Urban Taskforce
AUSTRALIA

17 January 2010

Mr Robert Furolo MP
Chair, Joint Standing Committee on Electoral Matters
Parliament House
Macquarie St
Sydney NSW 2000

By e-mail: electoralmatters.committee@parliament.nsw.gov.au

Dear Mr Furolo

Re: Submission to the Joint Standing Committee on Electoral Matters' Inquiry into the public funding of election campaigns

The Urban Taskforce is a non-profit organisation representing Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning of the urban environment to engage in constructive dialogue with both government and the community.

Fundamentally, the Urban Taskforce has a simple position on the matter of donations to political parties. We have had the same position for more than five years: **we advocate a complete national blanket ban on political party donations from anyone** — corporations or individuals, developers, lawyers, doctors, trade unions, miners, tobacco companies or environmentalists. However, this kind of change must be accompanied by substantial additional public funding. Taxpayers should meet all of the costs of election campaigns. Funding should be allocated to political parties in line with their share of the vote. Only a radical measure like this will ensure that the system is once and for all, free from any perception of financial influence.

Policy developments today have been ad-hoc and have been apparently pursued for the sake of a cheap headline, rather than any effort to resolve the concerns of the community in a satisfactory way. We have major concerns with the *Election Funding and Disclosures Amendment (Property Developers Prohibition) Act 2009* pushed through Parliament in much haste last year. Our concerns can be divided into two broad categories.

Firstly, the Act does not ensure that any perception of financial influence is removed from political parties. **A truck could be driven through the loopholes in the NSW Government's "ban" on property developer political donations contained in this Act.** In any event, a ban on donations from one segment of society will not ease community concerns about the influence of other segments of society.

Secondly, the Act has a harsh impact on the civil rights of individuals associated with property development companies. Quite frankly, this Act is McCarthyist in its scope. It represents the harshest attempt, to selectively strip civil rights from a group in our society, since the failed *Australian Communist Party Dissolution Act 1950* (Cth). It used to be 'reds under the beds', now it's 'property developers under the beds'. While certain bans and restrictions might be justifiable when they apply to the community at large, when the same bans and restrictions are applied only to one group in society they may not be justified.

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1. <u>There are fundamental weaknesses in the new definition of "property developer"</u>

Only companies who "regularly" make planning applications will be subject to the new ban.[1]

Undoubtedly, large property development companies would be covered by the ban.

The community understands a "property developer" to be someone who earns income from the development of land. This tends to mean that any company with significant landholdings can be regarded as a property developer.

However, the government has not sought to define a property developer based on its normal English language definition.[2] Instead, the Act takes a narrow technical view of a "property developer" – we have previously made it clear, that in our view, the Act essentially says a property developer is someone who makes a lot of planning applications.[3] In apparent response to the criticism, the government has stated that

> A property developer is not simply a company that makes a lot of planning applications. Any corporation engaged in the business, which regularly involves the making of relevant planning applications, for example, the business of property development, is a property developer for the purposes of the ban. [4]

This is very curious. The government is attempting to defend its own definition of "property developer" by claiming that it means anyone in the "business of property development" will be covered.

Firstly, that is not what the definition says.

The definition says a property developer is

> a corporation engaged in *a business* that regularly involves the making of relevant planning applications by or on behalf of the corporation in connection with the residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit ... (emphasis added)[5]

The definition *does not* provide that a corporation engaged "in the business ... of property development" is a property developer (as suggested by the government). That would be a vastly superior definition. Instead the definition relates to "a business" that "regularly involves the making of relevant planning applications". The word "business" in the sentence means nothing more than the corporation must be engaged in some form of trade or commercial activity.

Secondly, in the government's defence of its definition and in the definition itself, "the business of property development" is wrongly equated simply with the act of "regularly ... making ... relevant planning applications".

At some time or another banks, television networks, breweries, manufacturers, retailers, fast food chains, all need to sell and acquire land. These companies rarely ignore the development opportunity of their land when buying and selling. Some choose to develop themselves; others enter into joint-venture arrangements with full-time property developers and others give a full-time developer an option on their land, which will result in the land's purchase, if the developer successfully secures a development approval. **All of these companies are, in fact, property developers – as long as they're earning income from the development of land.**

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[1] s 96GB(1)(a).

[2] For example the *Macquarie Concise Dictionary* (4th edition) defined the verb to "develop" as, relevantly, "to bring into being or activity; generate; evolve"; "to build on (land)"; "to prepare (vacant land) for housing by the provision of roads, sewerage, etc.". "Developer" is the related noun is a person who "develops".

[3] As per proposed section 96GB.

[4] NSW, *Hansard*, Legislative Assembly, 1 December 2009, <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/8bd91bc90780f150ca256e630010302c/b31092ffb72bda19ca25768800045b34?OpenDocument>, (Mr David Harris).

[5] *Election Funding and Disclosures Act 1981* s 96GB(1)(a).

The Act's very narrow and overly technical definition of "property developer" will ensure that the ban on developer donations is **weak, ineffective and will fail to re-build confidence** in government decision-making.

Fly-by-night property developers will be exempt from the ban

Only companies who "regularly" make planning applications will be subject to the ban.[6]

Undoubtedly, large property development companies would be covered by the ban. However, the picture is not so clear for companies that have only made, and only plan to make, a single planning application.

The Supreme Court of Victoria has said that "regularly" means

1. at regular times or intervals.
2. according to plan, custom, etc.[7]

Clearly, any company that has never previously made a planning application and has no plans to make further applications, cannot be described as a company that "regularly" makes planning applications. That is, **most companies that are new to property development will not be a property developer under the government's definition.[8]**

Additionally, **a company that has only made a small number planning applications in an ad-hoc irregular way** (without any establishing any planned or customary behaviour), **may also be exempt from this 'ban'**.

Most property development projects are carried out by individuals – such as real estate agents, small-scale builders, hoteliers, accountants and lawyers – who have opportunistically bought a site and are aggressively pursuing a development approval. In anyone's language these people are property developers – yet many will not be covered by the NSW Government's 'ban' on developer donations. **The shelf company they form to buy the land will normally never have previously, made a planning application, and may never do so again.**

The government's ban is likely to capture large-scale professional businesses, but will exclude the fly-by-night opportunistic individuals.

In response to this criticism the government claims that

> the ban will cover companies that are new to the business of property development, even if they have not yet lodged a planning application, and shelf companies established by property developers to lodge planning applications in relation to a particular development.[9]

This is an assertion that is not backed by any text in their definition. Is true that a company who has not made a planning application may still be covered by the definition. This will turn on an objective assessment whether the business of the company will involve the regular making of relevant planning applications.

This might occur, for example, if the company is called "ABC Property Developments Pty Ltd" and the directors have agreed that they will seek to carry out a number of projects. On the other hand, if the company is called "100 Smith Street Annyville Pty Ltd", and its directors are of the view that the only purpose of the company is to put a single development application and complete a development at 100 Smith Street Annyville, then clearly the company is not carrying out a business involving regular planning applications.

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[6] s 96GB(1)(a).
[7] *Mornington Peninsula Shire Council v Payne and Others* [2001] VSC 337 [35].
[8] In relation to proposed section 96GB(1)(a). The implications of proposed section 96GB(1)(b) are separately.
[9] NSW, *Hansard*, Legislative Assembly, 1 December 2009, <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/8bd91bc90780f150ca256e630010302c/b31092ffb72bda19ca25768800045b34?OpenDocument>, (Mr David Harris).

The biggest corruption risks arise when unprofessional individuals buy a single site and try to secure a favourable development approval or rezoning. These individuals frequently end up with sites that have restrictions they didn't anticipate. ICAC inquiry reports are littered with the activities of such small-scale unprofessional developers.

It's very surprising that estate agents, lawyers, accountants, publicans and builders who do a little bit of property development on the side will still be free to donate to political parties.

The problems caused by opportunistic individuals getting over their head were well known. The whole ICAC inquiry into corruption at Rockdale Council centred on a tailor, who wanted to turn a site slated for four stories, into eight stories.[10]

The government responds to this point by saying that

> Those who wish to circumvent the system will always find loopholes.[11]

This response seems to suggest that these small-scale property developers will be deliberately structuring their affairs to avoid the application of the Act. This is disappointing, but it shows the government still doesn't understand the basics of normal business practice.

Small-scale developers will not have change the business structure to avoid the application of the Act. Their current business structures, formed for simple, legitimate and straightforward commercial reasons, will mean that they do not fall into the government's definition of "property developer".

In any event, it is a common industry practice to carry out development projects through a proprietary limited company formed (or purchased as shelf company) specifically for a single project. In many instances this practice is sensible because:

- The equity partners in one project may be different from a previous project – the distribution of shares in each company will reflect the respective exposure of equity investors, to that particular project.
- Each individual company has its own asset/liability structure and legal status that makes its obligations secure, even if a parent company goes into receivership or liquidation.
- A company will carry its own governance structure – allowing commercial decisions concerning a particular project to be dealt with by a project-specific board.

A parent company may own all or part of a large number of companies. The parent company may never make or lodge a planning application – such applications will might be made by (or on behalf of) the individual companies concerned.

When this corporate structure is used, the government's ban on property developer donations will not normally apply.

Again, that's because only a company who "regularly" makes planning applications will be subject to the ban.[12] As each company is only formed for a single project, it is possible that each company will only ever make one planning application.

We note that the government has included a provision in its Act for a "close associate" to be included in the property developer ban.[13] The definition of "close associate" includes "a related body corporate of the corporation".[14] However, in the above example, the 'ban' will not catch the parent company, nor any of the individual

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[10] Independent Commission Against Corruption, *ICAC Report: Report into corrupt conduct associated with development proposals at Rockdale City Council* (2002) 14.

[11] NSW, *Hansard*, Legislative Assembly, 1 December 2009, <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/8bd91bc90780f150ca256e630010302c/b31092ffb72bda19ca25768800045b34?OpenDocument>, (Mr David Harris).

[12] s 96GB(1)(a).

[13] s 96GB(1)(b).

[14] s 96GB(3)(b).

companies in the corporate group. That's because the "close associate" provisions are dependent on at least one of the companies involved "regularly" lodging planning applications. **In this (common) example, <u>none</u> of the companies regularly makes planning applications.**

This situation is most likely to arise in relation to individuals (such as real estate agents, publicans and small-scale builders) who invest in a series of property development projects. Again, the activities of these individuals are most likely to carry the greatest corruption risk.

Land owners seeking to make money from the re-development of surplus or under-utilised lands will be exempt from the ban

As mentioned above, only companies who "regularly" make planning applications will be subject to the ban.[15] The planning applications must relate to the "residential or commercial development of land, with the ultimate purpose of the sale or lease of the land for profit."[16]

A vast array of companies and business people get into property development because they find themselves in possession of surplus or underutilised land that is ideal for re-development.

Examples include:

- Coal and Allied, a mining company, who owns a large site near Catherine Hill Bay;
- Sydney Airport Corporation who has sought to develop a retail precinct on airport lands in Botany;
- Foster's Group, a beer manufacturer, who sought to develop the Carlton and United Breweries site on Broadway in Sydney;[17] and
- any number of farming enterprises that have become greenfield land developers once became clear that their land is well position to support urban expansion.

The decision of these businesses to become involved in property development:

- will not necessarily be repeated;
- is not part of any regular pattern; and
- is not customary for that business.

Therefore **they will be exempt from the government's ban** – even though their redevelopment project and any corruption risks, are indistinguishable from that of a full-time development company.

Sometimes landholders will not even be directly involved in the mechanics of property development (that is, hiring consultants, arranging for a planning application to be made, etc). Instead, they will sign an option agreement, which entitles a professional property developer to purchase the property within a set period at a pre-agreed price.

Usually the price is high enough to share some of the anticipated development profits with the landholder. Accordingly, the professional developer, will normally only exercise the option when a planning application has been approved. During this period, there is a risk that the landholder may undertake their own political lobbying activities, independent of the developer.

The definition limiting a "property developer" to a corporation that makes "planning applications"[18] removes from the definition a whole range of companies who profit from property development, most notably land owners.

The definition of "close associate" does not include key parties who may profit from the activities of a company

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[15] s 96GB(1)(a).
[16] Ibid.
[17] Foster's Group ultimately sold their interest in the site to Frasers Property in June 2007.
[18] Proposed section 96GB(1).

The definition of "close associate" does not include parties who may profit from the success or failure of a property development company. Most significantly this could include the creditors of a company. In many instances the creditors of a company can become the effective owners of a company's assets – for example – the massive Centro shopping centre chain is effectively being run for the benefit of its creditors, rather than its shareholders. Similarly, when a company is in receivership or liquidation (such as the Belmorgan company that owns a key site in Wollongong's city centre), the creditors are likely to take a keen interest in the ongoing property development activities of a business.

Developers who are merely speculating on changes in development controls are exempt from the ban

The Act says that "property developer" is a corporation that makes "planning applications".[19] This will exclude speculators who have made no planning applications, but have acquired land in anticipation of new development controls.

Consider the ICAC's inquiry into corruption at Strathfield Council. It occurred in the context of a series of land purchases made by small-scale property developers who expected the local environmental plan to be revised to increase the development potential of land.[20]

According to ICAC's report, the developers became concerned when it appeared that the proposed increase in development capacity would not proceed in full. On this basis the developers began a lobbying campaign.

Corruption risks can arise even if no planning application has been made. To link a ban on developer donations to the making of an application, ignores all of the other corruption risks in the planning system, and government decision-making generally.

2. <u>There is an unreasonable violation of the civil rights of directors, shareholders, officers and beneficiaries and an unjust restriction on the rights of their industry organisations</u>

Many people will be "close associates"

Any individual who is a "close associate" of a property development company will be covered by the ban on political donations. This includes a shareholder of more than 20 per cent of the company, an officer, a director or their spouse.[21]

The term "officer", in relation to a corporation, is to have the same meaning as the *Corporations Act 2001* (Cth).[22] That term means:

- a director or secretary of the corporation;
- a receiver, or receiver and manager, of the property of the corporation; an administrator of the corporation;
- an administrator of a deed of company arrangement executed by the corporation;
- a liquidator of the corporation; or a trustee or other person administering a compromise or arrangement made between the corporation and someone else.[23]

The definition also extends to a person:

- who makes, or participates in, making decisions that affect the whole, or a substantial part, of the business of the corporation; or
- who has the capacity to affect significantly the corporation's financial standing.

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[19] s 96GB(1).
[20] ICAC, *Report on investigation into the relationship between certain Strathfield Councillors & developers: ICAC Report* (2005) 6
[21] s 96GB(3).
[22] s 96GB(3).
[23] *Corporations Act 2001* (Cth) s 9.

The definition of "officer" to persons who have the capacity to affect significantly the corporation's financial standing is of uncertain scope. For example, it may include any person who is engaged in hedging or derivative transactions. Additionally, for a small company with only a handful of staff and two or three development projects, it may effectively include all employees of the business.

"Close associates" will have no right to support issue-based campaigns at election time

A "close associate" is not entitled to make a political donation. The only exception is a payment made by an individual to be a member of a political party, so long as the payment is under $1,000.[24]

A "political donation" is already defined very broadly under the Act.[25] In addition to the obvious meanings, **a gift is a political donation if it was made to an organisation <u>that is not a political party</u> and the purpose of the gift was to allow the recipient to incur "electoral expenditure"**.[26]

"Electoral expenditure" is defined broadly to embrace a whole range of election-related activity that does not necessarily involve endorsing particular candidates or parties.[27] It includes non-partisan activity by a property development industry group such as the Urban Taskforce, to highlight issues to voters at election time. Payments by "close associates" to an industry group for the purposes of issue-based election material, will be prohibited if it relates to:

- advertisements in radio, television, the internet, cinemas, newspapers, billboards, posters and brochures;
- expenditure on the distribution of election-related material;
- expenditure on research associated with election campaigns,
- expenditure incurred in employing staff engaged in election campaigns.

This ban prevents "close associates" of property developers financially supporting issue-based campaigns highlighting their concerns to voters. That is, people in the property development industry will lose their right to communicate their policy concerns to the public. No law of this kind has been proposed by a government since the ill-fated *Australian Communist Party Dissolution Act 1950* (Cth).

"Close associates" will have no right to attend political events

The existing definition of "political donation" includes a payment or entry fee for a function held by a political party – even if the fee is modest.[28] This means, when political parties hold functions and invite members of the public to them, a "close associate" will be prohibited from attending if the payment of an entry fee is required.

Furthermore, it will be unlawful for someone to make a payment on behalf of a "close associate" of a property development company, to attend such an event.[29]

Everyone in the property development industry votes. Some have been members of political parties all their lives. We reject the idea completely, that people who have a genuine interest in politics should be denied the right, by law, to attend political events to which others are invited. This is unquestionably a new form of McCarthyist demonisation.

Entrenchment of sexual discrimination

We are concerned that this law will apparently authorise the discrimination against people who have done no wrong, other than to marry someone involved in the property development industry. Given the background of many in our industry, including

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[24] Proposed section 96GD.
[25] s 85.
[26] s 85(1)(d).
[27] s 87(1).
[28] s 85(2).
[29] s 96GA(2).

building, construction, engineering and the trades (and the consequent over-presentation of men in the sector), this discriminatory rule will disadvantage far more women than men.

The discrimination against individuals, based on their marital status, in relation to the provision is prohibited under the *Sex Discrimination Act 1984*.[30] This provision also expressly applies to state governments.[31]

We note the comments from some parliamentarians in the debate on this Act when it was before Parliament, that the property rights of married couples are inseparable, and that modifying the right of a one person, in response to their spouses financial circumstances is well established.

It is true that, in respect to property. For example, access to welfare payments may be dined because of the income of a spouse. **However, the new Act constrains the civil liberties of a person based on their marital status.** We've never seen a law like it in NSW.

We ask that this Act be referred to a Parliamentary inquiry as matter of urgency. Any inquiry, should focus on how the Act can be re-drafted to apply a general ban on political donations from everyone, in every sector of society, whilst still preserving the civil rights of individual citizens to participate in the grass roots democratic process.

We are available to discuss these issues.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

[30] s 22.
[31] s 22(2).