Urban Taskforce
AUSTRALIA

15 July 2009

Mr Russell Couch
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NSW Department of Environment and Climate Change
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By e-mail: consultation.npwbill2009@environment.nsw.gov.au.

Dear Mr Crouch

Re: *National Parks and Wildlife Amendment Bill 2009*

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 appreciate the opportunity to comment on the package of material made publicly available as part of the exhibition of the above bill. We congratulate the Department of Environment and Climate Change for the proactive manner in which it has carried out this consultation.

We are, to be frank, very concerned with some parts of the proposed legislation. Some provisions in the legislation will significantly increase the regulatory and reputational risk in the development of greenfield land. Additionally, if the legislation proceeds as is, it will represent a missed opportunity to address fundamental shortcomings in the current legislative arrangements.

Any lack of certainty, about the legal liability of a developer, acts as a disincentive to invest (unless there is an appropriate risk premium). Regretfully, one of the great problems with greenfield development in NSW many otherwise attractive projects have been unable to attract equity and debt capital because of the risky regulatory environment. This proposed legislation will make the situation worse, not better.

1. **The existing definition of "Aboriginal object" is impossibly broad**

   The bill does not propose a change to the existing definition of "Aboriginal object". This is a serious mistake – the definition needs revision. The definition is out-of-keeping with both comparable interstate and federal definitions and is so absurdly broad that it makes almost anyone in the community potentially subject to proceedings under the *National Parks and Wildlife Act* ("the Act").

   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.

   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, 50 or 70 years old;

- items that have no or only minor cultural significance – for example refuse 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 50 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.[1]

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.[2]

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.[3]

In Tasmania the definition of "relic" excludes any items created after 1876.[4]

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).[5]

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.[6]

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).[7]

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 and Climate Changes) rather than that 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.

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

Recommendation 1

The definition of "Aboriginal object" should be limited to items of particular significance to Aboriginal people because of Aboriginal tradition in an area and should exclude any item made (or likely to have been made) for the purposes of sale. Items that are less than 100 years old should be excluded from the definition.

2. <u>There is no requirement for a register of Aboriginal places, nor is that information available in a coherent form on the internet</u>

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.[8] 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.

Recommendation 2

The Director-General should be obliged to maintain a complete register of all Aboriginal places (as is required in relation to critical habitats (*Threatened Species Conservation Act 1995*, Part 3, Division 2) and this register should be available on the internet.

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).

3. <u>New offences remove the defence of "honest and reasonable mistake of fact"</u>

Any greenfield urban development in NSW could encounter an Aboriginal object. In fact, the legislative scheme appears to have the greatest impact on urban developers, given that routine farming and other rural activities are apparently to be exempted from the scheme.[9]

We have already discussed the problems that the broad definition of "Aboriginal object" creates, and the absence of good information concerning "Aboriginal place". These problems are serious, but pale in comparison to the problems that will be created by the new "strict liability" offence in relation to the harming of Aboriginal objects or Aboriginal places.

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;[10]
- *knowingly* destroying, defacing or damaging an Aboriginal object or Aboriginal place.[11]

Both of these existing offence provisions require that the offender <u>intended</u> 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.[12] This means it would no longer be necessary

[8] See <http://www.environment.nsw.gov.au/nswcultureheritage/PlacesOfSignificance.htm>.
[9] As per the *Due diligence guidelines for protection of Aboriginal objects in NSW – Consultation draft*.
[10] s 86(a).
[11] s 90.
[12] *National Parks and Wildlife Amendment Bill 2009*, pproposed section 86.

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 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.[13]

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 in the case of a strict liability offence, excuse a defendant.[14] Wilful blindness is also not an excuse.[15]

We note that a defence of "due diligence" has been created, however, having studied the "due diligence guidelines" it is apparent that this defence will be of no practical use for developers. As the work of developers generally increases the disturbance of an area - even one previously disturbed - the only way a developer can comply with the due diligence guidelines is to apply for an Aboriginal heritage impact permit. They would do this anyway.

However, just because a developer has applied for and been given a permit, it may not excuse him or her from liability for prosecution. The proposed offence provision says that it is a defence from prosecution if the harm to an object or place

> was authorised by, and done in accordance with, an Aboriginal heritage impact permit.[16]

However, permits can include the following condition:

> [N]othing in this permit is to be construed as authorising any person to damage an Aboriginal object or site in, on or under the land.

As a result, if damage occurs because of an honest and reasonable mistake – for example the object was not identified in the archaeological study – the permit cannot be relied upon, because it did not authorise any damage.

Recommendation 3

Any offence provision should not interfere with the well established defence of "honest and reasonable mistake of fact".

4. New "strict liability" offences carry an imprisonment penalty when other comparable offences do not

The urban development industry is familiar with strict liability offences; so we do not object to these as such. However in land-use law, strict liability offences, such as section 125 of the *Environmental Planning and Assessment Act*, do not normally carry a term of imprisonment as a penalty.

[13] See the commentary by Justice Sully in *Hawthorn (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120, 239-240.
[14] *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.
[15] Caralis v Smyth 1/7/1988 NSWCCA Cited (1988) 65 LGRA 303.
[16] National Parks and Wildlife Amendment Bill 2009, proposed section 86(8)(a).

It is a very serious matter to send a person to gaol when they genuinely intended no wrong, did not act with recklessness and were not guilty of gross negligence. For this reason, in land use law, strict liability offences are normally limited to financial penalties.

In the face-to-face discussions we had with the Department on this matter, we were told that the *Protection of the Environment (Operations) Act* contained strict liability offences with gaol terms. However, this is not the case. Under that Act, gaol terms only apply to tier one offences, each of which require an accused to act "wilfully or negligently" and to "wilful" breaches of restraining orders.

We do not see why developers should be treated more harshly than the polluters dealt with by that piece of environmental legislation.

Recommendation 4

No penalty of imprisonment should be imposed for any "strict liability" offence.

Comparable Aboriginal heritage legislation does not link terms of imprisonment to Aboriginal heritage violations, in the absence of any intent to do wrong.

We recommend you consider the approach taken in Queensland or Victoria.

In Queensland there is a "cultural heritage duty of care" requiring a person to take reasonable and practicable measures to ensure their activity does not harm Aboriginal cultural heritage.[17] No term of imprisonment is set out. In NSW you are switching the onus of proof onto the defence to provide that they acted with due diligence, while in Queensland, the onus would be on the prosecution to establish an absence of "reasonable and practicable measures".

In Queensland a second, more serious offence, is established relating to the harming of Aboriginal cultural heritage where

> the person knows or ought reasonably to know that it is Aboriginal cultural heritage.[18]

A more serious penalty is set out – but still no term of imprisonment.

In Victoria there is an offence (with no imprisonment penalty) for a person that "knowingly" harms Aboriginal cultural heritage.[19] A further offence, with a reduced financial penalty, applies where there has been "recklessness". A third offence, with an even lower financial penalty applies where there has merely been "negligence".

5. "Harm" should not include moving an object

The new offence provision will mean a person is guilty of a serious criminal offence merely if they move an Aboriginal object – even if they reasonably and honestly did not know that the object was an Aboriginal object.

We think this offence should be separated from the offence of damaging an item. The community may expect a certain level of vigilance from a person who is destroying or damaging an item – thus a strict liability offence with a modest financial penalty can be appropriate (if there is, a sensible definition of Aboriginal object). However, a person who has merely moved an object – possibly pending further investigation as to its nature, should not be held to the same level of culpability as a person who has damaged or destroyed an object,

In Queensland, this is dealt with by a separate offence and applies in relation to the excavation, relocation or taking away of Aboriginal cultural heritage.[20] The offence applies where the person "knows or ought reasonably to know that [an item] is Aboriginal cultural heritage."

[17] *Aboriginal Cultural Heritage Act 2003* (Qld), s 23.
[18] Ibid s 24.
[19] *Aboriginal Heritage Act 2006* (Vic) s27.
[20] *Aboriginal Cultural Heritage Act 2003* (Qld), s 25.

Recommendation 5

The definition of "harm" should not be extended to include merely moving an object. This should be dealt with by a separate offence which requires knowledge (or circumstances where a person should have had knowledge).

6. "Harm" should not include "desecration"

The new definition of "harm" appropriately, includes the destruction, defacing and damaging an Aboriginal object or place. However it inappropriately extends to "desecration".

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 we do not think that a person should be found guilty of criminal offence.

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.[21]

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".[22]

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 6

The concept of "desecration" should not be introduced into the *National Parks and Wildlife Act*.

7. Criminalising a failure to notify DECC inappropriate

The existing section 91 is a provision that property developers would be more than happy to comply with – and do so regularly. This provision 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.[23]

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.

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[21] "PM rejects ban on climbing sacred site", *Sydney Morning Herald*, 11 July 2009; also available on the interent: <http://www.smh.com.au/travel/pm-rejects-ban-on-climbing-sacred-site-20090710-dg2k.html>.
[22] *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 [395]-[396] (Von Doussa J).
[23] *National Parks and Wildlife Act 1974* s 83(1)(b).

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 DECC, 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 property. 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.

Recommendation 7

We do not support the insertion of a penalty provision for non-compliance with section 91 if the definition of Aboriginal object is not reformed.

8. An entitlement to benefit from an Aboriginal heritage impact permit should automatically be transferred with land title

Traditionally, regulators have understood the need for the private sector to have security of title in order to make investment decisions. Property rights are the basis for that security in NSW law. Without secure property rights, a company is unable to borrow securely against an asset to finance business investment. Nor will a business be willing to pay the price of an asset, if key positive qualities of an asset are subject to regulatory risk.

For this reason, many legal permits are often given the status of "property" by the government. For example, the benefit of development consents is transferred automatically with the land they relate to, when the land is sold.[24] Development consents are propriety rights like patents or shares in a company.[25] Similar provisions exist in relation to water access licences and fishery shares entitlements.[26]

In relation to development approvals; a vendor can be paid by the purchaser both for the land value, plus the value of the approval. This is a crucial policy measure to ensure the appropriate incentives are in place to pursue approvals for development. It enhances the ability to finance development, because obtaining development approval can lift the value of land and therefore increase the borrowing power of the landowner. It reduces red tape by removing the need for a purchaser (whether by conventional sale, or sale by mortgagee-in-possession) to make a fresh application for a new approval.

We are concerned that the legislation does not provide for the automatic transfer of Aboriginal heritage impact permits; as per the existing regime for development consents. The Bill empowers the Director-General to refuse transfers - the only statutory limitation imposed is an obligation to accord an applicant procedural fairness.[27]

A party who secures a permit, in relation to his or her land, is denied the opportunity to on-sell the land with the certainty that the permit will remain intact for the benefit of a new purchaser. A sale of this kind could be necessary because the developer lacks the capital to carry out a development, market circumstances have changed, or a debt financer has forced a sale.

Additionally the power to "transfer" a levy is unhelpful when land is subdivided. The original permit holder may still need to rely on the permit to carry out building construction, while the new owners of subdivided land may require the benefit of the permit as well. This could arise, for example, serviced residential lots are sold by a developer to ordinary families who want to

[24] *Environmental Planning and Assessment Act 1979* s 81A; *Eaton & Sons Pty Ltd v Warringah SC* (1972) 129 CLR 270, 293 (Stephen J) cited with approval in *Sullivan v Rockdale Municipal Council* (1981) 48 LGRA 222, 227.
[25] *Uniting Church in Australia Property Trust (NSW) v Immer* (No. 145) Pty Ltd (1991) 24 NSWLR 510, 511 (Meagher J). In another case Else-Mitchell J described it as "in some respects … equivalent to a document of title: *Ryde Municipal Council v Royal Ryde Homes* (1970) 19 LGRA 321, 324.
[26] *Water Management Act 2000;* Chapter 3, Part 2, Division 4; *Fisheries Management Act 1994*, s 71.
[27] Seethe proposed section 90C.

build their own home, but risk encountering Aboriginal objects during excavation. This problem is overcome in relation to development consents for subdivision, as the owner of subdivided land may still benefit from a consent.[28]

It is not enough that the Department has policy that it will transfer permits. Such transfers will still be contingent on a review of a permit at the time of transfer and there is a risk that the permit will be refused or the permit conditions will be varied, potentially to the cost of the developer.

Recommendation 8

A purchaser of land should be entitled to benefit from an Aboriginal heritage impact permit obtained by a previous owner of their land in the same way that they are entitled to benefit from a development consent. In the event that they do not seek to benefit from the permit, then they should not be bound by its conditions, as per development consents.

9. <u>There should be no power to vary conditions on an Aboriginal heritage impact permit, except at the request of the permit holder</u>

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.[29] This power does not exist in relation to the existing system of section 90 consents extended to property developers.

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 legislation to issue an amended consent, so this process could be swift and easy, if the Department so wanted.

We *do* support a more limited provision that allows section 90 consents (or an Aboriginal heritage impact permit that replaces section 90 consents) to be amended at the request of the applicant (as per development consents).[30]

Recommendation 9

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.

[28] *Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2002) 55 NSWLR 446 (J Meagher). : Cf,.*Hillpalm Pty Ltd v Heaven's Door Pty Ltd* (2004) CLR 472, 497 (Kirby J).
[29] *National Parks and Wildlife Amendment Bill 2009*, proposed section 90D.
[30] See the *Environmental Planning and Assessment Act 1979* s 96.

10. <u>There should be no power to suspend or revoke a permit, except where there is corruption</u>

We oppose the new power for permits to be revoked by the Director-General. This power does not exist in relation to section 90 consents currently available to property developers. 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*.[31]

We note that, under that legislation, issue 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 10

The circumstances where development consents can be revoked have been limited in statute to instances of corruption.

11. <u>A permit-holder should not be criminally liable for the actions of third parties, where holder's behaviour was reasonable</u>

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.

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 third party and the permit-holder took reasonable steps to prevent the contravention. If the permit-holder is a company, an employee or officer of the company would not be regarded as a "third party".

12. <u>Right of appeal</u>

Investment cannot and will not take place unless businesses and individuals can purchase land with a reasonable degree of certainty about how the land may be developed. Meaningful

[31] s 124A.
[32] See the proposed s 90J of the Bill.
[33] The proposed s 90J(3).
[34] Again, we draw your attention to the commentary by Justice Sully in *Hawthorn (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120, 239-240.

rights for applicants to appeal decisions, on a merits basis, are important for building confidence in the objectivity of any decision-making process.

The Act currently provides for an applicant to appeal decisions to refuse permission or condition consent to damage, e.g. Aboriginal objects and places.[35] However this right of appeal is to the Minister. It is not a particularly effective review mechanism for either the industry, the Department or the Minister. More certainty and transparency would be given to the process if there was a right for an applicant of a permit to appeal an unsatisfactory decision to the Land and Environment Court, as exists for development consents.

Given that the bill proposes new provisions – replacing the section 90 consents with Aboriginal heritage impact permits - we submit, the appeal process should be adjusted accordingly to mirror that available for development consents under the *Environmental Planning and Assessment Act*. Alternatively, we note that other licensing regimes provide for merits appeal of the decisions to the Administrative Decisions Tribunal.[36]

Like development consents, this right would be available only for *applicants*, not third parties.

Recommendation 12

Applicants should have the right to appeal the merits of unsatisfactory decisions regarding the refusal, or conditional approval of Aboriginal heritage impact permits to the Land and Environment Court. In the event that this is not acceptable, such decisions could be appealed to the Administrative Decisions Tribunal.

13. Consultation requirement for permits

We note the Bill's proposal that regulations should be made, dealing with the consultation requirements for Aboriginal heritage impact permits. We do not see the need for such requirements to be legislated, and we query why they cannot be dealt with by administrative policy and permit conditions.

Recommendation 13

The Bill should not seek to authorise the making of regulations in relation to consultation requirements.

14. Remediation directions

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. 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 mind of the decision-maker) before similar orders can be imposed.[37]

Additionally, we are concerned that the proposed remediation directions do not even follow the precedent set by the existing provisions in the *National Parks and Wildlife Act,* which allow a merits appeal from decisions, concerning interim protection orders to the Land and Environment Court. [38] We also note that similar provisions exist in other legislation in relation to comparable

[35] s 90(3). The Bill proposes to continue this arrangement in the new provision section 90L.
[36] For example: *Fisheries Management Act 1994* s 126; *Forestry Act 1916* s 40; and the *Mine Health and Safety Act 2004* s 167.
[37] S 121B.
[38] s 91H.

orders.[39] In fact, the *Environmental Planning and Assessment Act* even says a person who has been unjustly subjected to an order, may be compensated.[40]

Recommendation 14

In general terms the rights and protections available to those adversely affected by remediation orders, should be brought in-line with both similar provisions in the current *National Parks and Wildlife Act* (in relation to merits appeals to the Land and Environment Court) and the orders regime in Part 6, Division 2A of the *Environmental Planning and Assessment Act*.

In particular, our preferred approach is that a decision to impose a remediation direction should be capable of being made by a Court, upon the conviction of a person for an offence under an Act. In the event there is a need to make a remediation direction, in urgent circumstances, prior to the completion of criminal proceedings, the decision to make the order should be subject to merits appeal in the Land and Environmental Court, and should also be capable of being set aside by the Court, should no criminal prosecution subsequently eventuate or the person is acquitted.

15. <u>The right of a director to defend themselves, based on their lack of knowledge should be retained</u>

The existing provisions of the *National Parks and Wildlife Act* allow a director to defend themselves from a prosecution directed at them personally for an offence committed by a company if

> the corporation contravened the provision without the knowledge (actual, imputed or constructive) of the person...[41]

This defence is a well-established principle of law in relation to criminal behaviour by corporations. It exists in 11 acts of the NSW parliament, in addition to the *National Parks and Wildlife Act*. The provision is a sensible and limited defence. It protects people, who have no criminal intent, from being convicted as criminals. We do not support its repeal.

Recommendation 15

The existing defence from personal criminal liability for company director who have no knowledge of the criminal actions of their company should remain.

Again, thank you for the opportunity to make these comments. We would welcome an opportunity to discuss these issues further.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

[39] *Environmental Planning and Assessment Act 1979* s 121ZK.
[40] s 121ZL.
[41] s 175B(1)(a).