Urban Taskforce
AUSTRALIA

13 September 2010

Mr Sam Haddad
Director General
Department of Planning
GPO Box 39
Sydney NSW 2001

Dear Mr Haddad

Re: World Heritage in NSW Discussion Paper

We refer to the above paper, issued by the Department of Planning in August.

The Urban Taskforce places a high value on NSW's important world heritage properties. Without question, decision-makers in the planning system should consider the world heritage values of these places and structures. We note that this has been taking place for many years without apparent difficulty.

We are concerned at the proposal for yet another state environmental planning policy (SEPP). A new World Heritage SEPP is not justified. It will only further complicate a confused and multilayered planning system. If another SEPP is to be created, it will be the 44th SEPP, and be yet another document that will need to be routinely checked for its application to development sites across NSW.

Our specific comments are set out below.

1. **The existing arrangements for assessment of world heritage impacts are comprehensive, and the SEPP does not simplify them**

   The *Environment Protection and Biodiversity Act 1999* (Cth) (("the EPBC Act") forbids any person from taking any "action" would have a significant impact on the world heritage values of a declared world heritage property.[1] The EPBC Act provides a framework for the issuing of approvals for the approval of such an "action".[2] There is also a process where a proponent can establish whether or not approval of proposed action is required under the EPBC Act (i.e. to decide whether it is a "controlled action").[3] A Federal-NSW bilateral assessment agreement is in place which allows the assessment regimes under the *Environmental Planning and Assessment Act 1979* (NSW) (the EP&A Act) to be automatically accredited under the EPBC Act.[4]

   This bilateral agreement makes it clear that, under the existing provisions of the EP&A Act, there is an obligation on all consent authorities to consider the impacts of the development on the environment (including biophysical, social and economic factors) including impacts on world heritage values of a world heritage property.[5] There is a requirement for the NSW Minister, the Director-General or the consent authority to issue guidelines to proponents of controlled actions

[1] s 12.
[2] Part 9.
[3] Part 7.
[4] *Agreement between the Commonwealth of Australia and the New South Wales Government under section 45 of the Environment Protection and Biodiversity Conservation Act 1999 relating to Environmental Impact Assessment*, January 2007.
[5] Schedule 1, Part A.

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to ensure that material prepared by the proponent as part of the assessment addresses the necessary federal requirements.[6] These guidelines may be generic or may be issued on a case-by-case basis. The consent authority must provide the Commonwealth with a copy of the assessment report that addresses the relevant impacts of the controlled action. Aside from the Opera House, where an 'approvals bilateral' agreement is in place, only the Commonwealth may issue an approval authorising an action that would have a significant impact on the world heritage values of a declared world heritage property.

Nothing in the discussion paper suggests that the SEPP would remove the separate need for guidelines to be issued. Given that guidelines would still be required, we cannot see what value a World Heritage SEPP could add. In short, **the substance of any new provisions of the SEPP is more likely to merely duplicate the matters that will be covered in guidelines issued under the bilateral agreement.**

New provisions to govern the development assessment process should only proceed if the existing requirement for guidelines to be issued and followed is revoked. This would require an amendment to the bilateral assessment agreement.

2. <u>State legislation already requires consideration of world heritage values</u>

The discussion paper claims that:

> There is currently no State legislation requiring consideration of World Heritage values in the development assessment or plan making process.[7]

This is simply not correct.

Section 79C(1) of the EP&A Act requires that:

> In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application .... the likely impacts of that development, including environmental impacts on ... natural and built environments and social and economic impacts in the locality, ...the suitability of the site for the development, ... the public interest.

As was noted in the second reading speech when section 79C was introduced:[8]

> Within this context is the streamlining and rationalisation of the criteria embodied in the current [now former] section 90 of the Act and applied in assessing development applications. **The proposed section 79C contains a** reduced and **general list of considerations**.
>
> The `public interest' test is applied in the assessment of applications.
>
> This test is consistent with the aims and objectives of the Act. **The `public interest' test will provide necessary flexibility for a consent authority to consider matters that may not be covered in the new list of considerations** (bold added).

Section 79C was introduced to simplify the more detailed and perspective list that preceded it. The world heritage values of a site are clearly relevant to the general items in the list of considerations, that is:

- "the suitability of site for development";
- "the likely impacts on natural and built environments"; and
- "the social ... impacts in the locality".

Even if this is thought to be inadequate, the obligation to consider the "public interest" allows a consent authority to consider relevant matters that fall outside of the list of considerations.

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[6] Ibid.
[7] NSW Department of Planning, *World Heritage in NSW Discussion Paper* (2010), 4.
[8] The Hon. Craig Knowles, Minister for Urban Affairs and Planning, *Environmental Planning and Assessment Amendment Bill 1997*, 15 October 1997.

There can be no real doubt that a development consent relating to a world heritage site that does not consider the world heritage values of the site would be unlawful. Such a consent could be struck down for either or both of the following two reasons:

- the world heritage values of a site would be a relevant consideration that a consent authority was bound to take into consideration under section 79C; and/or
- the consent authority's omission would be so unreasonable that no consent authority could properly consider the omission to be a reasonable exercise of its functions.

There is no need to expressly prescribe everything that a consent authority must consider when undertaking development assessment. Otherwise the list would be literally endless. There should be room for a consent authority to exercise its own common sense.

2. <u>While the proposed SEPP will consolidate provisions from existing environmental planning instruments, this is not the best way forward</u>

The discussion paper proposes the consolidation of site-specific provisions in various environmental planning instruments into a single World Heritage SEPP. We think this is the wrong approach.

An extra SEPP is just another document that will need to be routinely checked by town planners and lawyers for its possible impact on development sites across NSW.

A better approach would be to include these provisions in existing well-established environmental planning instruments that are already routinely checked: that is, local environmental plans. There is less chance that site-specific provisions, in local plans, will be missed when owners and prospective owners of sites are attempting to establish possible development constraints.

3. <u>A SEPP is not the right mechanism for regulating the preparation of future environmental planning instruments</u>

The discussion paper says that:

> In preparing an environmental planning instrument that will apply to a World Heritage site under Part 3, Division 2 or Part 3, Division 4 of the Environmental Planning and Assessment Act 1979 ('EP&A Act), the SEPP will require the Minister or the relevant planning authority to consider how that proposed instrument impacts on the world heritage values or the ability of the site to demonstrate to further generations the world heritage values.[9]

This is a major about-face in the Department of Planning's approach. In 2008, the Department advocated the removal of provisions in environmental planning instruments' that purported to regulate the plan-making function, on the basis that such provisions were no longer necessary with the advent of the new gateway process.[10]

In any event, it is unlikely that provisions in a SEPP are capable of binding future decision-making in the exercise of their plan-making powers under the EP&A Act. For example, in *Coffs Harbour Environment Centre Inc v Ministers for Planning & Coffs Harbour City Council* [11] the Court of Appeal found that it was not legally possible to entrench a provision in an environmental planning instrument so as to inhibit the operation of later inconsistent planning instrument.[12] New SEPPs now routinely include clauses declaring their paramountcy over all other environmental planning instruments. [13]

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[9] NSW Department of Planning, *World Heritage in NSW Discussion Paper* (2010), 4.

[10] NSW Department of Planning, *Consultation Guide on the proposed SEPP (Repeal of Concurrence and Referral Provisions) 2008* (2008).

[11] (1994) 84 LGERA 324.

[12] By Sheller JA expressly at 348/349 and it seems also by Kirby P at 333.

[13] See, for example: *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*, cl 5(4); *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, cl 5(3); *State Environmental Planning Policy No 53—Metropolitan Residential Development*, cl 5(2); *State Environmental Planning Policy No 71—Coastal Protection*, cl (5); *State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes)*, cl 7(1); *State Environmental Planning Policy No 6—Number of Storeys in a Building*, cl(5); *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development*, cl 6; *State Environmental Planning Policy No 64—Advertising and Signage*, cl 7; *State Environmental Planning Policy No 62—Sustainable Aquaculture*, cl 6(1); *State Environmental Planning Policy No 55—*

The proper mechanism to instruct local councils and other "relevant planning authorities" on the manner in which they exercise their plan-making powers is via section 117 directions.[14] In particular, *Local Planning Direction 2.3* already deals with heritage issues, so surely a minor tweaking of this section 117 direction would be sufficient to ensure world heritage values are addressed in any plan-making process?

In the event that it is necessary to establish principles governing the plan-making process for world heritage sites, the appropriate mechanism is an amendment to the existing section 117 direction on heritage matters. A new SEPP would be unnecessary and inappropriate.

Thank you for the opportunity to make a submission on your proposed policy direction.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

Remediation of Land cl 6(1); *State Environmental Planning Policy No 4—Development Without Consent and Miscellaneous Exempt and Complying Development*, cl 5; *State Environmental Planning Policy No 47—Moore Park Showground*, cl 4(2); *State Environmental Planning Policy No 41—Casino Entertainment Complex*, cl 7; *State Environmental Planning Policy No 36—Manufactured Home Estates*, cl 4(1); *State Environmental Planning Policy No 30—Intensive Agriculture*, cl 4; *State Environmental Planning Policy No 21—Caravan Parks*, cl 5(1) and ; *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*, cl 6.

[14] *Environmental Planning and Assessment Act 1979* (NSW) s 117(2) and 117(2B).