Urban Taskforce
AUSTRALIA

27 October 2010

The Hon. Catherine Cusack, MLC
Shadow Minister for Climate Change and Environmental Sustainability
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Ms Cusack

Re: Disallowance of portions of the
National Parks and Wildlife Amendment (Aboriginal Objects and Aboriginal Places) Regulation 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 are writing to you to express our concern at the motion moved by the Hon. Ian Cohen MLC to disallow clause 80B and 80C(9) of the above-mentioned regulation. We understand that this matter may come on for debate tomorrow.

We ask that you oppose the motion moved by Mr Cohen, and in doing so, that you support the continuation of the regulation, as published by the government.

1. Clause 80B – low impact defence

This clause of the regulation creates a defence to the "strict liability" offence in section 86 (2) of the Act (being the offence of harming an Aboriginal object).

This strict liability offence is new and came into effect on 1 October 2010. It is a substantial toughening of criminal penalties with enhanced protection for Aboriginal objects. Those in breach of the strict liability offences face maximum fines of between $110,000 and $220,000.

This strict liability offence can be harsh because a person can be found guilty of a crime whether or not the person knew an object was an Aboriginal object.

It's very possible that people going about their ordinary business could innocently harm an "Aboriginal object". That is because the law gives a very broad definition to the phrase. 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).

The sweeping nature of this definition has not gone unremarked by the judiciary. Justice Basten has said:

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> 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).[1]

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.[2]

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).[3]

As a consequence of the potential, very wide, application of the new offence provisions, there is already very little legal certainty. The defence provisions in clause 80B are essential if there is to be the slightest shred of equity and fairness for people who have acted honestly, but nonetheless have fallen short of the sweeping strict liability provisions of the newly amended Act. In broad terms, the defence provisions relate the routine business of land management and infrastructure maintenance/repair.

Without these defences, property owners would be forced need to go through a due diligence process to determine whether the act or omission constituting the alleged offence would harm an Aboriginal object and show that they reasonably determined that no Aboriginal object would be harmed. This would hugely complicate routine property maintenance and modification both in rural and urban settings (recalling that properties in which Aboriginal persons previously resided are likely to be home to Aboriginal objects, even in a modern urban context). Examples of the type of works that would (if clause 80B were reappealed) require a due diligence assessments are those that relate to:

- access ramps;
- aerials and antennae;
- air-conditioning units;
- animal shelters;
- aviaries;
- awnings, blinds and canopies;
- balconies, decks, patios, pergolas, terraces and verandahs;
- barbecues;
- bollards;
- cabanas, cubby houses, ferneries, garden sheds, gazebos and greenhouses;
- carports;
- clothes hoists and clothes lines;
- communications dishes;
- driveways;
- earthworks and retaining walls;
- farm buildings and structures;
- fences;
- flagpoles;
- fowl and poultry houses

[1] *Country Energy v Williams; Williams v Director General National Parks and Wildlife Service* [2005] NSWCA 318 [29].
[2] *Country Energy v Williams; Williams v Director-General National Parks and Wildlife Service* [2005] NSWCA 318, 446 (Spigelman CJ).
[3] Ibid.

- garbage bin storage enclosures;
- hot water systems;
- landscaping structures;
- letterboxes;
- minor internal building alterations;
- pathways and paving;
- playground equipment;
- portable swimming pools and spas and child-resistant barriers;
- privacy screens;
- rainwater tanks;
- scaffolding, hoardings and temporary construction site fences;
- screen enclosures (of balconies, decks, patios, pergolas, terraces and verandahs);
- shade structures of canvas, fabric, mesh or the like;
- signage;
- skylights, roof windows and ventilators;
- water features and ponds; and
- windmills. [4]

This would make the routine business of owning and caring for property incredibly complex. Even the owner of a suburban home in Sydney would have to carry out a due diligence process to satisfy themselves that there were no Aboriginal objects at risk when erecting a letterbox! This would be ridiculous. The low impact defence is a sensible provision given the strict liability nature of the Act's new criminal penalties and the extremely broad definition of Aboriginal objects.

2. Clause 80C(9) – avoiding legal challenges on a consultation process

Clause 80C sets out the consultation process that an intending applicant must undertake before applying for an Aboriginal heritage impact permit.

In our experience, applicants understand the need to work closely with Aboriginal people if they expect to receive an approval to carry out works in areas where Aboriginal heritage items may be present. Property developers in particular usually go to some lengths to address concerns and issues raised by the traditional Aboriginal custodians of the land.

In some respects, the process prescribed by clause 80C is helpful because it requires industry to consult with named persons identified by a defined list of entities. As an industry we have no desire to pick and choose who we talk to – we would prefer government to establish a clear direction as to which representative groups are legitimate and ensure that any public rights to participate in processes are accorded to them and them only. Nonetheless the process in the clause is complex, highly procedural, and therefore it is possible for minor errors to occur. Such an error could be as simple as giving someone 26 days to comment on a document, instead of the prescribed 28 days.

When government prescribes lengthy procedural steps before a decision is made, it is conventional for a provision to be inserted to make clear that failure to comply with those steps does not, by itself, invalidate a decision.[5] Without such provisions extensive litigation can be expected about the most minor and inoffensive procedural matters. Clause 80C(9) is a sensible

[4] These matters are all currently low-impact matters under cl 80B(1)(e), which effectively invokes the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*.

[5] For example: *Subordinate Legislation Act 1989* s9; *Environmental Planning and Assessment Act 1979* s 102; *Threatened Species Conservation Act 1995* s 52.

provision that prevents technical legal challenges to the validity of permits around the consultation process. The best independent check on the adequacy of an applicant's consultation process will be the Department of the Environment, Climate Change and Water. They will refuse to issue a permit if they feel that the process adopted by an applicant was inadequate.

It is worth noting that the preference in our industry is to reach agreements with the appropriate local representatives of Indigenous communities affected by individual projects. Nonetheless this process is sometimes undermined by apparently unrepresentative individuals who are still able to access public processes and use them to secure leverage for their claims. There is a history of such individuals launching legal action to strike down validity of approvals based on perceived flaws in the *process*, rather than any problem in the *substance* of a decision. Such individuals could be expected to exploit the situation if clause 80C(9) were repealed.

We appreciate the opportunity to provide you with our thoughts on the disallowance motion. We would welcome any opportunity to further discuss these issues, answer questions or provide further comment.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer