Urban Taskforce
AUSTRALIA

22 March 2011

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

Dear Mr Haddad

Re: Changes to the Standard Instrument made in February 2011

As you are aware the Standard Instrument is a document that sets out the template for all new local environmental plans (LEPs).[1] Standard Instrument compliant LEPs are now in place in 33 local council areas.

On the 25 February 2011 significant changes were again made to the Standard Instrument.[2] With one exception the changes are generally a further effort to undermine the positive intent behind the original 2006 text of the Standard Instrument.

Of course, this is only the latest re-write of the Standard Instrument. It follows radical changes to the document just before Christmas in 2007 - changes that were subject to extensive consultation with councils, but not with industry.

In this most recent occasion, the Department of Planning *did* publicly exhibit an options paper in the first half of 2010. We made a detailed submission in response to that paper.[3] Following our submission we met with yourself and Mr Tom Gellibrand, your Deputy Director-General. Your time was limited, so there was not an opportunity to discuss many of our concerns in detail. Instead we were assured that before the Standard Instrument was changed, a further meeting with senior staff, with a more generous allocation of time, would take place to work through the issues. Disappointingly, this never occurred. Instead the changes were published, without warning, as a fait accompli.

We note that many of the more illogical proposals flagged in last year's options paper were not implemented in the most recent round of changes. We thank you for that. Nonetheless, many of the original proposals have survived. So much so that we can safely say the structure of the Standard Instrument is even more hostile to the urban development needs of our community.

Our most significant concerns are set out below.

1. **<u>Reduced transparency in relation to "Aboriginal places of heritage significance" and a new power for them to be declared over private land without state government approval</u>**

   As a result of February's changes, the existence of an "Aboriginal place of heritage significance" will no longer automatically be disclosed in the heritage map of an LEP. Instead it may be hidden in a heritage study adopted by council and not expressly mentioned in an LEP at all. What's more the heritage study only needs to disclose the "general location" of the place.

[1] *Standard Instrument (Local Environmental Plans) Order 2006.*
[2] *Standard Instrument (Local Environmental Plans) Amendment Order 2011.*
[3] "Walking away from multiple use zoning .... and extending the reach of heritage laws into lounge rooms everywhere", 21 May 2010 <http://www.urbantaskforce.com.au/attachment.php?id=3315>.

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This means that development on private land may be restricted, but the existence of the restrictions will not be identifiable by examining the LEP. Even if a property owner or purchaser is made aware of the heritage study, and is able to get access to it, it may only describe the "general location" of the place, creating significant uncertainty as to which areas are actually protected.

This change also enables councils to sterilise private property rights and confer Aboriginal heritage protection on a location without state government approval (because it is not longer essential for the LEP to be amended). Contrast this with European heritage protection which (appropriately) still requires State Government approval.

There is no requirement for councils need to be judicious in their declaration of "Aboriginal place of heritage significance". A location may be designated an "Aboriginal place of heritage significance" solely because of its contemporary significance to the Aboriginal people. Such places are now possible in a wide variety of both urbanised and rural locations. They may freely be designated by councils over public (including state government) and privately owned land. There is a risk that the process of identifying Aboriginal places of heritage significance will be politicised and become a tool to stop particular development applications.

We are quite amazed at this deliberate attempt to make the planning system more opaque.

We note that the Department of Planning have not made the change in error - we flagged these very same issues in our submission last year. The changes have been made in apparent full knowledge of the implications.

The Department's deliberate decision to reduce the access that property owners and property purchasers have to information about restrictions on their use of their own land will increase the importance of "section 149" planning certificates (which are used in property valuation and conveyancing). The purpose of planning certificates was described by the Hon. Paul Landa MP, the Minister for Planning and Environment in the second reading debate for the original *Environmental Planning and Assessment Act* in 1979. Mr Landa said that section 149 was to provide:

> for a certificate that will detail *all controls* applying to a particular piece of land. A person may obtain that certificate from the relevant authority and it will provide in a single instrument the information [a person] ... would seek (emphasis added).[4]

Planning certificates must, under the law, disclose the existence of any conservation area (however described).[5]

Until now, "places of Aboriginal heritage significance" are disclosed because they formed part of declared heritage conservation areas. The Department's February changes mean that the re-named "Aboriginal places of heritage significance" areas are no longer part of the existing system of "heritage conservation areas". They are, however, still a type of conservation area (it's the substance, not the form, which governs the disclosure requirements for a section 149 certificate).

We are concerned that the Department of Planning has not advised local councils of the need to amend their systems so that they are still disclosing the existence of "Aboriginal places of heritage significance" as a type of conservation area on planning certificates. We note that deficiencies in planning certificates have the potential to cause significant conveyance issues and also place councils at risk of legal liability.

We are also concerned that the Department may be contemplating further regulation amendments to weaken planning certificates, possibly removing the requirement to disclose the existence of conservation areas (in the generic sense) such as "Aboriginal places of heritage significance". Such a move will significantly heighten the regulatory risk of valuing and declaring land in NSW. It is likely that such a move will hit land valuations generally.

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[4] NSW, *Parliamentary Debates*, Legislative Council, 21 November 1979, 3387 (Paul Landa).
[5] *Environmental Planning and Assessment Regulation 2000* Schedule 4 cl 2(g).

We urge that the Department to take urgent action to ensure that "Aboriginal places of heritage significance" are disclosed on planning certificates in accordance with the existing law.

2. <u>All Aboriginal objects are now protected under the EP&A Act, duplicating other legislation and also creating wide potential for third party legal challenges</u>

An "Aboriginal object" is any deposit, object or other material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of an area of NSW, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal background.[6]

There is no time limit on the definition of an Aboriginal object. That is, it may be 5 years old, 10 years old or 50 years old. There are very many such objects in existence.

The sweeping nature of this definition has not gone unremarked by the judiciary. Justice Basten has said (in reference to the substantively identical *National Parks and Wildlife Act* definition):

> 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).[7]

Previously an Aboriginal object needed to be specially named in an LEP to warrant protection under the LEP. Prior to February, (outside of a "place of Aboriginal significance") a "heritage item" was defined to include an Aboriginal object, but only if it was:

- shown on the LEP's heritage map as a heritage item;
- the location and nature of which is described in a schedule to the LEP; and
- specified in an inventory of heritage items available at the office of the Council.

(Development that impacts on heritage items is subject to special additional rules.)[8]

As a result of the changes made in February all "Aboriginal objects" are now treated as heritage items, even when they have not been specifically named in a LEP. There isn't even a need for such objects to be fixed to the ground. Household furniture, garden implements, etc are all covered. This means, for example, that development consent is now required to move household furniture that provides evidence of the Aboriginal habitation of an area.[9] We anticipate that these new provisions will greatly assist the Environmental Defenders' Office and others who wish to mount third party legal challenges against new development on technical grounds.

Until now, the *Environmental Planning and Assessment Act* has only extended protection to known, identified and mapped objects. It has been the role of separate legislation - the *National Parks and Wildlife Act 1974* - to protect unmapped objects.

For greenfield development, where there is a likelihood that Aboriginal objects may be present, it is normal for an archaeological study to be carried out and a permit to be sought from the Department of Environment and Climate Change under the *National Parks and Wildlife Act 1974*. Where this is an issue it will be dealt with as integrated development under Part 4.[10]

The distinction between the two legislative regimes has now been obliterated. Both now purport to do the same job. That is, confer protection on all Aboriginal objects, whether they are presently mapped or not. Why do we have two legislative regimes doing the same thing?

It is very strange that the Department of Planning should widen the protection extended by an LEP to such a very large category of unknown items. We alerted the Department to the problems this would cause in our submission last year, but the Department have decided to proceed despite our concerns.

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[6] Standard Instrument Dictionary.
[7] *Country Energy v Williams; Williams v Director General National Parks and Wildlife Service* [2005] NSWCA 318 [29].
[8] cl. 5.9 and cl. 5.10.
[9] Standard Instrument cl 5.10(s) read in conjunction with the definition of "Aboriginal object" in the dictionary.
[10] *Environmental Planning and Assessment Act 1979* Part 4 Division 5.

It is also important note that, under the new provisions, where a DCP has extended protection to vegetation (as tree preservation orders have done in the past) it is no longer possible for a permit to be issued to remove a tree that bears evidence of Aboriginal habitation of an area, except in a limited narrow set of circumstances. There is no legal requirement that the evidence is historic. That is, the tree may bear very recent markings evidencing Aboriginal habitation of the area and still be given this special protection.

We cannot understand why all trees bearing the evidence of Aboriginal habitation of an area (including contemporary habitation) should now be treated the same by the Standard Instrument. Surely such provisions should have been restricted to historical, rather than contemporary markings on trees (if required at all given the existence of other statutory protections)?

3. The "neighbourhood shop" definition has been narrowed

The neighbourhood shop definition is the most widely permitted category of retail establishment. It has been changed so that it now more closely resembles the old-style "general store" definition and is focused on the sale of "general merchandise", rather than "small daily convenience goods". (Although, unlike many general store provisions in old LEPs, all neighbourhood shops will be subject to a floorspace cap.)

This change will make it more difficult, if not impossible, for a shop that specialises in a narrow range of goods to be approved. The courts have previously said that a distinction can be drawn between "speciality" and "general merchandise" and that the definition of "general merchandise" is satisfied where a range and variety of product lines are offered for sale by retail.

It is possible that shops that are seeking to cater for particular activities (e.g. a DVD store or a florist) may be regarded as retailers of "speciality merchandise" rather than "general merchandise".[11] The change in definition will certainly raise uncertainty about the status of chemists, tobacconists, butchers and the like. Previously they may have been included because their products were "small daily convenience goods", but it now may be more difficult to argue that their range is broad enough to be regarded as "general merchandise". **This bureaucratic red tape is ludicrous. If an area is suitable for a convenience store (subject to development consent) why shouldn't it be suitable for a chemist, a tobacconist, or the like?**

4. Protection for *nominated* state heritage items will politicise the nomination process

Items that have *not* been listed as state heritage items, but have been publicly exhibited as proposed such items in a heritage study by council, will now receive formal protection under the LEP. This will result in the further politicisation of the heritage listing processes, as councils scramble to assemble state heritage nominations as means to block new urban development.

This will result in the state government been dragged into a wider range of controversies than necessary.

5. High technology industry definition allows discrimination between different types of light industry

A new definition of "high technology industry" will allow councils to distinguish between politically attractive ("high technology") light industries and other light industries.

The more broadly defined "light industries" remains a mandatory permitted use in the General Industrial, Light Industrial, Enterprise Corridor and Business Park zones. However, in a zone such as the Business Development zone (where all light industries should be permitted) it is now open to a planning authority to only now allow "high technology industry".

Planning authorities should not be able to sterilise boring, everyday, job creating development, merely in the hope that something more politically attractive will emerge.

6. Entertainment facilities are no longer a mandatory permitted use in some key zones

[11] *Hastings Co-operative Ltd v Port Macquarie Hastings Council* [2009] NSWLEC 99.

The definition of "business premises" no longer includes entertainment facilities, such as night clubs or cinemas. This, for example, means that they are no longer mandatory permitted uses in the Enterprise Corridor zone.

This does not make any sense, given that such entertainment facilities may not have significantly different impacts from the other mandatory permitted uses in this zone, such as garden centres, hardware and building supply wholesalers or retailers, light industries, warehouses and distribution centres.

The exclusion of entertainment facilities from business centres is illogical and should reversed.

7. <u>Land uses in industrial zones further limited by a new zone objective</u>

There is a new mandatory zone objective for the industrial zones, exhorting consent authorities to "protect" the land for industrial uses. This is clearly intended to make it even more difficult for job creating development such as bulky good retailing, hardware stores or fast food outlets in this zone. This makes little sense.

Further limiting the economic activity that can take place in industrial zones is neither good planning nor good economics.

We would welcome the opportunity to discuss our concerns with you.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
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