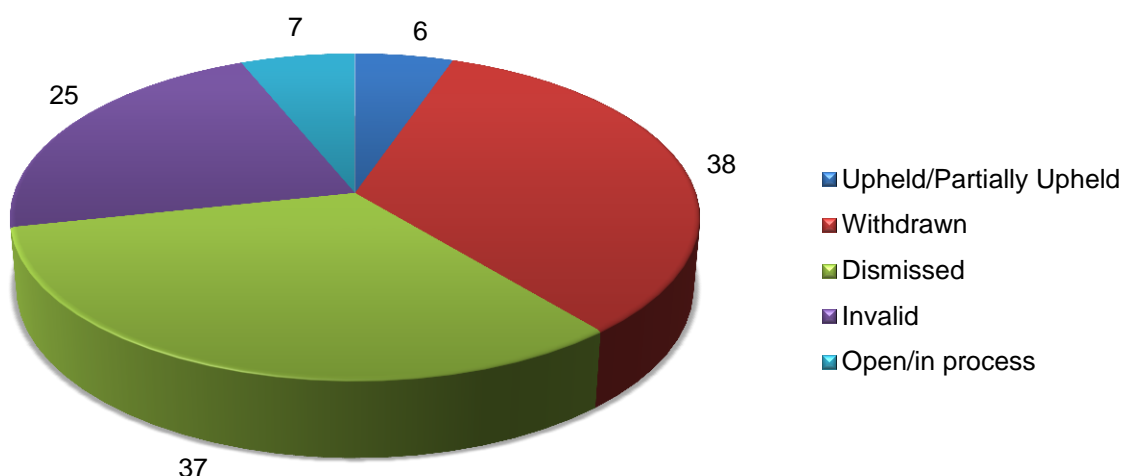
As at 30 June 2014, the Department had classified over 2,700¹³ sites and the Committee had received 113 appeals (less than five per cent of classification decisions). The status of the appeals lodged is illustrated in Figure 5.3.

The review did not examine appeals against notices due to a lack of data¹⁴.

¹³ This number reflects the number of sites classified as at 30 June 2014 and not the total number of classifications made by the Department — some sites have been reclassified on the basis of new information.

¹⁴ One appeal against an investigation notice was lodged with the Committee in November 2014.

Figure 5.3 Status of appeals against site classifications as at 30 June 2014



The chart shows that approximately one third of appeals lodged with the Committee have been withdrawn. The large number of withdrawals results from appeals which would have been upheld based on the additional information available, and which have been withdrawn by the appellant following advice from the Department that it would support reclassification under s 13 of the Act.

5.3.2 Outcomes

The review found that the low number of appeals lodged and upheld confirms that the current DER administrative process relating to the classification of known and suspected contaminated sites is effective overall. The review found that a review of the administrative arrangements in place could address the minor process issues identified to date.

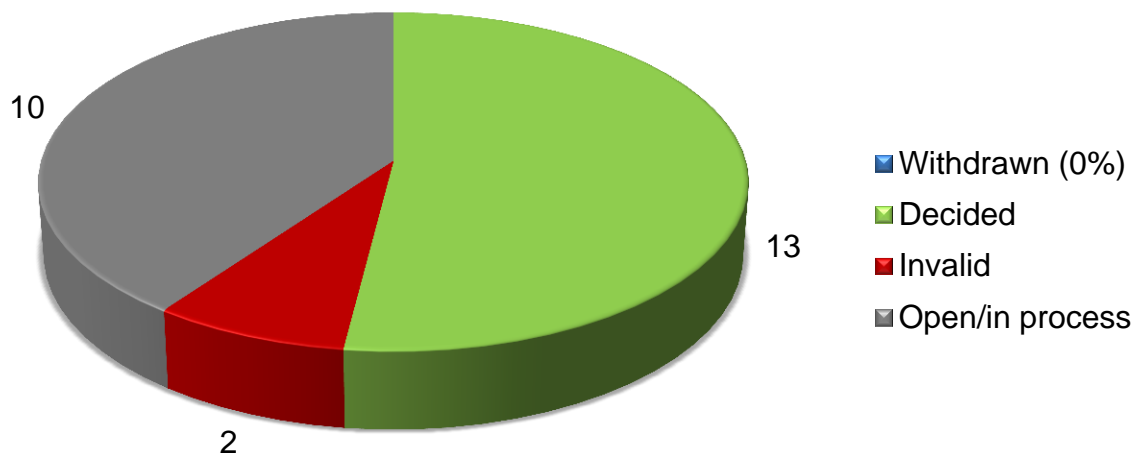
No legislative amendments are proposed in relation to appeals.

5.4 Decisions on responsibility for remediation

5.4.1 Issue and discussion

An application for a decision on responsibility for remediation can be lodged at any time after a site is classified as *contaminated – remediation required* under the Act. As at 30 June 2014, the Committee had received 25 applications for a decision on responsibility for remediation. The number of applications lodged has varied between zero (up to 30 June 2014) and eight (2011) per calendar year.

Figure 5.4 Status of applications lodged with the Committee for a decision on responsibility for remediation as at 30 June 2014



Four of the 13 matters relating to responsibility for remediation decided by the Committee have been appealed to the Supreme Court¹⁵. Three of the appeals were brought by the same appellant. Two appeals have been dismissed and the other two matters remitted back to the Committee for reconsideration pursuant to s 78(1)(c) of the Act¹⁶.

It was originally anticipated that most Committee decisions on responsibility for remediation would be made within six months of a request being lodged with the Committee (r 27). In practice, however, these decisions are taking from one to six years, depending on the quality and quantity of information provided and the submissions made by the potentially responsible parties.

Delays often occur because, after information has initially been circulated by the Committee to all identified parties, further relevant information is submitted by one or more parties, and additional consultation is then required (to provide procedural

¹⁵ <http://decisions.justice.wa.gov.au/supreme/supdcsn.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.

¹⁶[2012] WASC 221 Result – appeal dismissed,
 [2013] WASC 98 Result – Order nisi discharged, limited declaration made. This was an interlocutory process which failed following the issue of the s 37 notice. The same party subsequently appealed the issuing of the s 39 notice
 [2014] WASC 504 Result – appeals GDA 2 and 3 allowed, matter remitted to the Committee, appeal GDA 4 dismissed. These appeals relate to the same source site as [2013] WASC 98.

fairness to the parties) prior to the Committee's providing notice of its provisional decision under s 37 of the Act. The parties then have an opportunity to disagree with the statements made by the Committee in the s 37 notice and provide further information to support their response. The Committee is bound to take the parties' response into account in its decision (s 39 notice).

Access to a specific decision of the Committee on responsibility for remediation may be obtained via a Detailed Summary of Records request if the CEO of DER considers it appropriate under r 10 of the Regulations. However, although Committee decisions regarding appeals are published under s 83 of the Act, this section does not extend to publishing details of decisions on responsibility for remediation. Consequently, there is no public compilation of decisions to refer to and there is a lack of transparency in the decision-making process.

The Committee has also found that the legislation is silent or unclear in a number of other areas. Specifically, the Committee identified the point in time to which the Committee's decision on responsibility for remediation relates, the extent to which the Committee may take investigation and remediation already undertaken into consideration in its decision-making, and that a decision regarding a source site applies to an affected site to the extent that contamination from that source site has affected that site.

Clarification of these issues in accordance with the principle of 'polluter pays' would increase the incentive for a potentially responsible person, such as the current site owner, to undertake prompt action to prevent or mitigate contamination impacts as any 'overspend' would be recoupable from the other responsible parties.

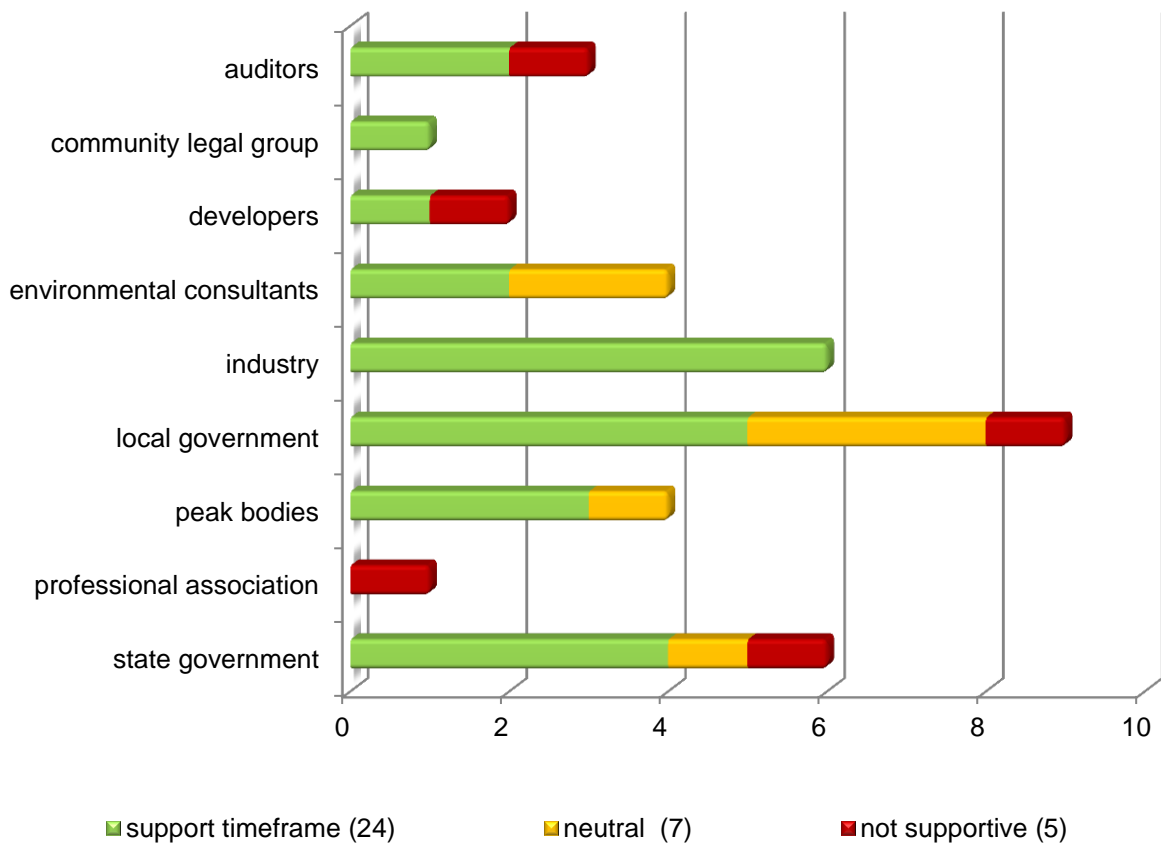
5.4.2 Consultation

Early in the review process, the Committee proposed that it would be helpful to consider amendments to the Act aimed at curtailing the lengthy exchange of submission and counter-submissions if this could be done without compromising the quality of the Committee's decisions or procedural fairness.

The review considered how the timeliness of Committee decision-making could be improved. Specific measures considered included a fixed time frame for the submission of information to the Committee and the publication of the Committee's decisions on responsibility for remediation with reasons. There was strong support for a fixed time frame, and most respondents felt that three months was appropriate to complete the circulation of all information submitted to the Committee. The Law Society, however, commented that the imposing of strict time limits may result in a denial of due process (procedural fairness).

Support for the proposed changes was evenly spread across all sectors as shown in Figures 5.6 and 5.7. Stakeholders agreed that the proposed changes would drive a more comprehensive and timely submission of relevant information in relation to responsibility decisions.

Figure 5.5 Breakdown of responses to the question “Are you supportive of a time frame of three months in the Act to complete the circulation of all information submitted to the Committee, provided the process was clearly articulated in supporting guidelines?”



Respondents who opposed the proposed changes most often indicated that their preference was for the role of the Committee in determining responsibility for remediation to be transferred to SAT.

5.4.3 Outcomes

The consultation undertaken indicated that most stakeholders supported changes that would assist the Committee in making more timely decisions. Measures aimed at streamlining the decision-making process would be consistent with the intent to provide a relatively straightforward system for determining responsibility, so that sites could be investigated and cleaned up in a timely manner.

Most submissions gave qualified support to the proposed introduction of a three-month time frame to provide information to the Committee. A view frequently expressed by stakeholders was that there would need to be provision for that time frame to be extended in some circumstances – for example, for sites with complex contamination issues, or in cases where additional time is required to analyse and interpret data before preparing a written submission.

The review found that the publication of detailed procedures, including providing greater clarity regarding the penalties applicable to providing false or misleading information (s 94 of the Act), could lead to a significant reduction in the time taken for a decision to be finalised.

The review also found that publication of the Committee's reasons for making a decision on responsibility for remediation would establish a body of precedence and also address any perception of bias, particularly if the decision related to liability of the State of Western Australia for 'orphan' sites or as a polluter. Currently, the Act only provides for these details to be published if the decision is appealed under s 77 of the Act.

An amendment of the Act to enable full decisions on responsibility for remediation to be published could be considered as part of future amendments to the Act. In the meantime, incorporation of a summary, in the published procedures, of the general principles applied by the Committee in its decision-making, would be helpful.

5.4.4 Recommendations

The review recommends the following actions in relation to decisions on responsibility for remediation:

- 2. Publish detailed procedures for determining responsibility for remediation.**
- 3. Review the effectiveness of the detailed procedures for determining responsibility for remediation in reducing the time taken for the Committee to reach a decision on responsibility for remediation after two years of operation.**

In the course of the review, the Committee identified the need to clarify and refine a number of matters relating to its decisions on responsibility for remediation. DER makes the following recommendations in relation to these matters:

- 4. Amend the Regulations regarding the facts and circumstances to be taken into account by the Committee when making a decision as to responsibility for remediation.**
- 5. Amend the Regulations to clarify that in regulation 23(a) "site" refers to both a source site and its affected site(s).**

6 Other matters relevant to the operation of the Act

6.1 Time frames for investigation and clean-up

Time frames for undertaking investigations and clean-up were frequently raised in submissions. Once a site is classified, DER current practice is to provide site owners (or the persons responsible) the opportunity to undertake voluntary action in the first instance. If appropriate voluntary action does not occur within a reasonable time, measures, including giving a statutory notice, can be taken by DER to require certain actions by the responsible parties.

A broad range of stakeholders commented that additional guidance was required to assist those responsible for investigations and clean-ups to understand their obligations. It was suggested that DER should consider statutory time frames for certain milestones, such as commencing an investigation following classification of a site. Several respondents called for more notices to be served to ensure that timely action was undertaken.

In practice, due to the broad range of site-specific circumstances which influence the urgency for action, a statutory time frame applicable to all sites would be problematic and could result in action being required to be undertaken regardless of the severity of the risk posed to the environment or human health. In response, DER has implemented administrative improvements which clarify the actions required and provide site-specific advice regarding time frames for action if appropriate. Revised guidance material to support the administrative improvements is under development.

No legislative amendments are proposed in relation to time frames for investigation and clean-up.

6.2 Contaminated site auditors

In prescribed circumstances¹⁷, a mandatory audit report (MAR) by an accredited contaminated sites auditor is required to be submitted to DER. Auditors are recognised as technical experts in the field of contaminated land management, investigations and remediation and are supported by an approved expert support team consisting of other individual technical experts in areas such as human and environmental health risk assessment, toxicology, hydrogeology and other specialist areas.

The auditor's role is to conduct an independent, high-level technical review of the investigation and remediation work (carried out by an environmental consultant(s) for the client) and to provide a recommendation as to the adequacy of the work carried out and, where applicable, the suitability of the land for the proposed land use.

Feedback during the review indicated that some industry and local government stakeholders were concerned about duplication in effort and the costs/delay involved in the audit process.

The issue of duplication in effort is considered one of perception only as:

¹⁷ The prescribed circumstances include sites where contamination has migrated off-site to affect other properties and where a site is subject to a planning or Ministerial condition or regulatory notice.

- the auditor does not duplicate the work of the primary consultant; and
- in the majority of circumstances, the Department only conducts a targeted review of the MAR findings when classifying the site and/or clearing a planning or Ministerial condition relevant to the site.

As part of its overseeing of the audit process for contaminated sites, the Department will conduct a detailed review of both the MAR and the environmental reports submitted for a site in order to:

- evaluate the quality of the first MAR submitted by a newly accredited contaminated sites auditor; and/or
- evaluate and maintain the integrity of the audit scheme.

The concerns raised are of an administrative nature and no legislative amendments are required to address the identified issues.

6.3 Landfill legacy sites

There are a significant number of unlined landfills around the State which are now closed and require investigation and/or remediation under the Act. For example, the Swan River Trust in its submission stated that an estimated 17 former landfill sites, with a total area of about 300 hectares, border the Swan-Canning river system and are potential sources of metals, hydrocarbons and pesticides to the system.

Many LGAs will be responsible for several historical landfills within their boundaries. The costs of investigation and clean-up are substantial and present a funding challenge to the responsible authorities. However, LGAs are not eligible to seek funding from the Contaminated Sites Management Account (CSMA) which was set up under s 60 of the Act to provide funding for the investigation and remediation of contaminated sites where the State or a public authority (other than a local government) is responsible for remediation. The purpose of the CSMA is not to fund the landfill legacy issues for which LGAs are responsible.

7 Conclusion

This review has been carried out by the Department in accordance with s 99 of the Act which requires the Minister to review the Act, as soon as practicable, after five years since commencement and consider and have regard to:

- the effectiveness of the scheme established by this Act in identifying, recording, managing and remediating contaminated sites; and
- any other matter that appears to the Minister to be relevant to the operation and effectiveness of this Act.

To inform the review, the Department carried out a stakeholder engagement process involving the publication of two consultation documents aimed at encouraging people to share their views, suggestions and expectations of the Act and how it is administered by the Department.

The review found that, overall, the Act is working well. Some minor improvements have been identified which will increase the effectiveness of the scheme set up by the Act to identify, record, manage and remediate site contamination. Five specific recommendations have been made.

The review also identified a number of process issues which are being addressed administratively by DER.

Appendix A – List of respondents

Table 1 Respondents to the consultation paper

No.	Name	Category
1	Association of Mining & Exploration Companies (AMEC)	Peak/Ind
2	BP Australia Pty Ltd	Ind
3	Burns, Chris	Dev
4	Celedge/Paul Stallwood	Dev
5	City of Bayswater	LG
6	City of Belmont	LG
7	City of Swan	LG
8	Coffey Environments Australia Pty Ltd	EC/A
9	Cooperative Research Centre for Contamination Assessment and Remediation of the Environment (CRC CARE)	Other
10	David E. Jackson Peer Review Service	EC
11	Department of Environment and Conservation (<i>Warren Region</i>)	SG
12	Department of Health	SG
13	Department of Regional Development and Lands	SG
14	Department of Water	SG
15	Eastern Metropolitan Regional Council	LG
16	Elkington, Amy	EC
17	Emerge Associates	EC
18	Emission Assessments Pty Ltd	EC
19	Fremantle Port Authority	SG/Ind
20	Kwinana Industries Council	Peak/Ind
21	LandCorp	SG/Dev
22	Landgate	SG
23	Law Society of Western Australia	Prof Assoc
24	Lionsville Denmark Inc.	Community
25	Parsons Brinckerhoff	EC
26	Shell Company of Australia Ltd	Ind
27	Swan River Trust	SG
28	Urban Development Institute of Australia, WA (UDIA)	Peak/Ind
29	WA Local Government Association (WALGA)	LG
30	Water Corporation	SG/Ind
31	Western Power	SG/Ind

Table 2 Respondents to the discussion paper

No.	Name	Category	Category for graphs in the main report
1	ACLCA	Peak	Peak
2	AMEC	Peak	Peak
3	Caltex Australia Petroleum Pty Ltd	Ind	Ind
4	Chamber of Commerce and Industry	Peak	Peak
5	Chamber of Minerals and Energy	Peak	Peak
6	City of Bunbury	LG	LG
7	City of Canning	LG	LG
8	City of Cockburn	LG	LG
9	City of Gosnells	LG	LG
10	City of Joondalup	LG	LG
11	City of Swan	LG	LG
12	Contaminated Sites Committee	SG	SG
13	Department of Health	SG	SG
14	Department of Lands	SG	SG
15	Department of Mines and Petroleum	SG	SG
16	Department of Sport and Recreation	SG	SG
17	Department of Transport, Main Roads and Public Transport Authority	SG	SG
18	Douglas Partners Pty Ltd	A/EC	A
19	Emerge Associates	EC	EC
20	JBS&G	EC	EC
21	Kimberley Community Legal Services	Legal P	CLG
22	LandCorp	SG/Dev	Dev
23	Metropolitan Redevelopment Authority	SG/Dev	Dev
24	Mindarie Regional Council	LG	LG
25	Newmont	Ind	Ind
26	Ports WA	SG/Ind	Ind
27	Rio Tinto Iron Ore Operations & Dampier Salt Ltd	Ind	Ind
28	Sean Hickey	MoP	MoP
29	SGA Environmental	EC	EC
30	Simon French	EC	EC
31	Steve Kirsanovs	A	A
32	Swan River Trust	SG	SG
33	The Law Society of WA	Prof	Peak

No.	Name	Category	Category for graphs in the main report
34	The Shell Company of Australia Ltd	Ind	Ind
35	UDIA WA	Peak	Peak
36	Umwelt (Australia) Pty Ltd	EC	EC
37	Vanessa Bryant, Environ	A	A
38	WALGA	LG	LG
39	Water Corporation	SG/Ind	Ind
40	Wesfarmers Chemicals, Energy and Fertilisers	Ind	Ind

Key to abbreviations for Tables 1 and 2

A	Auditor
CLG	Community legal group
Dev	Developer
EC	Environmental consultant
Ind	Industry
Legal P	Legal practitioner
LG	Local government
MoP	Member of the public
Peak	Peak body
Prof Assoc	Professional association
SG	State government