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| JURISDICTION | | CONTAMINATED SITES COMMITTEE (APPEAL AGAINST SITE CLASSIFICATION) |
| ACT | : | CONTAMINATED SITES ACT 2003 (WA) |
| CITATION | : | [2024] WACSC 01 |
| MEMBERS | : | W DODGE, CHAIRPERSON C BARTON, MEMBER H BROOKES, MEMBER V BRYANT, MEMBER P MCNAB, MEMBER |
| DETERMINED ON THE PAPERS | : | 21 FEBRUARY 2024 |
| FILE NO/S | : | CSC 1/2023 |
| APPLICANT | : | THOMSON GEER LAWYERS |
| OTHER PARTIES | : | LA VITA BELLA PTY LTD ¹ DEPARTMENT OF WATER AND ENVIRONMENTAL REGULATION |

Catchwords:

Appeal against site classification - Notice of Classification - Classification as “report not substantiated” – Whether sufficient or any evidence of contamination - Appeal dismissed

Legislation:

Contaminated Sites Act 2003 (WA), s 4(1), s 11, s 18, s 80(a), s 96(1), Schedule 1

¹ Registered proprietor of the site as recorded on the Certificate of Title. La Vita Bella did not take any part in the proceedings.

Result:

The appeal is dismissed. The site classification of *report not substantiated* is affirmed.

Representation:

Applicant : Thomson Geer Lawyers²
 Other parties : N/A

Case(s) referred to in decision:

Smargiassi v Shire of Collie [2021]
 WASCA 107

Viva Energy Australia Pty Ltd v Contaminated Sites Committee [2018]
 WASC 89

 REASONS FOR DECISION OF THE COMMITTEE:
Introduction

1. This decision is the determination of an appeal against a Contaminated Site Classification pursuant to s 18 of the *Contaminated Sites Act 2003* (WA) (CS Act).
2. So far as is relevant, s 18 provides as follows:

18. Appeals against classification

(1) *A person who reports a site under section 11 or 12 may appeal against a classification of that site as report not substantiated.*

[...]

(4) *An appeal is to be brought, dealt with and determined in accordance with Part 8 [of the CS Act which governs appeals].*

3. On 31 January 2023, a delegate of the Chief Executive Officer (CEO) of the Department of Water and Environmental Regulation (DWER) issued a notice of classification for 55 Barrett Street, Herne Hill (described as Lot 100 on deposited plan 45883, as shown on Certificate of Title Volume 2616 Folio 406) (site or subject land). The CEO classified the site as:

*report not substantiated.*³

² The Applicant cannot be identified by operation of s 96(1) of the CS Act. Thomson Geer Lawyers represented this party who reported the site under s 11 of the CS Act and also represented them in these proceedings.

³ Schedule 1 of the CS Act lists the possible classification of sites.

4. Prior to the CEO's decision, being the decision under review, the site had never been classified under the CS Act.
5. On 16 March 2023, Thomson Geer Lawyers, on behalf of its client (**Applicant**), applied to the Contaminated Sites Committee (**Committee**) for a review of this decision. The Applicant seeks to have the classification altered to *possibly contaminated – investigation required*.
6. In the notice of classification, the CEO concluded that although the site appears to have been subject to land uses with the potential to have caused contamination, the CEO does not hold supporting evidence to confirm the possible or actual presence of contamination.
7. The term "contaminated" is defined in s 4 of the CS Act as follows:

(1) *In this Act –*

contaminated, in relation to land, water or a site, means having a substance present in or on that land, water or site at above background concentrations that presents, or has the potential to present, a risk of harm to human health, the environment or any environmental value.

[...]

Grounds of Appeal

8. The Applicant is objecting to the site classification of *report not substantiated* on nine grounds (many of which are overlapping) and which are summarised below.
9. The applicant says that the decision maker erred:
 - i. where the decision maker says that the site was reported based on suspected historical land uses, which are actually known to include unlawful activities such as landfill, vehicle storage, wrecking, crushing and screening of waste, and plastic and metal fabrication, activities undertaken without lawful authority;
 - ii. where the decision maker stated it lacks evidence supporting the filling of the tributary to the Swan River;
 - iii. by focusing solely on the tributary to the Swan River without acknowledging a complaint ("complaint raised")⁴ was made about uncontrolled deposition of construction and demolition waste across the entire site;

⁴ A complaint was lodged with DWER in 2007 "regarding the dumping of various wastes at the site, reportedly including oil, asbestos and construction and demolition waste". (Letter from DWER to Department of Planning, Heritage and Lands dated 10 December 2021.) It is unclear if this is the complaint that the Applicant is referring to.

- iv. where the decision maker referenced that a structural fire of a dwelling on the subject land led to on-site stockpiling of construction and demolition materials;
 - v. by exclusively mentioning viticulture, automotive repair, and salvage yards as having the potential to cause contamination, as specified in DWER's 2021 guideline *Assessment and management of contaminated sites* (the 2021 Guidelines);
 - vi. by downplaying the potential for asbestos containing material (ACM) or asbestos fibres on the subject land by relying on a site inspection in April 2021 by City of Swan personnel, which did not observe visible asbestos fragments;
 - vii. where the decision maker appears to have only focused on ACM or asbestos fibres, in circumstances where other potentially contaminating land uses have occurred on the site which suggest the potential for many other contaminants;
 - viii. when the decision maker expressed the view that the site enjoys non-conforming use rights – or that the status of such indicates that the site is not possibly contaminated;
 - ix. where the decision maker states that they do not hold supporting evidence to confirm the possible or actual presence of contamination.
10. At this point it is convenient to note that the term filling has been used generically throughout the information and documentation provided by both parties. The Committee has adopted the term “filling” and associated terms, such as landfill, as they relate to this decision, to include both the importation of material to the site and the moving of material around the site.

Procedural History

11. On 3 May 2023, the Committee requested from the CEO a report on the Appeal pursuant to s 80(a) of the CS Act. This report (DWER's response) was received by the Committee on 21 August 2023.

Supplementary Information

12. From DWER's response it became apparent that after the Committee requested the report DWER made further enquiries and sought clarification of previous information obtained from within DWER, the City of Swan and the Department of Health (DoH).

13. On 30 August 2023, the Committee provided DWER's response, including this supplementary information, to the Applicant for a response.
14. On 3 October 2023, the Applicant provided a response to the information received.
15. In summary, the Applicant maintains that the site should be reclassified as *possibly contaminated - investigation required*.

Disposition of the Appeal

16. The Committee has concluded that none of the grounds have been made out and the Appeal should be dismissed for the reasons outlined below.
17. As will become apparent, neither the Applicant nor DWER have produced any sufficient evidence that there is any relevant contamination on the site, past or present, that meets the CS Act's definition of contamination. Thus, the CEO's classification remains appropriate.
18. We now turn to consider, in detail, each of the grounds of appeal.

Ground 1 (Historical land uses)

Applicant's submissions

19. The Applicant claims that the historical land uses are known, and include landfill, vehicle storage and wrecking, crushing and screening of waste and plastic and metal fabrication, none of which have occurred with lawful authority.

DWER's Response

20. DWER provided to the Committee an extensive eight-page summary and review of historical land uses from official sources including information obtained from the Applicant and the City of Swan. DWER submits that the "review [had] not identified indicators of potential contamination associated with these land uses".
21. DWER acknowledges that the notice of classification should be amended as it was, in part, "poorly constructed". The amended notice will confirm that crushing of construction and demolition material, storage of dilapidated vehicles and machinery and minor servicing works have occurred at the site, and that the site has been occupied by a concreting business.⁵

⁵ Under the CS Act a number of provisions (see, for example, ss 17-20) appear to authorise the CEO to amend various records to ensure "accurate and up to date" information. The subsequent amendment by the CEO of any records under these provisions does not affect either this decision or the site classification itself.

22. However, DWER submits that these land uses (whether undertaken with lawful authority or not) do not provide sufficient grounds, by themselves, to indicate contamination of the site. DWER relies on the 2017 guidelines: *Identification, reporting and classification of contaminated sites in Western Australia* (2017 Guidelines)⁶ which, broadly speaking, deal with the mechanics of the process of site classification.
23. DWER has submitted that this ground of appeal be dismissed and that the current classification of *report not substantiated* be affirmed.

Committee's Consideration

24. The Committee acknowledges that the 2017 Guidelines accept that knowledge, or evidence of, certain activities and land uses may provide sufficient grounds to suspect a site is contaminated and may trigger a reporting requirement under s 11 of the CS Act.⁷
25. The Applicant's claims relate to the known land uses conducted at the site and these have been acknowledged and will be clarified by DWER.
26. The Committee acknowledges that the site was reported by the Applicant based on these land uses, uses which, as we have noted, DWER accepts have occurred at the site.
27. As is mentioned above, DWER presented a summary of extensive historical information and relevant documentation relating to the site. DWER contends that this information supports its position. There has been no suggestion made that this summary is either inaccurate or incomplete.
28. There is nothing on the face of this material that suggests that any of these historical land uses have, in themselves and without more, presented, or have the potential to present, "a risk of harm to human health, the environment or any environmental value". That is to say, there is no evidence of contamination as defined under s 4 of the CS Act.
29. This ground of appeal should be dismissed.

Ground 2 (Swan River tributary fill)

Applicant's submissions

30. The Applicant submitted material to substantiate its claim that a tributary to the Swan River located on the site has been filled with unauthorised materials. The material submitted

⁶ The Committee notes that the Applicant has not specifically raised any argument as to the applicability or appropriateness of the 2017 Guidelines in relation to requirements for secondary indicators of contamination.

⁷ Section 11 of the CS Act deals with the reporting of known or suspected contaminated sites.

includes aerial imagery, published by Landgate, leading to the main contention by the Applicant that adverse changes in tributary contours have occurred over time.

DWER's Response

31. DWER accepts that the tributary's contours have altered over time. However, DWER submits that it does not hold any information, such as the results of any site inspections, relating to the type or quality of potential fill material (if present) in the vicinity of the tributary. DWER goes on to note that it has not been provided with any evidence in relation to the quality of any potential fill material. Therefore, DWER submits that it has not been demonstrated that the filling of tributary land, if it had occurred, was undertaken other than with certified clean fill (or site-derived soil material).
32. DWER submits that this ground of appeal be dismissed. Again, DWER acknowledges that the reasons for classification will be amended to better reflect that there is no evidence available relating to the type or quality of possible materials that may have been used to fill the channel.

Committee's Consideration

33. The Committee acknowledges that there is aerial imagery that suggests changes to the tributary contours over time.
34. The Committee also acknowledges that site visits, particularly those undertaken by qualified Environmental Health Officers, offer distinct advantages over relying solely on desktop analysis of the information and documentation received, including the review and interpretation of aerial images published online (as occurred here). A site inspection did take place on 15 April 2021 involving City of Swan personnel. However, those officers were planning and compliance officers and not specialist environmental officers. In any event, the Committee has not been provided with information to indicate those officers prepared any formal notations or conducted any relevant assessment of materials.
35. The Committee accepts DWER's submission that there is no evidence (such as site inspections and associated reporting) completed by DWER or anybody else, either prior to the issue of the notice of classification or after the appeal was lodged with the Committee, to indicate that contamination is responsible for any of these changes to the tributary contours, or, for that matter, that such changes are evidence of possible contamination.
36. The Committee has therefore concluded that there is insufficient evidence before the Committee to support a claim that the tributary to the Swan River has been filled with

material “that presents, or has the potential to present, a risk of harm to human health, the environment or any environmental value”. That is to say, there is no or no sufficient evidence of contamination as defined under s 4 of the CS Act.

37. This ground of appeal should be dismissed.

Ground 3 (Swan River tributary fill - waste across entire site)

Applicant’s submissions

38. The Applicant submits that the DWER made an error, within the notice of classification, by focusing solely on the tributary to the Swan River without acknowledging also a complaint had been made about uncontrolled deposition of construction and demolition waste across the entire site.

DWER’s Response

39. In its response, DWER did not address the Applicant’s reference to a complaint. DWER submits that the aerial photographs indicate that stockpiling of materials also occurred historically in the central and western portions of the site over time, not just in the eastern portion. (The western side of the site is nearest to the tributary). However, DWER submits the presence of stockpiles does not constitute evidence, that filling, if any, has occurred using these materials.

40. DWER again submits, in relation to this ground, that it does not hold evidence such as site inspections by qualified personnel to support the contention that filling of the site with uncontrolled fill (construction and demolition waste) occurred across the whole of the site.

Committee’s Consideration

41. It is not precisely clear what the Applicant is referring to when the Applicant refers to the “complaint raised”. The Committee has not been supplied with specific details associated with this complaint. The Committee has assumed that this is reference to generic complaints over time about the state of the site.⁸ However, there is no evidence before the Committee to suggest that the substance of these complaints establishes a causal link between the matters complained of and alleged contamination of the site.

42. As the Committee has briefly referenced within its response to Ground 2 above, no relevant on-site inspection and associated reporting was undertaken by DWER or anybody else,

⁸ See also footnote 4 dealing with a 2007 complaint.

either prior to the issue of the notice of classification or after the appeal was lodged with the Committee.

43. The Committee reiterates that a site visit, particularly one undertaken by qualified Environmental Health Officers, would have offered distinct advantages over relying solely on desktop analysis of the information and documentation received.
44. The Committee has concluded that it has insufficient evidence before it to substantiate the claim that the material located on or around the site contains material “that presents, or has the potential to present, a risk of harm to human health, the environment or any environmental value”.
45. This ground of appeal should be dismissed.

Ground 4 (Structural fire/stockpiling of waste)

Applicant’s submissions

46. The notice of classification refers to the possibility of a “structural fire” to a dwelling house on the site in 2007 resulted in a stockpile of construction and demolition material. The Applicant submits that this finding by DWER is erroneous.
47. The Applicant references aerial imagery which, says the Applicant, confirms that the burned (but not demolished) dwelling on the site was extant at the same time as crushing, screening and filling of the site was occurring. Thus, it is submitted, that there is no relevant connection between the dwelling house fire and the fill on the site.

DWER’s Response

48. DWER submits that materials have been stockpiled on the site from a combination of activities including demolition materials from the former dwelling house and from construction and demolition materials that appear to have been imported to the site.
49. DWER goes on to submit that it does not consider the stockpiling of construction and demolition material on the subject land (from any source) necessarily indicates grounds to suggest possible contamination of the site (or resulting in a classification of *possibly contaminated – investigation required*).

Committee’s Consideration

50. The Committee has noted above (see the Committee’s response to Ground 2 and Ground 3, above) the desirability of undertaking a site inspection by relevantly qualified personnel.

51. It is convenient at this point to note that here there was perhaps a missed opportunity by DWER to undertake such a site inspection following certain enquiries into the site's historical land use.
52. The Committee notes a letter dated 10 December 2021, sent by DWER, in response to a request by the Department of Planning, Heritage and Lands (DPLH) for certain advice.
53. DPLH was assessing a planning application in respect of the subject land in relation to whether the site's ongoing use as a "transport depot" should be permitted by the Western Australian Planning Commission, in the context of an appeal to the State Administrative Tribunal. DPLH was particularly interested whether any form of contamination assessment and/or management would be warranted should the ongoing use of the site as a "transport depot" be permitted on appeal.
54. Given that these enquiries related to a major development on the site it may have been useful to have contamination issues, if any, thoroughly investigated.
55. Thus DWER, in the absence of any such investigation, responded to DPLH as follows:

"The [DWER] advises that [the subject land] has not been reported or classified as a known or suspected contaminated site under the *Contaminated Sites Act 2003* and [DWER] holds no records in relation to the contamination status of the site. However, it is noted that [DWER] received a complaint in 2007 regarding the dumping of various wastes at the site, reportedly including oil, asbestos and construction and demolition waste."
56. In short, there were no enquiries instigated by DWER or any other authority. This is the "missed opportunity" referenced by the Committee above. However, this observation does not affect the result of this appeal. In any event, consistent with DWER position above, DWER has indicated that the notice of classification will be clarified "to provide greater detail in relation to the stockpile containing demolition spoil from the property ([including the] sequence of events indicated by aerial imagery and stockpile composition) and to better reflect that stockpiling occurred across much of the site".
57. In the absence of a relevant on-site inspection (see the Committee's observations above and its response to Ground 2 and Ground 3, above) there is no or no sufficient evidence for the Committee to be able to say that the alleged consequences of the structural fire (that is, the resulting construction and demolition debris) or debris from any other source presents, or has the potential to present, a risk of harm to human health, the environment or any environmental value.

58. This ground of appeal should be dismissed.

Ground 5 (Failure to specify relevant guideline land uses)

Applicant's submissions

59. The Applicant submits that there was an error within the notice of classification whereby in a passing reference, the decision maker referenced "viticulture, automotive repair and salvage yards", activities occurring on the site, as having the potential to cause contamination. The decision maker expressly referenced these land uses from the 2021 Guidelines which broadly speaking deal with the steps to be taken after a site has been classified as contaminated (which is not the case here).
60. Presumably the Applicant is drawing attention to the possibility of other more relevant activities that should also have been specified within this paragraph of the notice of classification.

DWER's Response

61. DWER submits that this ground of appeal be dismissed.
62. However, DWER acknowledges, consistent with the concessions made above, that the reasons for classification will be amended to reflect that, for example, demolition is also an activity that has the potential to cause contamination.

Committee's Consideration

63. The Committee agrees with DWER that the notice of classification is limited in context and could also be strengthened to include information specific to the site including known activities. The activities mentioned in the discussion of Ground 1 above may be a useful source for this task.
64. Consistent with the approach taken by the Committee with respect to Ground 1, in the Committee's view, the extensive information and documentation provided with respect to the whole case does not suggest that any of these historical land uses (that is, viticulture, automotive repair, salvage yards and demolition) have, in themselves and without more, presented, or have the potential to present, "a risk of harm to human health, the environment or any environmental value". That is to say, there is no evidence of contamination as defined under s 4 of the CS Act.
65. This ground of appeal should be dismissed.

Ground 6 (Downplaying April 2021 site inspection)**Applicant's submissions**

66. The Applicant submits that the notice of classification appears to “downplay” the potential for ACM or asbestos fibres to be present because a site inspection by local authority officers in April 2021, which is referred to above under Ground 2, did not observe visible asbestos fragments.
67. However, in December 2020 the City of Swan sent personnel to investigate a complaint about asbestos on the site (the December 2020 visit). The Applicant submits that there are comments in the report that suggest that asbestos may be present in the stockpile of construction and demolition waste.
68. The Applicant also submits that there is no indication who the local authority officers are/were, what their expertise was, for what purposes they attended the site, and which areas of the site they inspected.
69. Further, in any case the Applicant lists evidence to support the Applicant’s claims that ACM or asbestos fibres may be present on the site.

DWER's Response

70. DWER contends that this ground of appeal has not been made out.
71. DWER’s response does refer to the December 2020 visit. This relates, as we have referred to above, to a visit to the site by two of the City of Swan’s Environmental Health Officers, on 3 December 2020. These personnel were authorised, trained and experienced in ACM assessment under the *Health (Asbestos) Regulations 1992 (WA)*.
72. DWER notes this site visit and its subsequent consultation with the DoH prior to classifying the site and submits that:

“Any asbestos contamination resulting from poor demolition practices or dumping on a single block is generally considered a low public health risk situation and managed in accordance with the DoH’s guidance note *Management of Small-Scale Low-Risk Soil Asbestos Contamination* (May 2009).”

Committee's Consideration

73. The Committee notes that DWER and DoH have developed comprehensive guidelines for the assessment, remediation and management of asbestos contaminated sites.⁹ The DoH 2021

⁹ DoH 2021 *Guidelines for the Assessment, Remediation and Management of Asbestos Contaminated Sites in Western Australia*, DWER of Health 2021. (DoH 2021 Guidelines).

Guidelines have been developed to ensure that asbestos contaminated sites are identified early and are managed effectively. The Committee has not been provided with copies of any reports to indicate that investigations have been undertaken at this site in conformity with this guideline. The visit by the Environmental Officers in December 2020 does not qualify as an investigation under these DoH 2021 guidelines.

74. The Committee has already mentioned the May 2009 *Management of Small-Scale Low-Risk Soil Asbestos Contamination* (DoH 2009 Guidelines). These guidelines are “intended to be primarily used by Local Government Environmental Health Officers (LG EHOs), in consultation as necessary with the [DoH]”.
75. Specifically, this guidance is provided for assessing “small scale” incidents of possible asbestos “resulting from poor demolition practices or dumping”. The guideline prescribes the methods to be employed by LG EHOs for assessing and reporting the potential presence of ACM.
76. Although DWER makes reference to, in effect, suitably qualified personnel attending the site in December 2020, no investigation documentation, information, field notes, photographs, or other reporting has been provided to the Committee from this visit - as is recommended by the DoH 2009 Guidelines. The guidelines further recommend:
 - i. A review of building licence records; demolition applications; asbestos removal plans or asbestos disposal receipts; and
 - ii. a detailed systematic “walkover” inspection of the site in accordance with guideline requirements.
77. Given the large stockpile of material discovered by City of Swan personnel to be present on the site, the applicability of inspection, without consulting DoH, appears to be contrary to the recommendations of the DoH 2009 Guidelines (see “Purpose” page 1). However, if there was a failure to comply with these guidelines this does not affect the outcome of this review.
78. In short, no information has been provided to the Committee indicating that the site has been inspected by representatives from DWER or DoH.
79. Thus, there is no material before the Committee to support a finding that there is ACM or asbestos fibres on the site.
80. Accordingly, the Committee has insufficient evidence before it to substantiate the claim that the material located on or around the site contains material “that presents, or has the potential to present, a risk of harm to human health, the environment or any environmental value”.

81. This ground of appeal should be dismissed.

Ground 7 (DWER focusing on ACM – many other contaminants)

Applicant's submissions

82. The Applicant submits that the decision maker appeared to focus only on ACM or asbestos fibres (in the notice of classification), in circumstances where potentially contaminating land uses that have occurred on the site suggest the potential for many other contaminants.

DWER's response

83. DWER's review of all available evidence indicates that the site has predominantly been used for viticulture and as a low-scale "transport depot", although other land uses and activities have occurred (as detailed in DWER's response to Appeal Ground 1). Some of these land uses and activities are potentially contaminating land uses as referenced in DWER's response to Appeal Ground 5.

84. Nonetheless, in the absence of secondary indicators or secondary evidence, such as staining odour, plant stress, etc, of possible contamination, DWER submits that additional potentially contaminating land uses do not indicate possible contamination of the site.

Committee's consideration

85. In the Committee's view, this ground of appeal in substance has already been addressed in the discussion of Ground 1 and Ground 5 above.

86. Accordingly, the Committee has insufficient evidence before it to substantiate the claim that the material located on or around the site contains material "that presents, or has the potential to present, a risk of harm to human health, the environment or any environmental value".

87. This ground of appeal should be dismissed.

Ground 8 (Non-conforming land uses)

Applicant's submissions

88. The Applicant provided a comprehensive historical analysis of land ownership and land use at the site.

89. The Applicant submits that the decision maker erred when the decision maker expressed the view that the status of the subject land indicates that the subject land is: "not possibly

contaminated” based, apparently, upon alleged lawful use of the land according to non-conforming use rights.

90. In particular, it is contended, that the decision maker erred when they referred to non-conforming land use rights in the following terms: “Some of [the] land uses are considered by the local authority to be non-conforming uses under the provisions of the local authority planning scheme.” The Applicant contends, in effect, that there are no relevant, enforceable or extant non-conforming land use rights.
91. The Applicant submitted an analysis of planning law principles, including the citation of a leading WA case in the Court of Appeal.¹⁰

DWER’s Response

92. DWER submits that the references to non-conforming land use rights reflected its understanding of the situation at the time the notice of classification was issued and were included “for context”.
93. Of more importance, DWER submits that:

“Whether or not planning approval has been granted for any particular land use or activity is immaterial to DWER’s assessment of whether there are grounds to indicate possible contamination of a site. Accordingly, DWER did not place any weight on the existence (or otherwise) of planning approval or non-conforming use rights when classifying the site *report not substantiated*.”

94. DWER has again offered that, in the event the Committee affirms the current classification of the site, it will clarify the sentence referring to non-conforming uses from the notice of classification.

Committee’s Consideration

95. The Committee agrees with DWER that whether or not there are non-conforming land uses, or for that matter development approvals in force, these regulatory matters do not affect whether the land is contaminated as a question of fact.
96. Such matters may however be useful to give historical and contextual clarification, but they do not affect the operation of the CS Act.
97. As is evident from our conclusions above on the other grounds put forward by the Applicant, in the Committee’s view, the extensive information and documentation provided does not

¹⁰ *Smargiassi v Shire of Collie* [2021] WASCA 107.

suggest that any of these historical land uses, in themselves and without more, present or have the potential to present, “a risk of harm to human health, the environment or any environmental value”.

98. Moreover, as is also the approach adopted above, the Committee has concluded that there is insufficient evidence to substantiate the claims that the material located on or around the site contains material that presents a risk of harm to human health, the environment or any environmental value.

99. This ground of appeal should be dismissed.

Ground 9 (Contamination maybe possible / investigation)

Applicant’s submissions

100. The Applicant submits, in effect, that DWER has supporting evidence to confirm the possible or actual presence of contamination and consequently submits that the appropriate classification is *possibly contaminated - investigation required*. Further, the Applicant submits that various statutory powers should be used to inspect the subject land.¹¹

DWER’s Response

101. DWER submits that, consistent with their submissions in respect of Grounds 1 – 7 above, there are no “secondary indicators” or “secondary evidence” of soil, groundwater or surface water contamination at the site (such as staining, odour, plant stress, etc).

102. DWER submits that no new information regarding secondary indicators of contamination has been submitted in support of the appeal or identified during DWER’s enquiries. Accordingly, there is no case at present for the invocation of statutory powers of investigation.

Committee’s Consideration

103. Consistent with the Committee’s findings above, the Committee agrees with DWER. The Committee has insufficient evidence before it to substantiate the claim that the material located on or around the site contains material “that presents, or has the potential to present, a risk of harm to human health, the environment or any environmental value”.

104. As to the Applicant’s contention the Committee should investigate contamination on the subject land, the Committee draws attention to the following observation of Smith AJ:

¹¹ For example, s 89 of the *Environmental Protection Act 1986* (WA) and s 49 of the CS Act (investigation notices).

“The Committee has some inquisitorial powers. However, the Committee does not have an inquisitorial function in the full sense, as it does not have a general duty to inquire or investigate.”¹²

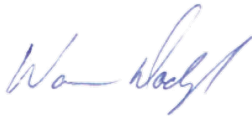
105. This ground of appeal should be dismissed.

Conclusion

106. For the reasons stated above, none of the grounds of appeal have been made out and the Committee therefore dismisses the Appeal and affirms the decision under review.

I certify that the preceding paragraphs comprise the reasons for decision of the Contaminated Sites Committee.

W DODGE, CHAIRPERSON



21 February 2024

¹² *Viva Energy Australia Pty Ltd v Contaminated Sites Committee* [2018] WASC 89, at paragraph [128]. And see paragraph [130].