Urban Taskforce
AUSTRALIA

3 March 2010

Mr Frank Sartor, MP
Minister for Climate Change and the Environment
Level 35 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Re: *National Parks and Wildlife Amendment Bill 2010*

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.

We have previously commented directly to the Department of the Environment, Climate Change and Water on a draft exposure version of the above bill last year. We acknowledge that some significant revisions have been made to the bill to address some of our concerns.

Nonetheless, the latest version of the bill contains provisions that will weaken property rights and increase investment uncertainty. Amendments to the bill can rectify these issues, without compromising on the government's public policy objectives.

Some of key concerns are set out below.

The bill introduces a new power for the government to unilaterally vary conditions on an Aboriginal heritage impact permit or revoke permits. The risk premium required to secure debt and equity finance to develop land will increase if the conditions on the permit may be varied, at will, by the regulator. Any financer will factor in the potential that additional costs could be imposed which may cancel out the benefits of the permit. Provisions of this kind do not exist in comparable land use permits, such as development consents or mining leases.

New offence provisions are based on an unreformed definition of "Aboriginal object". The proposed should be based on a reformed definition. The current definition is so broad that it even means the following items are "Aboriginal objects":

- items of very recent vintage – for example items that are 5, 10, 20 or 50 years old;
- items that have no or only minor cultural significance – for example, debris from an unexceptional recently abandoned Aboriginal home;
- Aboriginal items that are manufactured (i.e. produced by a machine, rather than by hand or manual processes);
- items that are no longer in their original setting – such as a 40 year old painting on display in a modern home (if the painting was not made for sale).

As a consequence of the potential, very wide, application of the new offence provisions, there will be little legal certainty. In practice, the liability of any individual who is likely to encounter an

Urban Taskforce Australia Ltd. ABN: 21 102 685 174 | GPO Box 5396 Sydney NSW 2001
T 612 9238 3955 | F 612 9222 9122 | Level 12, 32 Martin Place Sydney NSW | Level 6, 39 London Circuit, Canberra ACT
admin@urbantaskforce.com.au | www.urbantaskforce.com.au

Aboriginal object in their daily business will be determined by the discretion of a potential prosecuting authority (i.e. an officer of the Department of Environment, Climate Change and Water) rather than the text of an Act of Parliament. Parliament should remedy this situation before it toughens up the penalty provisions.

The normal defence of "honest and reasonable mistake of fact" has not been adequately preserved. The new criminal offence provisions mean it would no longer be necessary for the Department to prove that a person acted with intent or knowledge of what they were doing. In other legislation, when this kind of change is made, the common law defence of "honest and reasonable mistake of fact" is still retained. Regretfully, the proposed provision does not respect this principle because it seeks to set aside this standard defence.

Apparently there is to be a vague reference to the defence, in relation to "Aboriginal objects", in non-statutory due diligence guidelines. In our view this is not sufficient to preserve the defence. It also still removes the defence entirely for "Aboriginal places".

Land purchasers will not get enough information on the declared "Aboriginal places" to ensure they avoid criminal liability. The current system of planning (section 149) certificates is intended to warn owners and buyers of land of statutory restrictions on the use and development of land. The bill does not ensure that the locations of "Aboriginal places" are communicated through this existing mechanism for warning people of potential obligations.

Aboriginal places should not be declared over private land unless the land owner receives compensation The restrictions that may be placed on privately owned land as a result of the declaration of an "Aboriginal place" under the Act are significant. The new penalty provisions further extend the obligations of private land owners by prohibiting 'desecration' of site (see discussion below). Consistent with our views on heritage declarations, and down-zoning decisions, we believe that property owners should be compensated for any loss of land value when a portion of their land is declared as an "Aboriginal place".

Its been observed in the Federal Court that the concept of "desecration" can be "irrational" or "difficult to comprehend", yet this idea will be inserted into Aboriginal heritage legislation for the first time in NSW. Regretfully, most members of the Australian community are unaware of the religious and spiritual particulars of traditional Aboriginal society. It is possible to act honestly and reasonably, in relation to an object or place and still, nonetheless, cause offence to Aboriginal people. Obviously such a situation is to be avoided, but if it occurs <u>without destruction, defacement or damage to an Aboriginal object or Aboriginal place,</u> a person should <u>not</u> be guilty of a crime.

There is no consensus in our community favouring the prohibition of activities that constitute desecration, but not actual damage, in relation to Aboriginal heritage. For example, the Prime Minister, Kevin Rudd, was reported as saying, on 11 July 2009, that he would still favour climbing Uluru, despite the views of traditional owners and the Central Land Council that this would desecrate their sacred site.[1] Under these laws, if Uluru was located in NSW, thousands of tourists might face prosecution. Neither Queensland, nor Victoria, prohibit "desecration" of an Aboriginal object.

The government will acquire a new power to issue "remediation directions", but normal checks and balances in other legislation won't apply. The Department will only need to form a <u>subjective</u> opinion about a matter, in order to make an order.[2] This reduces the capacity of a court to review the grounds for the Department's actions. We urge the Department to revise these provisions to reflect the approach taken in the *Environmental Planning and Assessment Act* where particular factual circumstances must be found to exist in an objective sense (that is, they must <u>actually</u> exist,

[1] "PM rejects ban on climbing sacred site", *Sydney Morning Herald*, 11 July 2009; also available on the internet: <http://www.smh.com.au/travel/pm-rejects-ban-on-climbing-sacred-site-20090710-dg2k.html>.
[2] *National Parks and Wildlife Amendment Bill 2010*, proposed section 91K(1); 91L(1).

not just exist in the opinion of the decision-maker) before similar orders can be imposed.[3] Additionally, we are concerned that the provisions are not consistent with the *Environmental Planning and Assessment Act* which says that a person who has been unjustly subjected to an order may be compensated.[4]

The interests of land owners may not be considered when making decisions to issue, refuse or amend an Aboriginal heritage impact permit. The Bill sets out a long list of matters which must be considered by the Director-General when making decisions regarding the issue, refusal or amendment of an Aboriginal heritage impact permit. These matters contain separate points relating to the (legitimate) interests of Aboriginal people. Yet there is no acknowledgement of the interests of a private land owner on whose land an Aboriginal object or Aboriginal place may be located.

We have prepared (and attached) a more detailed paper that cites case law and specific interstate and federal legislation in support of our arguments. The paper also contains specific changes that can be made to the bill to address the concerns that we have raised.

We hope you will support amendments to the bill to deal with these concerns. We would welcome an opportunity to discuss these issues further.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

Encl.

[3] *Environmental Planning and Assessment Act 1979* s 121B.
[4] *Environmental Planning and Assessment Act 1979* s 121ZL.

Urban Taskforce
AUSTRALIA

National Parks and Wildlife Amendment Bill 2010

A policy paper from the Urban Taskforce analysing and recommending amendments to this proposed legislation.

3 March 2010

Urban Taskforce Australia Ltd. ABN: 21 102 685 174 | GPO Box 5396 Sydney NSW 2001
T 612 9238 3955 | F 612 9222 9122 | Level 12, 32 Martin Place Sydney NSW | Level 6, 39 London Circuit, Canberra ACT
admin@urbantaskforce.com.au | www.urbantaskforce.com.au

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.

We have previously commented direct to the Department of the Environment, Climate Change and Water on the draft exposure bill made available through a community consultation process last year. We acknowledge that some significant revisions have been made to the bill to address some of our concerns.

Nonetheless, the latest version of the bill, now before Parliament, contains provisions that will increase investment uncertainty in NSW. Minor amendments to the bill can rectify these issues, without compromising on the government's public policy objectives. The specific issues we have concern with are set out below.

1. There should be no power to vary conditions on an Aboriginal heritage impact permit, except at the request of the permit holder

We do not support the proposal for the Director-General to be given a new power to vary the conditions on any permit at any time.[1] This power does not exist in relation to the existing system of section 90 consents.

The risk premium required to secure debt and equity finance to develop land will increase if the conditions on the permit may be varied at will by the regulator. Any financer will factor in the potential that additional costs could be imposed which may nullify the benefits of the permit. Such conditions could even reduce the development potential of some land.

Development consents, mining leases, etc do not have provisions, generally authorising regulators to impose new conditions once a document has been issued. Generally, such a power is limited to circumstances where the permit-holder requests a variation to conditions.

In discussions with the Department we were told that applicants would benefit from ability for conditions to be varied at the Director-General's discretion. We were told that applicants would benefit, because requests for new conditions by applicants could now be accommodated.

With respect, the proposed changes are not advantageous to applicants. There is nothing in the current law preventing the Director-General from issuing a new consent, with new conditions, if an applicant seeks one. There are no procedural steps enshrined in existing legislation to issue an amended consent, so this process could be swift and easy, if the Department so wanted.
We *do* support the provisions that allow the new Aboriginal heritage impact permits to be amended at the request of the applicant (as per development consents).[2]

Recommendation 1

The Department should only be able to vary the conditions on an Aboriginal heritage impact permit when the variation is requested by the permit holder. This would require amendments to the proposed section 90D.

[1] *National Parks and Wildlife Amendment Bill 2010*, proposed section 90D.
[2] *National Parks and Wildlife Amendment Bill 2010*, proposed section 90E and parts of the proposed section 90D.

2. There should be no power to suspend or revoke a permit, except where there is corruption

We oppose the new power for permits to be revoked by the Director-General.[3] This power does not exist in relation to the existing section 90 consents. Like the proposed power to unilaterally amend permits, this power will significantly increase the risk of the permit system. It may make some projects, where there is a risk of political activity, much more difficult to finance.

The circumstances where development consents can be revoked have been limited in statute to instances of corruption. If there is to be a power to revoke permits it should be phrased in similar terms to that provision in the *Environmental Planning and Assessment Act*.[4]

We note that, under that legislation, issues of non-compliance are dealt with by way of orders, or if absolutely necessary, prosecution, rather than revocation. We cannot see why a different approach should apply under this legislation.

Recommendation 2

The proposed section 90G should be re-drafted to mimic section 124A of the *Environmental Planning and Assessment Act*. That is, there should be no power to suspend or revoke a permit, except where there is corruption

3. New offence provisions are based on an unreformed definition of "Aboriginal object" – the tougher penalty provisions necessitate a reformed definition

The bill creates new offences that are much broader than any existing offence in the Act. The penalties are much greater too. The new offence provisions are still based on an unreformed definition of "Aboriginal object". Since the definition of "Aboriginal object" is unusual and counter-intuitive, it is necessary to briefly explain how it works.

An "Aboriginal object" is defined to mean

> any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.

The definition is out-of-keeping with both comparable interstate and federal definitions and is so absurdly broad that it has the potential to make almost anyone in the community potentially subject to proceedings under the *National Parks and Wildlife Act* ("the Act").

It is hard to believe, but this definition is so broad that it means the following items are Aboriginal objects:

- items of very recent vintage – for example items that are 5, 10 or 20 or 50 years old;
- items that have no or only minor cultural significance – for example debris from an unexceptional recently abandoned Aboriginal home;

[3] *National Parks and Wildlife Amendment Bill 2010*, proposed section 90G.
[4] s 124A.

- Aboriginal items that are manufactured (i.e. produced by a machine, rather than by hand or manual processes);
- items that are no longer in their original setting – such as a 40 year old painting on display in a modern home (if the painting was not made for sale).

The definition is much broader than the equivalent federal definition, which is limited to objects of

> particular significance to Aboriginals in accordance with Aboriginal tradition (emphasis added).[5]

It is also much broader than the equivalent Victorian definition. In Victoria an object must be of "cultural heritage significance" and expressly excludes "manufactured" as well as handcrafted items for sale.[6]
In Queensland the definition is limited to items of

> *particular significance* to Aboriginal people because of either or both of the following—
>
> (a) Aboriginal tradition;
>
> (b) the history, including contemporary history, of an Aboriginal party for an area (emphasis added).[7]

In Tasmania the definition of "relic" excludes any items created after 1876.[8]
The sweeping nature of this definition has not gone unremarked by the judiciary. Justice Basten has said:

> Clearly the definition is deliberately formulated in broad terms which are apt to catch *anything in physical form* which bears witness to the presence of Aboriginal people anywhere within New South Wales (emphasis added).[9]

Chief Justice Spigelman has said that

> [t]he breadth of the definition of Aboriginal objects demonstrates that almost any land which has not been the subject of intensive development is likely to be affected.[10]

He also said that

> Aboriginal objects may be found *on land throughout the State*, including private land, especially in rural areas where there has not been intensive development (emphasis added).[11]

As a consequence of the potential, very wide, application of the statutory scheme, there is little legal certainty. In practice, the liability of any individual who is likely to encounter an Aboriginal object in their daily business is determined by the discretion of a potential prosecuting authority (i.e. an officer Department of Environment, Climate Change and Water) rather than the text of an Act of Parliament.

The exercise of this discretion is not governed by the neutral application of "blind justice", but is instead subject to the personal views of individual public servants, the identity of the alleged offender, the political influence and media skills of the alleged victims.

The unpredictability of this statutory regime significantly elevates the risk premium required for greenfield land development in NSW.

---

[5] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s3
[6] *Aboriginal Heritage Act 2006* (Vic) s4
[7] *Aboriginal Cultural Heritage Act 2003* (Qld) s10.
[8] *Aboriginal Relics Act 1975* (Tas) s 2(4).
[9] *Country Energy v Williams; Williams v Director General National Parks and Wildlife Service* [2005] NSWCA 318 [29].
[10] *Country Energy v Williams; Williams v Director-General National Parks and Wildlife Service* [2005] NSWCA 318, 446 (Spigelman CJ).
[11] Ibid.

The current law manages the very broad definition of "Aboriginal object" by providing for relatively minor penalties for breach of the provision. Currently a person cannot be imprisoned for disturbing or excavating any land for the purpose of discovering an Aboriginal object. The fine they face is a minor one, $11,000 for individuals and $22,000 for corporations.[12] Under the current law a person can be imprisoned for knowingly destroying, defacing or damaging an Aboriginal object for up to 6 months, and can be fined to the tune of $22,000.[13]

The new maximum penalties of between $275,000 and $1.1 million coupled with terms of imprisonment ranging from one to two years are clearly more onerous. In this situation, the government should have taken steps to reform the definition of "Aboriginal object" to make clear that only items of historical and cultural significance were captured by the tough new penalty provisions.

Recommendation 3

The existing definition of "Aboriginal object" - which is used by the new penalty provisions in the proposed section 86 (Schedule 1 [32]) – should be revised to refer to items of particular historical cultural significance and expressly exclude modern items.

4. The defence of "honest and reasonable mistake of fact" for strict liability offences has not been adequately preserved

The existing penalty provisions in the Act, on private land, make it an offence to:

- disturb or excavate any land *for the purpose* of discovering an Aboriginal object;[14]
- *knowingly* destroy, deface or damage an Aboriginal object or Aboriginal place.[15]

Both of these existing offence provisions require that the offender intended to do what they were doing. A court would have to be satisfied that they weren't mistaken, or acting out of ignorance. Appropriately, a term of imprisonment is permitted for those who breach these provisions of the Act.

However, the Department is now proposing to introduce what it calls a "strict liability" offence in relation to harming an Aboriginal object or place.[16] This means it would no longer be necessary for the Department to prove that a person acted with intent or knowledge of what they were doing.

A normal "strict liability" offence still permits an accused person to plead a defence of "honest and reasonable mistake of fact". This would mean that a person who, having turned their mind to the issue, reasonably and honestly, concluded that an object was not an Aboriginal object, could not be convicted under the Act. Regretfully, the proposed provision does not respect this principle because it seeks to set aside this standard defence.

Instead, the new provisions (at least in some respects) are "absolute liability" offences which expressly apply, even when the accused person has a reasonable belief that an object was an Aboriginal object or an Aboriginal place was such a place. Offences of this kind have come under heavy criticism by the judiciary, because they require a person to go to unreasonable (and in many cases impossible) efforts to be certain they are not breaching the law.[17]

[12] s 86; s 175.
[13] s 90.
[14] s 86(a).
[15] s 90.
[16] *National Parks and Wildlife Amendment Bill 2010*, pproposed section 86(2); section 86(4).
[17] See the commentary by Justice Sully in *Hawthorn (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120, 239-240.

It is unnecessary for the Department to introduce an absolute liability defence, because strict liability offences are strict enough. In strict liability, reliance upon assurances given by others does not excuse a defendant.[18] Wilful blindness is also not an excuse.[19]

The proposed statutory provision clearly removes the requirement for any knowledge of the existence of an "Aboriginal object"[20] or "Aboriginal place".[21] We note that a defence of "due diligence" has been created, and draft "due diligence guidelines" are prepared that make reference to the defence of "honest and reasonable mistake of fact". However, the guidelines are not part of the Act or the Regulation and are an inadequate vehicle for re-instating this fundamental common law defence. In any event, the defence of "due diligence" only applies to the "Aboriginal object" offence and does not apply to the "Aboriginal place" offence.

Recommendation 4

The common law defence of "honest and reasonable mistake of fact" should be retained in relation to all strict liability offences, including those related to Aboriginal places. This can be achieved by either:

1. omitting the text "(whether or not the person knows it is an Aboriginal object)" from the proposed section 86(2) and (4); or
2. expressly listing the defence of "honest and reasonable mistake of fact" in the proposed section 87.

5. Information on the location of declared "Aboriginal places" should appear on planning (section 149) certificates

The Act sets out to protect Aboriginal places and create offences relating to those places, but information about which places have been designated as "Aboriginal places" is hard to come by. For example in the public exhibition material for this consultation process, a link was provided for more information on Aboriginal places.[22] The linked web page contained a loose assortment of studies about potential Aboriginal places, vague descriptions, but no single coherent reliable list of such places.

We acknowledge the government's proposal to create a public register of "Aboriginal places" (the proposed section 188F), however, this information still will not appear on the "planning certificate" (commonly known as a "section 149 certificate") issued under the *Environmental Planning and Assessment Act*. Planning certificates are intended to warn owners and buyers of land of statutory restrictions on the use and development of land. It would be a serious oversight to strongly toughen up the penalty regime for Aboriginal places, without also ensuring that this information was easily accessible through the existing mechanism for warning property owners of potential obligations.

Recommendation 5

There should also be an express requirement for Aboriginal places to be identified on "section 149" planning certificates, as are critical habitat declarations (*Environmental Planning and Assessment Regulation 2000*, Schedule 4).

[18] *Mosman Municipal Council v Menai Excavations Pty Ltd* (2002) 122 LGERA 89 at 96; *Mcdonagh on behalf of Great Lakes Council v Birdon Dredging Pty Ltd* 99 LGERA 198.
[19] *Caralis v Smyth* 1/7/1988 NSWCCA Cited (1988) 65 LGRA 303.
[20] *National Parks and Wildlife Amendment Bill 2010*, pproposed section 86(2).
[21] *National Parks and Wildlife Amendment Bill 2010*, proposed section 86(4).
[22] See <http://www.environment.nsw.gov.au/nswcultureheritage/PlacesOfSignificance.htm>.

6. Aboriginal places should not be declared over private land unless the land owner receives compensation

The restrictions that may be placed on private owned land as result of the declaration of an "Aboriginal place" under the Act are significant. The new penalty provisions further extend the obligations of private land owners by prohibiting 'desecration' of site (see discussion below). Consistent with our views on heritage declarations, and down-zoning decisions, we believe that property owners should be compensated for any loss of land value when a portion of their land is declared as an "Aboriginal place".

Recommendation 6

The declaration of an "Aboriginal place" on private land should entitle a property owner to seek compensation from the State for any loss of property value. Queensland legislation can be used as a model, in this respect (*Sustainable Planning Act 2009*, Chapter 9, Part 3).

7. The legislation should not be extended to include "desecration", the prohibition of destruction, defacement and damage is sufficient

The legislation is to be extended to include "desecration".[23]

It's clearly the intention of the Department, that "desecration" means something more than destruction, defacing or damaging – otherwise there would be no need to include this term.

This may be in recognition of the fact that "desecrating" relates to religious and/or spiritual values. Regretfully, most members of the Australian community are unaware of the religious and spiritual particulars of traditional Aboriginal society. It is possible to act honestly and reasonably, in relation to an object or place and still, nonetheless, cause offence to Aboriginal people. Obviously such a situation is to be avoided, but if it occurs without destruction, defacement or damage to an Aboriginal object or Aboriginal place, a person should not be guilty of a crime.

There is no consensus in our community favouring the prohibition of activities that constitute desecration, but not actual damage, in relation to Aboriginal heritage. For example, the Prime Minister, Kevin Rudd, was reported as saying, on 11 July 2009, that he would still favour climbing Uluru, despite the views of traditional owners and the Central Land Council that this would desecrate their sacred site.[24]

Neither Queensland, nor Victoria, prohibit "desecration" of an Aboriginal object. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) – which only applies to objects and places, that have been "declared" for the purposes of the legislation - *does* include the concept of "desecration".

In a well known case concerning the Hindmarsh Island bridge proposal, the Federal Court of Australia observed that conduct may be considered "desecration" even when a given activity was "desecration" for reasons that were "irrational" or "difficult to comprehend".[25] It is an unreasonable

[23] *National Parks and Wildlife Amendment Bill 2010*, proposed section 86(1); section 86(4).
[24] "PM rejects ban on climbing sacred site", *Sydney Morning Herald*, 11 July 2009; also available on the internet: <http://www.smh.com.au/travel/pm-rejects-ban-on-climbing-sacred-site-20090710-dg2k.html>.
[25] *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 [395]-[396] (Von Doussa J).

imposition to hold someone criminally liable for behaviour when it is possible there is no 'rational' reason why their behaviour should be unacceptable.

We have the greatest respect for Aboriginal customs and beliefs, but we do not think a person should be found guilty of a criminal offence for failing to adhere to such beliefs when there was no actual damage, defacement or destruction to any Aboriginal object or place.

Recommendation 7

The proposed section 86(1) and (4) should be amended to omit the text "or desecrate".

8. Remediation directions give DECCW too much power over private property; the checks and balances of environmental planning legislation should also apply to DECCW

We are concerned that the proposed remediation directions are triggered when there is a suspicion that an offence has been committed and apply, even if subsequently no charges are laid, or a person is acquitted of the charges made against them.

We also note that the Director-General merely needs to form a subjective opinion about a matter, in order to make an order.[26] This reduces the capacity of court to review the grounds for the Department's actions. We urge the Department to revise these provisions to reflect the approach taken in the *Environmental Planning and Assessment Act* where particular factual circumstances must be found to exist in an objective sense (that is, they must actually exist, not just exist in the opinion of the decision-maker) before similar orders can be imposed.[27]

Additionally, we are concerned that the provisions are not consistent with the *Environmental Planning and Assessment Act* which says that a person who has been unjustly subjected to an order may be compensated.[28] A provision of this kind is particularly important, given that a remediation order will not be suspended, pending the resolution of an appeal in the Land and Environment Court.[29] If an order required immediate action, and the need for the order was unsubstantiated or the terms of the order were unreasonable, an applicant would be left with only a pyrrhic victory, because they would have no right to compensation for the costs they have already incurred in complying with such an order.

Recommendation 8

The proposed sections 91K(1) and 91L(1) should be revised to reflect the provisions of sections 121B and 121ZL of the *Environmental Planning and Assessment Act 1979*. That is, particular factual circumstances must actually exist (not just exist in the opinion of the decision-maker) before orders can be imposed. Additionally the Court should be able to order compensation where the need for the order is found to be unsubstantiated or the terms of the order are found to be unreasonable.

[26] *National Parks and Wildlife Amendment Bill 2010*, proposed section 91K(1); 91L(1).
[27] *Environmental Planning and Assessment Act 1979* s 121B.
[28] *Environmental Planning and Assessment Act 1979* s 121ZL.
[29] *National Parks and Wildlife Amendment Bill 2010*, proposed section 91T(2).

9. Criminalising a failure to notify DECCW is inappropriate if the definition of "Aboriginal object" is not reformed

The existing section 91 requires that the Department be notified of the existence of an Aboriginal object that is Crown property or real property. This includes any Aboriginal object that was abandoned *since* 1975.[30]

Developers will generally apply for an Aboriginal heritage impact permit and therefore will carry out archaeological studies, so, in-principle, section 91 does not present a major issue for us.

The practical problem for section 91 arises for property owners generally. The very broad nature of the definition of "Aboriginal object" means that a wide variety of items should be properly notified to DECCW, but have not been so. Most property owners will be unaware that relatively modern Aboriginal objects that have been abandoned on their property since 1975 are actually property of the crown. There are also issues in relation to real estate. For example, has the Aboriginal Housing Office notified the Department, under section 91, of the location of each of its homes?

The bill proposes to introduce a penalty provision in the event that notice is not given.[31] Given that section 91 applies to a very wide range of modern items, including modern refuse, a breach of section 91 should not be a criminal offence, unless its application is narrowed. This can be achieved by barrowing the terms of section 91 or reforming the definition of "Aboriginal object".

Recommendation 9

Either:

1. Schedule 1 [34] should be omitted from the bill;
2. section 91 should be revised to only include items of particular historical cultural significance and excluded modern items; or
3. the definition of Aboriginal object should be reformed (as per the recommendation above).

10. A permit-holder should not be criminally liable for the actions of third parties, where holder's behaviour was reasonable

The Bill creates a strict liability criminal offence, with a term of imprisonment, if the terms of an Aboriginal heritage impact permit are violated by anyone, not just a permit holder.[32] A defence is created, excusing a permit holder from liability if they can show the contravention was caused by another person and the holder took "all reasonable steps" to prevent the breach of the permit.[33] However, the defence is not available if the person who breached the permit is a contractor or sub-contractor of the permit-holder.

It is unjust and inconsistent with normal legal principles to find a person criminally liable for the actions of a contractor or subcontractor when that person can prove that they took all reasonable steps to prevent a breach. The text of the Bill clearly contemplates that a person must take unreasonable, or impossible, action to avoid criminal liability. There can be no argument that this is good public policy,[34] and defence should be broadened so that it is available in relation to any third parties.

[30] *National Parks and Wildlife Act 1974* s 83(1)(b).
[31] *National Parks and Wildlife Amendment Bill 2010*, Schedule 1 [34].
[32] See the proposed s 90J of the Bill.
[33] The proposed s 90J(3).
[34] See the commentary by Justice Sully in *Hawthorn (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120, 239-240.

A contractor or subcontractor who acts outside of their authority and harms an Aboriginal object or place would be able to be prosecuted under the proposed section 86.

Recommendation 10

Where a permit-holder is prosecuted for a breach of a permit's conditions, it should be a valid defence that those actions were caused by a contractor or sub-contractor and the permit-holder took reasonable steps to prevent the contravention. This change would involve omitting the words "licensee, contractor or sub-contractor" from the proposed section 90J(3).

11. The interests of land owners should be considered when making decisions to issue, refuse or amend an Aboriginal heritage impact permit

The Bill sets out a long list of matters which must be considered by the Director-General when making decisions regarding the issue, refusal or amendment of an Aboriginal heritage impact permit.[35] These matters contain separate points relating to the (legitimate) interests of Aboriginal people.[36] Yet there is no mention of consideration of the interests of a private land owner on whose land an Aboriginal object or Aboriginal place may be located. The Bill goes onto prohibit the Director-General from considering any other matters not expressly listed.[37]

Of course, the interests of a private land owner should not necessarily trump the interests of Aboriginal people in a given case. Nonetheless, a private land owner should be entitled to expect that their interests are, at least, worthy of consideration by the Director-General. The bill, as drafted, mean the needs of a private land owner are irrelevant to the Director-General when making decision regarding Aboriginal heritage impact permits.

While the bill does allow the Director-General to consider "the social and economic consequences of making the decision", which may include social and economic impacts on a private property owner, there is no requirement to specifically consider those impacts. Indeed, the ground of consideration is very general, and it's possible the Director-General may consider it satisfied if he or she merely considers the economic and social consequences to the community as a whole, without giving special attention to the consequences for a land owner.

We also note that the bill does require and permit the Director-General to consider material submitted as part of a permit application.[38] We suspect that DECCW will argue that permit applications are made by or on behalf of land owners, and therefore, their interests will be documented in the application and considered in that way. However, this ignores the fact that DECCW is expressly seeking the power to amend or revoke permits at its own initiative, without any application being made by a permit holder.[39]

Recommendation 11

Where a permit-holder is prosecuted for a breach of a permit's conditions, it should be a valid defence that those actions were caused by a contractor or sub-contractor and the permit-holder took reasonable steps to prevent the contravention. This change would involve omitting the words "licensee, contractor or sub-contractor" from the proposed section 90J(3).

[35] *National Parks and Wildlife Amendment Bill 2010*, proposed section 90K(1).
[36] *National Parks and Wildlife Amendment Bill 2010*, proposed section 90K(1)(b)-(f)
[37] *National Parks and Wildlife Amendment Bill 2010*, proposed section 90K(2).
[38] *National Parks and Wildlife Amendment Bill 2010*, proposed section 90K(1)(h).
[39] *National Parks and Wildlife Amendment Bill 2010*, proposed sections 90D(3); 90G.

12. Further information

The Urban Taskforce is available to further discuss the issues outlined in this submission.

Please contact:

Aaron Gadiel
Chief Executive Officer
GPO Box 5396
SYDNEY NSW 2001

Ph: (02) 9238 3955
E-mail: admin@urbantaskforce.com.au
Website: www.urbantaskforce.com.au