Urban Taskforce
AUSTRALIA

26 February 2008

Mr Niall Johnston
Acting Manager – Specialised Regulation
PO Box A290
SYDNEY SOUTH NSW 1232

Dear Mr Johnston

Re: Contaminated Lands Management Amendment Bill 2008

Thank you for the opportunity to make a submission in response to a draft of the above Bill, circulated by the Department of Conservation and Climate Change on 30 January 2008.

The 2008 Bill proposes significant changes to the *Contaminated Land Management Act 1997* (CLM Act). The 2008 Bill has been modified since the public consultation draft *Contaminated Land Management Bill 2007* (2007 Bill).

The Taskforce made submissions in relation to the several key matters under the 2007 Bill in November 2008. A copy of our previous submission is attached.

We would like to acknowledge the considerable effort that the Department has gone to consider our concerns. In particular, we recognise that the 2008 draft bill has been amended to provide that

> …the EPA is to take into account any relevant guidelines and each of the following matters with respect to the substances that the EPA believes cause the land to be contaminated" (s12(1)) before declaring land to be significantly contaminated under s11.

In general, the Urban Taskforce considers that this amendment adequately qualifies the test of "significant contamination", as it is now clearly mandatory for the EPA to take each of the matters listed in s12 of the 2008 Bill into account in its assessment of significant contamination.

However, we have two significant concerns – covered in detail in our previous submission (attached) that have not been addressed.

1. Removal of the "Principal Responsibility" test

The "principal responsibility" test is important to the development industry. It helps distinguish between those who may have a notional responsibility for contamination from those who have actually caused pollution.

Section 6(4) says that a person who seeks a development approval is also regarded as the person responsible for the contamination of land if, for instance, that approval led a former industrial site to be converted to residential use. So a developer can be 'responsible' for the contamination of land even though he/she does not introduce any contaminants to it. The apparent unfairness of the existing legislative provision is ameliorated by the 'principal responsibility' requirement.

At the moment, the principal responsibility test is an important safeguard for developers who plan to acquire and redevelop contaminated land because it ensures that the party most responsible

for the contamination (who is rarely the developer) will be pursued first and foremost by the Department.

The effect of its removal is to enable the Department to pick and choose who to pursue. It would be legally open to the Department to ignore a major polluter (for example, a government agency responsible for 80 per cent of the contamination on a site) and instead pursue someone who's responsibility is relatively modest.

In verbal discussions departmental officers have indicated that they do not need the full degree of flexibility they are seeking. If this is the case we request that this statutory power be narrowed to cover what the Department actually intends to do.

2. Failure to take reasonable steps

The "principal responsibility" concept is also heavily undermined in the Bill by the proposed wider definition of the person "responsible for the contamination of land" (in section 6(1)(c) to include a person who

> ... is the owner or occupier of the land and the contamination occurred because the person failed to take reasonable steps to prevent the contamination of the land.

Under the existing law owner and occupiers may be found liable in the person with principal responsibility is unavailable.

This change to the definition effectively makes a potentially wide range of long term owners and occupiers liable, as if they were principal polluters, despite that fact that they may have had no knowledge and could not have reasonably be expected to have any knowledge that either:

- foreign substances were on the land, or
- that those foreign substances presented a risk to human health or of environment harm.

If the definition of a person responsible for contamination of land be broadened as proposed, that the law should distinguish

- those who knew, or should have known, about contaminants

from

- those who did not know, and could not have reasonably been expected to know.

This will not prevent any owners and occupiers being pursued if/when the party with principal responsibility is found to be unavailable.

3. Failure to notify

We're concerned that the Bill continues to include a provision for a new kind of order to be made (preliminary investigation orders) without any requirement that these orders be on the public record.

Developers are major buyers of land, including land that may possibly be contaminated. The industry draws comfort from the current provisions of the Act which require the fact that land subject to an order under the Act is to be on public record via the section 149 certificate.

This new power enables matters that previously had to be on the public record now to be dealt with secretly.

If these matters are not to be identified on the section 149 certificate, then at the very least, they should, be required by statute to be placed on the Department's website.

As always we remain available to meet and discuss our concerns. We would appreciate the opportunity to review a further draft of the Bill, prior to anything being introduced into Parliament.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer