Urban Taskforce
AUSTRALIA

9 May 2011

The Hon. Barry O'Farrell, MP
Premier of NSW
Level 40 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Premier,

**Re: *Lobbying of Government Officials Bill 2011***

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 are writing to alert you to an unintended consequence of the above bill, which was introduced into Parliament last week.

The object of this bill is "to prohibit the giving or receipt of success fees for lobbying by lobbyists who lobby Ministers, Parliamentary Secretaries and other Government officials".[i] We support this objective and congratulate the government for taking this initiative.

Key provisions of the bill related to the payments made to lobbyists. However, **section 5(3) goes further than the government's stated objective. It applies to <u>any person</u> other than lobbyists.** This is the provision that concerns us.

There is a significant risk that section 5(3) of the bill will criminalise commercial agreements routinely entered into by property developers and land owners.

Property developers often acquire an interest in land on a "call option" basis. This means a developer pays for <u>the right</u> to buy a property (the exercise of the option). The right usually expires within a set period or upon the occurrence of a certain event. A typical event which might trigger the expiry of an option agreement is a rezoning or development approval.

If a developer exercises an option, the developer and the landowner then must enter into a further agreement (which is generally annexed to the original option agreement). This new agreement might be a contract for the sale of land, a lease, or a development agreement.

This method of land acquisition raises no public policy concerns. The arrangement is common, because it allows developers to make a modest payment for exclusive right to the development potential of the land, while they pursue the uncertain process of rezoning or development approval. Only if the rezoning or approval process is successful, do they then need to source the significant capital required to fund the exercise of the option.

Without call option agreements, developers would have to acquire potential development sites much earlier, dramatically increasing the capital requirements for what are highly uncertain and preliminary steps in the development process.

The proposed section 5(3) criminalises <u>any person</u> who receives, or agrees to receive, "a success fee" for the "lobbying" of a Government official. The phrase "success fee" and the word "lobbying", used in section 5(3) have been given special definitions by the bill.

A "success fee" includes any "valuable consideration".[ii] This extends to any right, interest, profit, or benefit that may accrue to a party.[iii] This would include, for example, a developer's right to purchase or develop land. If the exercise of an option by a developer is contingent on a rezoning

being granted or a development proposal approved, then the benefits to a developer under the option agreement may be deemed to be a "success fee".

Under the bill "lobbying" of a government official means communicating with an official for the purpose of representing the interests of another person. However, most people who "lobby" do so for more than one reason. A *professional lobbyist* lobbies for the benefit of their client and for their fee. A *developer* lobbies for an approval, for the benefit of the landowner (who will be paid a handsome price if the developer exercises the option) and for themselves (because they will acquire the right to earn development profits of the land). The scheme of the bill clearly intends that communication undertaken for more than one purpose will still, nonetheless, be criminalised.

In short, **we are concerned that the government may be on the verge of unwittingly:**

- **voiding a large number of option agreements already entered into, in good faith, by developers and land owners; and**
- **criminalising a routine industry practice that presents no probity concerns.**

While the bill allows the government to make regulations narrowing the definition of "lobbyist", this cannot address our concerns with section 5(3) of the bill. That's because this provision only applies to people who are not lobbyists.

We ask that the government consider either:

- removing the proposed section 5(3) from the bill; or
- amend the bill to clarify that option agreements (to purchase, lease or develop land) are excluded from the provisions of section 5(3).

We would welcome the opportunity to meet with you or your officers to further discuss this matter.

Yours sincerely
**Urban Taskforce Australia**

Aaron Gadiel
Chief Executive Officer

[i] Explanatory Memorandum.
[ii] Proposed s 4.
[iii] *Currie v Misa* (1875) LR 10 Ex 153,162.