Urban Taskforce
AUSTRALIA

Walking away from multiple use zoning

.... and extending the reach of heritage laws into lounge rooms everywhere

A submission to the NSW Department of Planning paper *Potential Amendments to the Standard Instrument – March 2010*

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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.

Executive Summary

We find ourselves in a position where we are very critical of the great bulk of the proposals in the Department of Planning paper *Potential Amendments to the Standard Instrument – March 2010* ("the options paper"). We are not seeking to be negative for the sake of it. In fact, we were very positive about the original Standard Instrument that was also produced by the Department in 2006. We're alarmed at the Department's apparent abandonment of the reformist move to multiple-use zoning, embodied in the original 2006 Standard Instrument.

We are also critical of the proposal for a new mammoth body of heritage regulation that will literally reach in the lounge rooms of many tens of thousands of households across Australia.

Our concerns are briefly set out below, and then detailed in the body of the paper.

The counter revolution against multiple-use zoning

The December 2007 shock amendments to the Standard Instrument represented a roll-back of reforms designed to promote multiple-use zoning. The changes saw town planning traditionalists successfully re-instate the primacy of single-use zoning in NSW. The options paper largely represents a further step to dispose of the last vestiges of the visionary multiple-use zoning system, pioneered in 2006, but never implemented.

Some examples of the return to single-use zoning in the options paper are:

- formalising "business development zones" as being largely about "bulky goods premises" when they were originally supposed to be about office and retail uses;
- attempts are made to rid the "enterprise corridor" zone of the last vestiges of its role in providing a ready supply of affordable housing, as envisaged by the Metropolitan Strategy;
- industrial retail outlets are to be scaled back in size without justification;
- a new layer of additional regulation to descend on the least regulated form of retail development – a neighbourhood shop;
- a new definition of "high technology industry" to be created – which will allow less politically sexy forms of light industry (with same minimal impact as "high technology industry") to be banned from some local council areas;
- a new power is to be given to councils to permit "retail premises", but ban "bulky goods premises" in the same zone;
- a new power is to be given to councils to allow restaurants in a zone, but ban wine bars (until now they had to permit or prohibit both together in a zoning plan);
- a new power is to be given to councils to allow professionals, such as lawyers, accountants and architects to work in a zone, but ban health care professionals such as doctors, physiotherapists, psychologists and naturopaths;
- a new power is to be given to councils to prohibit cinemas and nightclubs, whilst allowing other businesses that provide services to the public – and such uses are now no longer to be permissible as a matter-of-course in enterprise corridors; and

- coastal protection works currently allowed in ten zones, subject to council approval, now may be subject to blanket bans in all zones.

On a positive note, we do support the Department's efforts to reform the definition of "hardware and building supplies" and support the inclusion of this term as a mandatory permitted use in the business development zone and the light Industrial zone. It should also be mandated as a permitted use in the IN1 general industrial zone. We also support efforts to address obvious flaws in the existing definition of "shop top housing", however we would prefer a return to definition that more closely resembled the 2006 definition of "shop top housing".

Mammoth new heritage regulation

The scale of the proposed new heritage regulation is mammoth. The implications of the far-reaching changes in the options paper will impact on everyday home owners across NSW. The changes include:

- high level protection for almost every privately owned physical object or property relating to either the modern or historical occupation of NSW by Aboriginal people;
- abolition of mapping requirement for protected Aboriginal places with the result that every site, of contemporary significance to Aboriginal people, will automatically be protected under planning legislation, even when on private property;
- abolition of time limits requiring speedy responses from Aboriginal people when consulted about development applications on private property;
- abolition of rule requiring "relics" to be 50 years old or more before being protected under the planning laws, along with the corresponding abolition of the rule requiring "relics" to be attached to or buried in the ground – this means household furniture, among other things, will now be "relics" under planning legislation;
- owners of heritage listed buildings will now need to write to council and seek agreement for even the most minor of maintenance issues - an excessive intrusion into the life of thousands of owners of heritage listed homes;
- several proposals designed to give draft heritage listings that have not been approved by the state government the same status as those that have – taking away people's property rights without the involvement of any state-level elected representative;
- a weakening of existing incentives for the adaptive re-use of heritage properties; and
- a removal of the requirement to properly document heritage matters in LEPs and their maps - green lighting careless conduct by both parliamentary draftsmen and those that instruct them.

We urge the NSW Government to carefully review these proposals in the light of our submission.

Introduction

The role of the Standard Instrument

Since 2006, the NSW Government has been working towards replacing all existing local environmental plans (LEPs) in each local government area with a new modern plan. The new plan is to be compliant with a template set out in the *Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument").

This makes the Standard Instrument is a crucial document for the development of NSW. It lays down the framework to which all future local environment plans must adhere.

Theoretically, the new Standard Instrument will simplify the planning system for residents, businesses and councils, by significantly reducing the overall number of LEPs, and by introducing a consistent approach to land use planning controls across NSW.

The Standard Instrument was finalised in 2006 following an extensive process of consultation with industry and local government. However, in December 2007, just before Christmas, far-reaching changes were made to the Standard Instrument.

The changes rolled back the reformist bent of the original document and left NSW with little hope of meeting the dwelling and employment targets set out in the Metropolitan and regional strategies. We were given no warning of these changes; nor were we consulted prior to their gazettal.

On 20 December 2007 the Urban Taskforce wrote to the NSW Government to express our serious concerns about the changes. We were assured that a process would be put in place for resolving our concerns. This never happened.

These changes will have a perverse impact on Sydney and NSW. We are concerned that these changes signal a lack of commitment by the NSW Government to its own strategic targets.

Furthermore, even the original Standard Instrument gave little assurance that comprehensive local environmental plans would overcome the entrenched micro-regulation of uses across NSW. While we have repeatedly voiced concerns, both formally and informally, at the content of the existing Standard Instrument, the Department has not moved to address these issues. Most recently, in March this year, we submitted a comprehensive document to the NSW Department of Planning setting out our concerns with the Standard Instrument - *Reforming the Standard Instrument: Ensuring that the comprehensive local environment plans work*.[1] The Department released *Potential Amendments to the Standard Instrument – March 2010* ("the options paper") soon after our submission. It was clearly not drafted in response to most of the issues we have raised.

This submission will not seek to cover the same ground as our recent, comprehensive paper, except where it is necessary to respond directly to questions or issues raised by the Department of Planning in its options paper. Nonetheless, we stand by our previous submission, and urge the Department to consider the proposals we raised in March, together with our comments in this submission.

For convenience, the structure and headings of this submission follows the options paper.

Multiple-use zoning

We find ourselves in a position where we are very critical of the great bulk of the proposals in the options paper. We are not seeking to be negative for the sake of it. In fact we were very positive

[1] The submission is available on the internet: <http://www.urbantaskforce.com.au/attachment.php?id=3286>.

about the original Standard Instrument that was also produced by the Department in 2006. We are concerned at the Department's apparent abandonment of the reformist move to multiple-use zoning embodied in the original 2006 Standard Instrument. In order to put our concerns properly in context, it is necessary to briefly discuss the policy issue of multiple-use zoning versus single-use zoning.

Planning authorities in NSW perceive themselves as protecting the community from the market. They often fall prey to the pitfall of seeking to stop the market from doing what it does, without asking why the market is acting in a particular way and whether the public interest is served by preventing the market from working.

In particular, the NSW planning system is inherently reluctant to zone for a mix of uses. This is now out-of-keeping with international best practice. The original 2006 Standard Instrument sought to break-down the rigid rules that re-inforced single-use zoning by restricting such zones, and instead favouring a series of multiple-use zones. This would have delivered more vibrant urban communities and reduced the pressure on Sydney's road system by reducing car travel and providing greater opportunities to locate services close to where people live, work and to where they already travel.

The December 2007 shock amendments to the Standard Instrument represented a roll-back of the reform push. Town planning traditionalists successfully sought to re-instate the primacy of single-use zoning in NSW. The options paper largely represents a further step to dispose of the last vestiges of the visionary multiple-use zoning system, pioneered in 2006, but which has never been implemented.

These issues were canvassed in the *Liveable Centres*[2] report by urban design experts, Roberts Day. The report highlights how recent zoning plans prevent new homes being built in the areas that need it most. The report's author, Stephen Moore, is a well credentialed expert in urban design and town planning. Mr Moore concluded that:

- There is an endemic bias against residential development in the heart of centres.
- NSW is being denied the benefit of many genuine mixed-use centres.
- Mixing uses around public transport is the most effective way to reduce unnecessary traffic congestion.
- Reducing car dependence also boosts household disposable income. The average yearly cost of car ownership is the equivalent of servicing a $90,000 mortgage debt.
- Physical form is a place's most intrinsic and enduring characteristic. Regulation should be concerned with the physical form of buildings, rather than the use of a building.

Tragically, the Standard Instrument, as originally conceived, did not have many of these problems. For example, offices were to be permissible in every business development zone, apartments were to be allowed in every medium density zone and retail premises were to be permitted in every enterprise corridor zone. All this changed when the government gazetted surprise amendments to the Standard Instrument, just before Christmas in December 2007.

Also in December 2007, an amendment was gazetted to the Standard Instrument which changed the definition of "shop-top housing". The effect of this amendment was to ensure that only convenience type shops could go in on the ground floor of a mixed-use development (rather than, say, a supermarket) in:

- Zone R1 General Residential;
- Zone R3 Medium Density Residential;
- Zone R4 High Density Residential; and
- Zone B1 Neighbourhood Centre.

[2] S Moore, *Liveable Centres* (2009). The report is available on the internet: <http://www.urbantaskforce.com.au/attachment.php?id=2375>.

A zone like the Standard Instrument's mixed-use zone (as originally conceived) offers a market friendly means of accommodating high intensity employment and residential uses in single zone. That is, once the decision has been made that the infrastructure of an area is suitable for high intensity uses, it does not matter what mix of uses ultimately emerges. This can be managed through market processes. A mixed-use zone, properly implemented, allows this to happen.[3] Other zones that could offer a more flexible approach are the enterprise corridor zones (if modified) where office, retail, residential and light industrial uses could be flexibly mixed, and the business park zone (where retail, office and light industrial uses should be able to be mixed, if the Standard Instrument were appropriately amended).

The benefits of mixed-use zoning, well articulated in the report *Liveable Centres*, are often not realised because of planning criteria that requires authorities to be 'certain' that they can deliver sector based targets for commercial office, residential, etc. When land is able to be used flexibly for different uses, planning authorities do lose control as to the precise use of the land. This is ultimately in the public interest because it allows the market to do what it does best – deliver the product that delivers the greatest value to the economy and community.

In the greater scheme of things, there is little risk that, for example, housing will displace commercial development across a region; or conversely, that retail will displace housing. All will ultimately find their relative need to the community (as expressed through their economic value).

Too many planning authorities view zoning as an exercise in dividing up a fixed amount of development across different geographic areas. They frequently fail to appreciate that by instating restrictive zoning, the economic and social value of development, and the overall level of development activity, is reduced.

If there is a concern that by rezoning land for a mix of uses, there will be less land available for high density residential uses, just rezone some more land for high density residential. There is no actual shortage of land in NSW – just a shortage of land zoned for some key uses (such as retail, high density residential and greenfield development).

The use of multi-use zones should be encouraged; to avoid sterilising land in the event that the market does not seek to develop some or all of the land made available.

It's important to understand that while we advocate for mixed-use development to be permissible, we do not suggest that it should be mandated.

That is, the Standard Instrument should allow (but not require) a mix of commercial, residential and retail development in a single zone, and even in a single building.

Unfortunately, rules that require a mix of uses within a building can cause serious problems.

For example, if retail is required on the ground floor of a resident building and there is insufficient demand for retail space, developers are still forced, by such rules, to build ground floor retail space that can be empty and underused. This will lead to a ghost town atmosphere in the local streetscape. It is far better that developers be allowed to populate empty land with the vibrancy of a residential neighbourhood than leave it bare because of a lack of demand for retail space. Similarly, forcing developers to build retail space that they know will be vacant (in order for the developer to get the benefit of residential space above) is a waste of resources and will do nothing to create a vibrant streetscape.

For example, the *Draft Greater Taree Local Environmental Plan 2008* says that any residential development in the neighbourhood centre, local centre, commercial core and the mixed-use zones

[3] By "properly implemented" we are referring to a mixed-use zone that does not contain backdoor means of discrimination against different high intensity uses. An example of such discrimination is offered by the *Burwood Town Centre Local Environmental Plan 2008*, which zones for mixed uses, but then has discriminatory floor space ratios based on whether the use is retail;/commercial or residential.

must be "shop top housing". That is, residential development can only take place if it is above or attached to retail or business premises.

This is not an isolated example. *Liveable Centres* found that, since 2007, NSW local councils, with the approval of the Department of Planning, had released 13 new local environmental plans in-line with the government's new standardised format. This report showed that eleven of the plans prohibit purely-residential buildings in centres, forcing a mix of residential and non-residential uses in every building within a centre.

This information is offered by way of background. It helps contextualise the further undermining of mixed-use principles in the great majority of the proposed changes to the Standard Instrument in the options paper.

1. Clauses & Zone Objectives

1.1 Secondary Dwellings and Clause 5.4(9)

The options paper proposes two options ("option 2" and "option 3") which will reduce the permitted floor -space of secondary dwellings.

We support option 1 (the status-quo). No case for increased regulation is made out. For example, before such a sweeping prohibition is imposed, the Department should address the first four of the NSW Government's seven better regulation principles:

- Principle 1: The need for government action should be established.
- Principle 2: The objective of government action should be clear.
- Principle 3: The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options.
- Principle 4: Government action should be effective and proportional.[4]

We strongly oppose option 3 in particular.

By using a definition as a means of imposing a numerical restriction, the status of the restriction becomes unclear, and is likely to be classified (inappropriately) as a prohibition rather than (appropriately) a development standard.[5]

Wherever there must be additional controls, imposition of new controls, imposition of development standards is more appropriate than the outright prohibitions achieved by limiting the definition of a use.

Recommendation 1: Secondary Dwellings and Clause 5.4(9)

We support option 1 (the status-quo).

We note that the flexibility offered by clause 4.6 does not apply to the development standards in clause 5.4.

We note that clause 4.6 is intended to replace *State Environmental Planning Policy No 1—Development Standards*.

By prohibiting the use of clause 4.6 consent authorities are deprived from setting aside rules when their application would be unreasonable and/or there are sound planning grounds to do so. This is all that SEPP 1 or clause 4.6 would permit. There is no public policy reason why consent authorities should not have the ability to set aside development standards that are "unreasonable or inappropriate in the circumstances of the case".[6]

Allowing clause 4.6 to apply would restore the flexibility previously available (prior to the shock amendment of the Standard Instrument in December 2007) for the following development types:

- bed and breakfast accommodation;
- home businesses;

[4] <http://www.betterregulation.nsw.gov.au/better_regulation_requirements> at 11 May 2010.
[5] *Agostino v Penrith City Council* [2010] NSWCA 20.
[6] cl 4.6(3)(a).

- home industries;
- industrial retail outlets;
- farm stay accommodation;
- kiosks;
- neighbourhood shops;
- roadside stalls; and
- secondary dwellings.

Recommendation 2: SEPP 1- style provisions

The provisions of clause 4.6 should apply to clause 5.4.

This would enable development standards in clause 5.4 that are unreasonable or unnecessary in the circumstances of a particular case to be set aside where there are sufficient environmental planning grounds.

1.2 B5 Business Development Zone

We agree that it is not sufficiently clear that bulky good premises are to be permitted in this zone.

However, the current zone objective and list of permitted uses, and the proposed option 2 are inappropriate, restrictive and are not consistent with the original intent of this zone.

Option 2 proposes that the key zone objective be amended to read:

> To ~~enable~~ cluster a mix of business and warehouse uses, and ~~specialised retail uses~~ bulky goods premises that require a large floor area in locations that are close to, and that support the viability of centres.[7]

When the Standard Instrument was made in 2006, the zone objective was:

> To enable a mix of office, retail and warehouse uses ...

This wording is superior to that proposed by option 2. In particular, the use of the word "cluster" is inappropriate in option 2 as it suggests that, even within a business development zone area, a bulky goods premises development should be refused if it is not located in the immediate vicinity of any existing bulky goods outlet. That would be an anti-competitive outcome. Bulky good premises should be able to be established anywhere within the zone, subject to normal merit assessment.

Originally, the business development included "office premises" and "retail premises" as mandatory permissible uses (prior to the shock amendments of December 2007). Bulky goods premises are currently either "retail premises" or "warehouse or distribution centres" (or both) so there is no reason why bulky goods premises need to be separately listed if "retail premises" is restored as a mandatory permissible use ("warehouse or distribution centres" is already a mandatory permissible use")

[7] NSW Department of Planning, *Draft – Potential Amendments to the Standard Instrument* (2010) 4.

Recommendation 3: Business development zone provisions

The zone objective for the business development zone should read "To enable a mix of office, retail and warehouse uses ..." and the mandatory permissible uses should be extended to include "office premises" and "retail premises".

1.3 Residential in Zone B6 Enterprise Corridor

We agree that the current arrangements in relation to this zone are unsatisfactory.

Option 1 is inappropriate because it walks away from the Metropolitan Strategy's support for residential development in enterprise corridors.[8] It is worth noting that the Metropolitan Strategy says that "[r]esidential development is often pursued in [enterprise] corridors to take advantage of lower land costs".[9] Any steps the Department of Planning takes to reduce opportunities for residential development in enterprise corridors involves a retreat from the idea of more affordable housing and greater housing choice.

We think, the relevant zone objective should merely be restored to its original text in 2006 (prior to the shock amendments of December 2007):

> To enable a mix of employment (including business, office, retail and light industrial uses) and residential uses.

Furthermore, in 2006 (and until December 2007) the list of mandatory permitted uses in this zone included mutli dwelling housing, which at the time included townhouses, terraces and residential flats. We believe the list of mandatory permitted uses should be restored to its original state in this regard, although given the changes to definitions made in December 2007, this would involve both "multi dwelling housing" and "residential flats" being permitted in the enterprise corridor zone.

The suggestion in option 3 to insert a note to instruct consent authorities to adhere to the Department of Planning's *Guidelines for Development Near Rail Corridors and Busy Roads* would be an inappropriate.

A note does not form part of an environmental planning instrument and is provided for guidance only.[10] A note that purports to direct a consent authority is beyond power. Even if such a provision were effective, it would constitute giving a document that is not legally drafted the status of a statutory document. That is, such a provision purports to incorporate, by reference, the guidelines as a mandatory provision of the environmental planning instrument.

The guidelines exist already and they can be referred to by a consent authority when exercising their functions under section 79C. There is no need for further reference to them in the Standard Instrument.

No public policy justification has been made as to why purely residential buildings should be prohibited in an enterprise corridor zone and we note that such buildings were not prohibited prior to December 2007.

[8] NSW Department of Planning, *City of Cities: A Plan For Sydney's Future: Metropolitan Strategy Supporting Information* (2005) 302.
[9] Ibid.
[10] cl 1.5.

Recommendation 4: Enterprise corridor zone provisions should be restored to their pre-2007 status

The relevant zone objective for the enterprise corridor should read "[t]o enable a mix of employment (including business, office, retail and light industrial uses) and residential uses. ..." and the mandatory permissible uses should be extended to include "residential flats" and "multi dwelling housing".

1.4 Industrial Retail Outlets

The 400 metre requirement

The paper says

> There appears to be a drafting error in Clause 5.4(4)(b) where the 400 square metre limit should be the maximum rather than the minimum retail floor area for an industrial retail outlet.[11]

Firstly, this assertion is founded on a misapprehension as to the nature of the existing provision in clause 5.4(4). The current provision does not establish a minimum retail floor area for an industrial retail outlet. The current reference to a " number not less than 400" in clause 5.4(4)(b) does not prevent an industrial retail outlet having a retail floor area less than 400 square metres. Instead this provision *prevents* an LEP from imposing a cap of less than 400 metres, while *permitting* an LEP to impose a cap at a higher level. This proposed change should be rejected on the ground of this error alone.

Secondly, no public policy case is made out why the retail floor area of an industrial retail outlet must always be capped, without exception, to 400 metres (as the proposed change will do).

For example, before such a sweeping prohibition is imposed, the Department should address the first four of the NSW Government's seven better regulation principles (listed in section 1.1 above).

The 40 per cent requirement

The paper also proposes to change the percentage cap on the retail floor area, so that it is no longer to be expressed as a percentage of the combined gross floor area of the industrial retail outlet and the industrial area of the premises. Instead, the 40 per cent will now be calculated solely by reference to the floor area of the industrial area of the premises only.

This effectively is a lowering of the retail area that is to be permitted and represents an uncompensated down-zoning for property owners already subject to the Standard Instrument.

If the industrial area of the premises is 500 square metres, a retail area can currently be approved if it is up to 333 square metres in size. With the change in wording recommended by the paper, this would fall to 200 square metres.

Again, no public policy argument for this more restrictive inflexible rule has been made out. No case has been expressed in terms of the government's better regulation principles.

[11] NSW Department of Planning, *Draft – Potential Amendments to the Standard Instrument* (2010) 6.

Recommendation 5: There should be no further restrictions on industrial retail outlets in the Standard Instrument

The proposed additional restrictions on industrial retail outlets should not proceed.

1.5 Extent of lands reserved under NPW Act

We have no comment on this matter.

1.6 Rename Zone RU4 Rural Small Holdings

This proposal seems to be founded on misconception as to the objectives of this zone. The paper says that:

> the core zone objectives [is] to protect sustainable primary industry uses ...[12]

In fact, the relevant core zone objective is

> [t]o *enable* sustainable primary industry and other compatible land uses (emphasis added).

There is a big difference between "protect" and "enable". The former suggests that developments that will lead to a reduction or cessation of primary industry should not be approved, while the latter wording presents no difficulty to such a proposal.

For this reason, the name change suggested by both options 2 and 3 is misconceived and inappropriate.

An LEP may apply to this zone in an area where it is important that the rural and scenic character of the land be maintained and where there is need to ensure any development does not unreasonably increase the demand for public services or public facilities. The uses an LEP may permit in this zone would not necessarily be limited to primary production. Therefore a name that carries this connotation is inappropriate.

Recommendation 6: The name of the rural small holdings zone should remain unchanged.

We support option 1.

[12] NSW Department of Planning, *Draft – Potential Amendments to the Standard Instrument* (2010) 6.

Part 2: Heritage Issues

2.1 Heritage items and Aboriginal objects

The paper proposes two very radical changes to the way Aboriginal heritage matters are to be dealt with under the Standard Instrument.

Firstly, the Standard Instrument compliant LEPs will recognise all "Aboriginal objects" as requiring special consideration, assessment and consultation. Currently only Aboriginal objects within mapped Aboriginal places are considered in the development assessment process.

Secondly, it will extend existing special requirements for mapped, clearly identified, 'places of Aboriginal heritage significance', to any area that may be subjectively thought, on an ad-hoc basis, to satisfy broadly phrased criteria.

The repercussions of this course of action are very serious, so we will address these two issues in some detail.

Aboriginal object

The phrase "Aboriginal object" is currently used in the Standard Instrument in two ways.

Firstly, if the development is taking place within a "place of Aboriginal significance" identified on an LEP map the consent authority must consider the effect of the proposed development on:

- the heritage significance of the place; and
- any Aboriginal object known or reasonably likely to be located at the place. [13]

Secondly, a "heritage item" is defined to include an Aboriginal object, but only if it is:

- 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.[14]

The current use of the definition of "Aboriginal object" is largely irrelevant to most infill development, because it is rare for land to be mapped in an LEP as a "place of Aboriginal significance" in an existing urban area or for Aboriginal object to be identified in a schedule to an LEP. 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.[15]

According to the dictionary in the Standard Instrument:

> ***Aboriginal object*** means any deposit, object or other material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of an area of 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.

[13] cl 5.10(8).
[14] cl. 5.9 and cl. 5.10.
[15] *Environmental Planning and Assessment Act 1979* Part 4 Division 5.

This definition is almost identical to the definition of "Aboriginal object" included in the *National Parks and Wildlife Act 1974*.[16]

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, 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 (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).[17]

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.[18]

He also said that

> Aboriginal objects may be found *on land throughout the State* ...(emphasis added).[19]

Unlike the existing provisions in the Standard Instrument, the use of this term in the *National Parks and Wildlife Act* is not constrained or qualified. As a result there is potentially a very wide application of the statutory scheme and 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, Climate Change and Water) rather than the text of the *National Parks and Wildlife Act*. Therefore 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.

We have advised the Department of Environment and Climate Change (DEEC), that the unpredictability of their unqualified use of the broad statutory regime significantly elevates the risk premium required for greenfield land development in NSW. DECC has verbally conceded to us that the use of the term is very broad and they have said that they hope to address this issue in a future review.

An example of the problems this legal uncertainty causes by the unqualified use of the "Aboriginal object" term is given by a recent article in *the Daily Telegraph* in April this year.[20] The newspaper reported that the auction of a Sydney house, in need of renovation, was disrupted after an Aboriginal person lodged a caveat on the property a day before the auction, claiming it contains priceless Aboriginal artefacts.

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[16] s 5.
[17] *Country Energy v Williams; Williams v Director General National Parks and Wildlife Service* [2005] NSWCA 318 [29].
[18] *Country Energy v Williams; Williams v Director-General National Parks and Wildlife Service* [2005] NSWCA 318, 446 (Spigelman CJ).
[19] Ibid.
[20] <http://www.dailytelegraph.com.au/news/nsw-act/the-league-star-a-pile-of-shells-and-the-house-auction-day-farce/story-e6freuzi-1225856609512> at 23 April 2010.

The current arrangement under the Standard Instrument is vastly superior, in this respect, to the regime under the *National Parks and Wildlife Act*. That's because the use of the phrase "Aboriginal object" is qualified. The legal uncertainty that exists under the *National Parks and Wildlife Act* is avoided by providing that only clearly identified Aboriginal objects are subject to additional regulatory requirements under the *Environmental Planning and Assessment Act*. Central to this requirement, is the need for the Aboriginal objects to be either:

- named in the LEP; or
- be situated on an Aboriginal place named and mapped in the LEP.

Without this safeguard, the list of items that would answer the description of "Aboriginal object" would be endless. For example, any home that had been occupied by Aboriginal people, if only for a short time, would be blessed with a wide range of material evidencing the Aboriginal habitation of an area and therefore "Aboriginal objects". Please note that there is no requirement that material be old. Modern items are, without question, Aboriginal objects if they evidence Aboriginal occupation of part of the state.

Its seems strange to us, that the Department of Planning should seek to incorporate the wide legal uncertainty that currently exists under the *National Parks and Wildlife Act*, into the *Environmental Planning and Assessment Act*. There is no doubt in our mind that the level of litigation around "Aboriginal object" would skyrocket if the recommended changes were made. We would anticipate that detailed assessment under clause 5.10(8) will become routine, for almost all applications for infill development in any area which has seen recent occupation by Aboriginal persons. In most cases, such assessment would, as a matter of policy, be unjustifiable because the items being assessed would be unexceptional modern day objects. (Again, recalling that there is no requirement that the objects be culturally "significant" or "important".)

In any event, we do not understand why the Department should propose that clause 5.10(1)(d) be broadened so that it covers Aboriginal objects generally (rather than simply Aboriginal objects within mapped places of Aboriginal significance) when the *National Parks and Wildlife Act* already deals with this subject and works hand-in-hand with the planning system through the integrated development provisions of Part 4.

Recommendation 7: Aboriginal objects

There should be no change in the use of the phrase "Aboriginal object" in the Standard Instrument.

Places of Aboriginal heritage significance

A "place of Aboriginal heritage significance" is currently defined under the Standard Instrument to mean

> an area of land *shown on the Heritage Map* that is:
>
> (a) the site of one or more Aboriginal objects *or* a place that has the physical remains of pre-European occupation by, *or* is of contemporary significance to, the Aboriginal people. ..., or
>
> (b) a natural Aboriginal sacred site or other sacred feature. ... (emphasis added).

A "heritage conservation area" is currently defined to include any "place of Aboriginal heritage significance", so provisions applying generally to heritage conservation areas also apply to places of Aboriginal significance. There are also additional requirements for development that go beyond the heritage conservation area requirements, namely:

- development consent is required for disturbing or excavating in a place of Aboriginal heritage significance;[21] and
- the consent authority must consider the effect of the proposed development on the heritage significance of the place, and any Aboriginal object known or reasonably likely to be located at the place, and notify the local Aboriginal communities about the application and take into consideration any response received.[22]

The options paper says that

> Aboriginal places of significance are usually of a sensitive and confidential nature and the changes suggested will remove the need for them to be mapped (unless agreement is reached with the Aboriginal community in which case it could be included in a DCP).[23]

This simply is not true.

Most places of Aboriginal significance are not confidential, and are not of sufficient sensitivity that they should not be mapped and their existence made known to the public.

In the absence of a mapping requirement any of the following will automatically be a place of Aboriginal significance:

- a site where there are one or more Aboriginal objects – this will include any site where there is material evidence of recent Aboriginal occupation, this will include a very large number of modern homes within the Sydney metropolitan area; or
- a site of contemporary significance to Aboriginal people – this will include a wide range of places on public and private land, including, for example, the place where Paul Keating delivered the famous Redfern speech; or
- a place that has the physical remains of pre-European occupation – this will include numerous midden sites throughout NSW (mounds or deposits containing shells, animal bones, and other refuse that indicates the site of a human settlement); or
- a natural Aboriginal sacred site or other sacred feature.

Most of the sites that answer the above descriptions are not confidential and there is no valid reason why (in the overwhelming majority of cases) their existence should be kept secret. If such a site is worthy of protection, then the public interest is best served by including the existence and boundaries of the site on the public record. By removing information from public record, as suggested in the options paper, landholders, land purchasers and consent authorities are less likely to be aware of their obligations, and compliance with the planning scheme will be significantly reduced.

If this proposal was to proceed, then a large number of sites that are not sufficiently exceptional to be protected by the Standard Instrument regime will automatically become protected without any assessment of their value. In fact, it is impossible to estimate precisely, but we can safely assume tens of thousands of locations within NSW will suddenly be deemed "places of Aboriginal heritage significance" under the new LEPs.

As a place of Aboriginal heritage significance is also deemed to be a heritage conservation area, the amount NSW set aside as a heritage conservation area will also dramatically increase, without assessment by any expert and without consultation with the private land owners or government agencies affected. There are grave public policy issues in deeming unmapped areas with uncertain boundaries as heritage conservation areas. The NSW planning system has always proceeded on the basis that the boundaries of such areas should be known and mapped.

[21] cl 5.10(2)(e).
[22] cl 5.10(8).
[23] NSW Department of Planning, *Draft – Potential Amendments to the Standard Instrument* (2010) 9.

Investment uncertainty will dramatically increase. The existence of places of Aboriginal heritage significance would no longer be disclosed on planning certificates issued under section 149 of the *Environmental Planning and Assessment Act*. Land owners and development assessment staff would need to apply highly subjective criteria (such as whether or not a site is "of contemporary significance to Aboriginal people") to each and every development application. It will be impossible for a wide range of exempt and complying standards to be applied under the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, because the requirements vary depending on whether a site is in a heritage conservation area, and a certifier will not be in a position to make that judgment.

In any event, even if the Department scaled back its proposals so that only a small number of places of Aboriginal heritage, the interest of Aboriginal people in keeping the existence of a site secret must be balanced against the interests of the owner of that site and future purchasers of that site. If a person is to have some of their land sterilised (or reduced in development potential) because of the Aboriginal significance of their land, then they have a right to know about it. The current mapping and listing process is an opportunity to be informed of a proposal and for land owners to object. Similarly, future purchasers of that site, should be entitled to know about the reduced development potential of the land before they agree on a price. The current mapping requirement and section 149 certificates fulfil this intent.

Given the substantial loss of land value, that would accompany most decisions to formally identify a parcel of private land as "places of Aboriginal heritage significance" we see no argument for any mapping process to be demoted to a DCP. DCPs are approved by councils only and are easily amended. LEPs can only be amended with the approval of the state government and there is more rigorous and independent oversight of that process. If a decision is to be made to wipe 20-30 per cent of a property's value away, then that decision should have to go to the state government for approval. A council should not have such unilateral authority.

Recommendation 8: Places of Aboriginal heritage significance

There should be no change in the current arrangements for "places of Aboriginal heritage significance" in the Standard Instrument and, in particular, such places should continue to be mapped in the LEP before any special restrictions are imposed.

Notification requirements

The Standard Instrument currently requires councils to notify the local Aboriginal communities when development may affect listed places of Aboriginal significance.[24] The consent authority is only obliged to consider any response received within 28 days after the notice is sent.

The paper has this to say on this matter:

> Concurrences and referrals should be kept to a minimum in EPIs, and as such are generally deleted or reduced. However, it was suggested in some submissions to the draft SEPP (Repeal of Concurrence and Referral Provisions) 2008 that setting a specific timeframe (e.g. 21 days) in clause 5.10(8)(b) may not be the most effective approach in all instances and it is considered that specific arrangements for consultation with local Aboriginal communities should be left to Councils to specify with a period of no less than 21 days to be inserted in the clause.

This proposes to remove an existing requirement for a prompt reply by Aboriginal communities into an utterly open ended arrangement. A council could nominate 90 days, or 180 days in their individual LEP.

[24] cl. 5.10(8)(b).

No serious public policy argument is advanced in this paper to justify removing a perfectly sensible upper limit on the period to be allowed for consultation.

Recommendation 9: Period for consultation with Aboriginal communities

No changes should be made to the current arrangement.

2.2 Definition of 'Heritage Item' and 'Relic'

The paper proposes changes to the definition of "heritage item" and "relic".

Relic

The paper's reproduction of the definition of "relic" is incorrect. The existing definition is as follows:

> ***relic*** means any deposit, object or other material evidence of human habitation:
>
> (a) that relates to the settlement of the area of [insert name of local government area], not being Aboriginal settlement, and
>
> (b) that is *more than* 50 years old, and
>
> (c) that is a fixture or is wholly or partly within the ground (second emphasis added).

The Standard Instrument provides that development consent is required for:

- demolishing, altering or moving a relic within a heritage conservation area; or
- disturbing or excavating a (mapped and listed) archaeological site while knowing, or having reasonable cause to suspect that a relic will be impacted.[25]

The options paper proposed a new definition of relic as follows:

> ***relic*** means any deposit, artefact, object or material evidence that:
>
> (a) relates to the settlement of the area that comprises New South Wales, not being Aboriginal settlement, and
>
> (b is of State or local heritage significance.

The effect of this change is that:

- a relic will no longer need to relate to the settlement of a particular local government area – so, for example, a relic in Ashfield will no longer need to relate to Ashfield in order for it to be protected under the Ashfield LEP;
- a relic will no longer need to be more than 50 years old – so, an item that is 5, 10, 15 or 20 years old would now be regarded as a relic;
- a relic would no longer need to be a fixture or buried partly or wholly in the ground, this means that moveable objects, such as indoor and outdoor furniture, curtains, household appliances, tools, etc will not be classed as relics.

We're having trouble understanding how the Department of Planning could be proposing this change. For example, a person who wants to move or alter historic furniture within their home in a heritage conservation area will need development consent.

[25] cl 5.10(2).

If this isn't bad enough, the ramifications are far wider than this. The only provision to be retained that will prevent regular household items in a heritage conservation area from becoming a "relic" will be the test that the item must be of "State or local heritage significance".

The *Australia ICOMOS charter for places of cultural significance* ("the Burra Charter") is the generally accepted document to determine whether or not an item is of heritage significance.[26] The charter says that

> [t]he term cultural significance is synonymous with heritage significance and cultural heritage value.[27]

The Burra Charter goes on to provide that

> Cultural significance means *aesthetic*, historic, *scientific*, *social* or *spiritual* value for past, present or future generations. Cultural significance is embodied in the place itself, its *fabric*, setting, use, associations, meanings, records, related places and related objects (emphasis added).[28]

This is consistent with the Standard Instrument itself, which says that

> heritage significance means historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value.

This means, that an item may be of cultural/heritage significance, for reasons other than historic qualities. For example, a modern item might be of heritage significance because it has aesthetic or social value for present or future generations. The criteria are very broad, subjective and open to debate in the circumstances of individual cases.

According to the Burra Charter, a heritage place (such as a heritage conservation area) includes its "fabric". This is defined to include

> all the physical material of the place including components, fixtures, contents, *and objects* (emphasis added).[29]

The Burra Charter as a clear perspective on the management of objects, such as furniture, in a "place":

> Contents, fixtures and objects which contribute to the cultural significance of a place should be retained at that place. Their removal is unacceptable unless it is: the sole means of ensuring their security and preservation ...[30]

The Burra Charter has not been approved by government as its own policy document. It is nonetheless applied by officials in the planning system when environmental planning instruments requires consideration of heritage significance and heritage impacts. Government currently limits the application of the Burra Charter through a range of provisions in environmental planning instruments, including the current limited definition of "relic" in the Standard Instrument. This currently prevents consent authorities from telling home owners in a heritage conservation area what they can do with their household chattels.

The proposed changes will unquestionably mean that many modern privately owned moveable objects of aesthetic or social value will receive protection under the *Environmental Planning and Assessment Act*. We find this strange, given that the Act is designed as a body of land use legislation and is ill-suited to the protection of moveable cultural heritage.

The options paper asserts, without justification, that there should be an alignment between the *Environmental Planning and Assessment Act*'s definition of "relic" and the *Heritage Act*'s definition. This overlooks the basic point of difference between the two acts. The *Heritage Act* seeks to protect heritage generally, include real property, but also moveable objects. The *Environmental Planning and*

[26] <http://www.nsw.nationaltrust.org.au/burracharter.html> at 13 May 2010.
[27] Article 1.2.
[28] Article 1.2.
[29] Article 1.3.
[30] Article 10.

Assessment Act is a piece of land use legislation, and only seeks to protect moveable objects when they are wholly or partly buried in the ground, and then only in very narrow and specific circumstances (e.g. more than 50 years old, significant to the particular local government area concerned, etc).

Heritage item

Under the current provisions of the Standard Instrument, a "heritage item" is defined to be:

> a building, work, archaeological site, tree, place or Aboriginal object:
>
> (a) shown on the Heritage Map as a heritage item, and
>
> (b) the location and nature of which is described in Schedule 5, and
>
> (c) specified in an inventory of heritage items that is available at the office of the Council.

The options paper proposes to extend this definition to allow councils to also list any relic, moveable object or precinct in their heritage map and schedule.

This is a far-reaching and radical change to the system of heritage regulation under the *Environmental Planning and Assessment Act*.

Moveable objects

The arguments against listing moveable objects were covered in our discussion regarding relics above. Essentially the *Environmental Planning and Assessment Act* is land use legislation and is ill-suited to regulating items that are not connected to the ground. If the government wants to extend the protection to moveable objects it should enact new legislation to do so. The Commonwealth, for example, did this when it enacted the *Protection of Movable Cultural Heritage Act 1986*.

Relics

This provision would allow relics to be listed, and therefore protected even when they are not located in a heritage conservation area or a mapped and listed archaeological site. This is inappropriate for the reasons discussed above.

Precincts

This provision seems to duplicate existing provisions that allow heritage conservation areas to be identified. Why have two separate mechanisms to recognise heritage precincts? Surely the provisions for heritage conservation areas are sufficient? This will cause duplication, confusion and increased regulatory uncertainty.

The justification for the above changes is not advanced in the options paper. No attempt has been made to address the relevant NSW Government better regulation principles. We do not support the change.

Recommendation 10: Definition of "relic" and "heritage item"

No changes should be made to the current definitions of "relic" and "heritage item".

2.3 Non-structural changes to the interior of a heritage item

The paper proposes to extend the heritage clause of the Standard Instrument (clause 5.10) so that non-structural changes to the interior of a heritage-listed building require development consent.

This is a significant extension to the existing regulatory regime contained in the Standard Instrument which focuses on:

- the detail, fabric, finish or appearance of a building's exterior;
- structural changes to a building's interior.[31]

Literally, "structure" means something which has been constructed, although with particular reference to buildings in common parlance, we refer to the bare building as the structure.[32] While fixtures and fittings are thought of as being attached to a structure, they can also be considered structures in their own right. Maintenance, replacement or repair is "structural" when its purpose and effect are to remedy some "failure on the part of the structure to remain satisfactorily put together".[33] A repair, such as cosmetic patching or painting cracks that do not present a threat to load bearing integrity, is a non-structural modification to a building.[34]

The existing prohibition on structural changes to a building's interior, without development consent, is already very broad. It embraces a very wide variety of modifications that might be made to the interior of a heritage building. It, however, does not embrace minor cosmetic repairs, maintenance or modifications such as patching cracks. If this recommendation was to proceed, the owner of a heritage listed building would need to write to council for even the minor of maintenance issues and seek agreement of the council to the carrying out of the work (under clause 5.10(3)). This is an excessive intrusion into the life of thousands of owners of heritage listed homes and this change should not proceed.

Again, we note that the Department has made no effort to address the first four of the NSW Government's seven better regulation principles before proposing this extended micro-regulation.

Recommendation 11: Non-structural changes to the interior of a heritage item

No changes should be made in relation to non-structural changes to the interior of a heritage item

2.4 Draft Heritage Items Clause 5.10(3)

The paper says

> *There is a need* to include draft heritage items in Clause 5.10(3) to enable owners that already know their properties are going to be listed in the LEP to have *the same benefits* under the clause as already listed heritage items (emphasis added).

It is unclear how owners will enjoy any "benefits" from this clause. The proposed amendments to clause 5.10(3) are nonsensical, as the only purpose behind clause 5.10(3) is to limit the operation of clause 5.10 generally which does not currently apply to draft heritage items at all.

[31] cl 5.10(2)(b) and (c).
[32] *Hampson v Clyne* (1967) 86 WN (NSW) 321 (Brereton J).
[33] *Ibid.*
[34] *Carbure Pty Ltd v Brile Pty Ltd* [2002] VSC 272 (Balmford J).

Since what is actually proposed does not make sense, we can only assume that the Department intends to extend clause 5.10 to draft heritage items. If so, the Department should have been more frank about this intention in the paper.

This "need" is not explained or justified. No examples are offered of the terrible things that have been happening whilst this "need" has been unaddressed. No attempt has been made to address the first four of the NSW Government's seven better regulation principles.

Draft heritage items often remain in that position for some time because the state government has not supported a proposed heritage listing by council. There are usually good reasons why the state government has withheld such support. Extending clause 5.10 to draft heritage items is tantamount to giving councils the uncontrolled right to list properties as heritage, as there would be no practicable difference between a heritage listed property or a draft heritage listed property. Since heritage listing often represents an uncompensated expropriation of private property rights, state government approval must be retained before any legal effect is given to a council proposal to list something as heritage.

Recommendation 12: Draft heritage items

There should be no reference to draft heritage items in the Standard Instrument.

2.5 Heritage Management Document

We support this change.

Recommendation 13: Heritage management document

We support the proposed re-wording to include "heritage management documents" in lieu of "heritage conservation plan".

2.6 Concurrences and referrals (item recommended for listing)

Clause 5.10(9) of the current Standard Instrument provides that:

> The consent authority must, before granting consent for the demolition of a heritage item identified in Schedule 5 as being of State significance (other than an item listed on the State Heritage Register or to which an interim heritage order under the *Heritage Act 1977* applies):
>
> (a) notify the Heritage Council about the application, and
>
> (b) take into consideration any response received from the Heritage Council within 28 days after the notice is sent.

The options paper has this to say about clause 5.10(9):

> The Heritage Branch has agreed that concurrences and referrals in clause 5.10(9) can be deleted for items that are listed on the State Heritage Register as they are covered through other legislation.

This statement does not make any sense. Clause 5.10(9) already does not apply to an item listed on the State Heritage Register; as it very clearly states.

The options paper goes on to say that

> there is a need to ensure that, as a result of the deletion of subclause (9), those items which are awaiting a decision about inclusion in the State Heritage Register are not left vulnerable.

The option paper does not contain a proposal to delete clause 5.10(9), so this sentence, again, does not make sense. The paper goes on to say:

> Properties that may need to be listed on the State Heritage Register that haven't yet been identified as local heritage items under Schedule 5 of the LEP (as no heritage study or updated study has been conducted) also require coverage.

Essentially, this is saying that properties that are not yet heritage listed should be given protection as if they are heritage listed. What is the point of heritage listing, if property is subject to restrictions before they are listed? How is it fair that a property owner might have tens of thousands of dollars wiped off the value of their property when no heritage study has been conducted? We canvassed reasons why draft heritage items should have no status under clause 5.10 in our discussion of section 2.4 of the options paper above; those reasons are also relevant here.

The paper then proposes amendments to clause 5.10(9) that will radically change its meaning and effect. In short, it will no longer apply only to "heritage items" but any property that a group of unelected officials (in the form of the Heritage Council) proposes to list as "heritage". It is unconscionable that the planning system could place such serious restrictions on the use of a private property's owners' land without the involvement of a state-level elected official. In any event there are already sufficient powers under the *Heritage Act 1977 for* interim heritage orders to be issued to protect properties that are in imminent danger of demolition.[35]

Recommendation 14: Clause 5.10(9)

We oppose the proposed change to clause 5.10(9).

2.7 Concurrences and Referrals (Others)

The options paper suggests that an amendment to clause 5.10(4) is required

> [t]o minimise concurrences and referrals by instead referring to published Departmental guidelines ...

However, clause 5.10(4) does not contain any concurrence or referral provisions. In fact, there is no proposal in this section of the paper to remove any existing concurrence or referral provisions.

The only proposal of substance is to insert a note that refers to the existence of guidelines. As notes do not form part of the plan,[36] this proposal is unnecessary. Neither the 'problem' nor the 'solution' is clear.

[35] s 24.
[36] cl 1.5.

Recommendation 15: Clause 5.10(4)

The proposed change to clause 5.10(4) serves no purpose.

We support the amendment to clause 5.10(7) insofar as it removes the need to consult with the Heritage Council. However, it seems strange to us that a local council should be obliged to check whether or not a permit has been issued under the *Heritage Act*.

The *Heritage Act* requires a permit to be obtained when a person is intending to disturb or excavate any land, knowing or having reasonable cause to suspect that the disturbance or excavation will, or is likely to impact on, a relic.[37] It is an offence to carry out such works, even if other approvals have been obtained from the local council.[38]

A council is merely consenting to development, which may include a wide range of activities that will not "disturb or excavate" land. For example, a mere change in use is "development".

A better approach would be to amend the integrated development provisions of the *Environmental Planning and Assessment Act*,[39] so that they include excavation permits issued under section 139 of the *Heritage Act*. A minor change of this kind could occur through the Statute Law Revision process.

Recommendation 16: Clause 5.10(7)

The proposed change to clause 5.10(7) relating to the removal of the concurrence role is supported, but there should be no requirement for council to verify whether or not an excavation permit is required from the Heritage Council. If necessary, the provisions for integrated development could be extended to deal with this issue.

2.8 Clause 5.10 Heritage Conservation

Use of "land" in clause 5.10(10)

The existing text of clause 5.10(10) says that:

> The consent authority may grant consent to development for any purpose of a building that is a heritage item, or of the *land on* which such a building is erected, even though development for that purpose would otherwise not be allowed by this Plan ... (emphasis added)

The paper says there is a need

> to ensure 'land' relates to the lot or parcel a heritage item is located on for heritage incentives (currently ambiguous and potentially open to misuse).

The paper does not explain how it is unclear or open to misuse. It proposes to eliminate the unspecified potential for misuse by replacing the word "land" with "lot or parcel".

[37] s 139(1).
[38] s 156 and s 157.
[39] s 91.

The drafting approach (i.e. referring to "land on" which a building or development is situated) follows numerous precedents set in the *Environmental Planning and Assessment Act* and instruments made under that act.[40] There are many judicial decisions, including a High Court decision, explaining how the phrase can be applied.

In the Standard Instrument itself, the Department has considered the concept of sufficient legal certainty to use it in relation to the height of buildings,[41] floorspace ratio[42] and exceptions to development standards.[43] Judicial decisions on the issue relate mostly to existing use rights and the calculation of floorspace ratios. However the principles articulated in these case could be readily applied to the current text of clause 5.10(10).

Interestingly, in reference to "land" on which a building is located, the High Court has found that ordinarily, on small urban allotments the whole parcel of land will be treated as one.[44] Chief Justice Barwick went so far as to say that it would be a rare case in which "a line can properly be drawn within a suburban allotment".[45] So generally speaking, reference to "land" will be a reference to the whole allotment. However, as Justice Walsh stated in the same judgment

> It is clear, in my opinion, that it will not be possible in all cases to avoid the difficulty of resolving questions of fact and of degree or to avoid the necessity of drawing a line to mark off one area from another within land within the same ownership.[46]

For example, the NSW Court of Appeal found that a reference to "land" could encompass more than one lot.[47] In this matter, the separate lots (adding up to 500 acres) were, at the relevant time, all within the one ownership. Each portion, being physically contiguous with another portion, was managed by its then owner as a single parcel of land, and the various activities conducted on any part of the 500 acre area were not separated from other activities by any fencing or by natural topographical features.

Despite this very clear body of law, the Department is proposing to take clause 5.10(10) out-of-step with other provisions in the Standard Instrument, and in doing so make the provision work in a more narrow, technical fashion.

By substituting "land" with "lot or parcel" the commonsense approach taken by the NSW Court of Appeal, when several lots have been managed as a single unit of land in common ownership would be set aside. It is not unusual for some properties to have been subdivided at some point, but nonetheless for all practical purposes managed as a single unit of land. If there is an opportunity to adaptively re-use a heritage building, through an otherwise prohibited use, the fact that parts of the historic subject site are on different allotments, should not be relevant if the land, taken together, has always been managed as a single unit. The Department's change will mean a more technical restrictive approach rather than the current commonsense approach.

Additionally, the proposed technical approach only goes one way. The department has not merely proposed to replace "land" with "lot", they have proposed the replacement with "lot or parcel". In this context "parcel" must clearly mean something different from "lot" (otherwise the phrase would not be used). Judicial authority provides guidance on how the word "parcel', in this context, means something additional to the word "lot": the expression "parcel" in reference to land can include part of the land comprised in a certificate of title.[48] The proposed change will allow a consent authority to reduce the size of the land to benefit from the conservation incentive to a mere portion of a lot (where the circumstances would allow it), but there would be no matching ability for more than one lot to be

[40] For example, see ss 72I, 72J, 121W.
[41] cl 4.3.
[42] cl 4.4.
[43] cl 4.6.
[44] Eaton & Sons Pty Ltd v Warringah Shire Council (1972) 129 CLR 270.
[45] Ibid 274.
[46] Ibid 278.
[47] *Steedman v Baulkham Hills Shire Council (No 1)* (1991) 87 LGERA 26.
[48] Christies Sands Pty Ltd v City of Tea Tree Gully (1975) 11 SASR 255; (1975) 37 LGRA 325.

included (again where the circumstances justified it). This approach is counter-intuitive and will not assist in the adaptive re-use of heritage properties.

Recommendation 17: Clause 5.10(10) – conservation incentives

The use of the word "land" should not be replaced with other language in clause 5.10(10).

The new clause 5.10(11)

The Department has proposed that a new clause 5.10(11) be inserted. It would say that

> Despite any other provision of this Plan, a heritage item, a heritage conservation area or an archaeological site is validly identified for the purposes of this Plan if it is shown on the Heritage Map *or* described in Schedule 5 (emphasis added).

This effectively overrides the current requirement, drawn from the dictionary, which requires such identification in both the heritage map and the schedule.

The only justification offered for this change by the options paper is a need to

> provide for entries that may be inadvertently missed from either Schedule 5 or the Heritage Map ...

This proposal seems to regard the legal certainty offered by the current arrangements as nothing more than a hindrance. The proposal, if adopted, would green light careless conduct by both parliamentary draftsmen and those that instruct them.

It would mean that a lawyer who checks a schedule to an LEP will not be able to rely on the schedule to be a complete and accurate list. It will mean that a town planner who checks a map will not be able to rely on it.

Additionally, where an item is listed on a map, but not a schedule, vital information will be missing, including a description of the listed item and information about whether the item is of state or local significance. Such information is essential if the provisions of the planning regime are to be properly applied.

We implore the Department to recognise, once and for all, the importance of certainty when dealing with land use issues. Maps and schedules in statutory instruments should be able to be relied upon 100 per cent by professionals, property owners, etc. The consequences of errors of public servants should not be shifted onto the users of the government's legal documents – these are issues that the government itself must address without shifting the burden for its mistakes onto the private sector.

Recommendation 18: Proposed clause 5.10(11) – government errors

The proposed clause 5.10(11) to shift the consequences of government errors onto the private sector should not be implemented.

2.9 Schedule 5

We do not object to the proposal about formatting. However, we do object to any move to turn the *Environmental Planning and Assessment Act* into a general tool for the protection of moveable objects, when the legislation is clearly designed for land use control (see the discussion in section 2.2 above).

As consequence, we do not support the last sentence of the proposed note, which says that:

> Moveable objects do not need to be included in the heritage schedule or map where not attached to land.

As we said in reference to section 2.2, moveable objects that are not attached to or partly/wholly buried in the land have no place being protected under the *Environmental Planning and Assessment Act* (and are currently not so protected). Should the government decide to introduce such protection it should do so by substantive legislation, not a backdoor amendment to an environmental planning instrument.

Recommendation 19: Proposed changes to Schedule 5

There should be no reference to moveable objects that are not attached to land in the note in Schedule 5.

Part 3: Clarification of Group Terms and Sub-Terms

3.1 Circular definitions

The most basic rule of definition writing is to avoid circular definitions, but the proposed new dictionary provisions in the standard instrument, are laden with them. A circular definition exists where one phrase is defined using a word which, in turn, uses the original phrase as its definition. For example, "happy" may be defined as "joyful", but if "joyful" is also defined as "happy" both definitions mean nothing.

Circular definitions can establish that two phrases mean the same thing, but can often shed little light on what either of the word or phrases in question actually mean.

For example, the new proposed definition of "residential accommodation" is:

> a building or place used predominantly as a place of residence, and includes any of the following:
>
> (a) attached dwellings, ...

Yet, an "attached dwelling" is defined to mean

> residential accommodation that comprises a building containing 3 or more dwellings ...

A "dwelling" is defined to mean

> a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile.

And the dictionary tells us that a "domicile" is "a place of residence ...". [49]

So, "residential accommodation" includes an "attached dwelling" and an "attached dwelling" is "residential accommodation" that is a "place of residence". Has anyone noticed the tautology going on here? As a general rule the courts will assume that words have been inserted for a purpose. What is the purpose of this repetition? We are concerned that unnecessary legal argument and time will be wasted trying to read legal meaning into the unnecessary words that will be inserted into numerous definitions as a result of the proposed extensive use of circular definitions.

We have sympathy with the Department's desire to highlight the relationship between group and sub-group terms, but we believe the same approach can be achieved without circular definitions, by more extensive use of notes.

Recommendation 20: Circular definitions

There should be no circular definitions in the Standard Instrument. We recommend the Department should highlight the relationship between group and sub-group terms through more extensive use of notes. We recommend that the Department obtain detailed advice from senior counsel on these issues.

[49] A Delbridge, J Bernard, D Blair et al, *Macquarie: Australia's National Dictionary*, Revised third edition (1997) 560.

3.2 Making neighbourhood shop and subspecies of shop

The form of retail development that is subject to the most minimal regulation is "neighbourhood shop". Therefore any attempt to further restrict the categories of retail shop that might fall within this definition requires significant scrutiny.

The existing definition of "neighbourhood shop" says that the phrase

> means retail premises used for the purposes of selling *small daily convenience goods* such as foodstuffs, personal care products, newspapers and the like *to provide for the day-to-day needs of people who live or work in the local area*, and may include ancillary services such as a post office, bank or dry cleaning, but does not include restricted premises (emphasis added).

The current key elements that allow premises to be regarded neighbourhood shop are:

- the premises must be used for the purposes of selling small daily convenience goods; and
- the items sold must provide for the day-to-day needs of people who live or work in the local area.

The definition also makes it clear that items that fall into the genus of "foodstuffs, personal care products, newspapers" are unquestionably "small daily convenience goods", but does not preclude other items from being "small daily convenience goods" so long as they "provide for the day-to-day needs of people who live or work in the local area".

As we have observed in many previous submissions, this definition is very limited. In a centre which only permits neighbourhood shops a small shop that sells iPods, mobile phones and personal radios will be banned. As will a baby clothes shop. A florist will have to argue that flowers are a "small daily convenience good" and "satisfy day-to-day needs" of locals.

The options paper proposes to delete the reference to "retail premises" in the definition and instead replace it with the word "shop". This will mean that the neighbourhood shop is not just a sub-category of the generously defined group "retail premises", it will be a sub-category of the more restricted type of retail premises known as a "shop".

The definition of "shop" was not part of the original scheme of the Standard Instrument, which was subject to extensive consultation with industry in local government and finalised in 2006. It was, at the time, intended that the traditional reference to "shops" in environmental planning instruments would be superseded by the more generously defined "retail premises".

However, a series of shock amendments were made to the Standard Instrument just before Christmas in December 2007, following clandestine consultations with local government officials (but not with industry). These amendments inserted a new definition of "shop" which is more limited than "retail premises". This enabled councils to be more prescriptive about the forms of retail that might be located in important centres. For example, a centre that only permits "shops" will not allow many kinds of speciality retailers, such as pet shops or jewellery stores.

In the Standard Instrument "shop" is defined to mean

> retail premises that sell *groceries, personal care products, clothing, music, homewares, stationery, electrical goods or other items of general merchandise*, and may include a neighbourhood shop, but does not include food and drink premises or restricted premises (emphasis added).

By changing the status of "neighbourhood shops" to a subspecies of "shop" the limitations of "shop" are imposed on "neighbourhood shops" on top of the restrictions already contained in the "neighbourhood shop" definition. This is important because the purpose of a "shop" must be to sell one or more of the following:

- groceries;
- personal care products;

- clothing;
- music;
- homewares;
- stationery;
- electrical goods;
- other items of general merchandise.

If the recommended change to the definition of "neighbourhood shop" in the options paper is adopted, the key elements that allow premises to be regarded neighbourhood shop will now be:

- the premises must be used for the purposes of selling small daily convenience goods; and
- the items sold must provide for the day-to-day needs of people who live or work in the local area; **and**
- the purpose of the shop must be to sell groceries, personal care products, clothing, music, homewares, stationery, electrical goods or other items of general merchandise.

There will clearly be no impact on a shop that retails foodstuffs, personal care products and newspapers because these item are expressly mentioned as examples of permitted goods in the "neighbourhood shop" definition.

Groceries

However, there would be some ambiguity about the extent of food items that could be sold, particularly fresh food. Under the new proposed hierarchy, the reference foodstuffs in the neighbourhood shop definition will be limited such that only foodstuffs that are "groceries" or "general merchandise" are to be permitted.

The *Macquarie Dictionary* defines groceries as commodities sold by a grocer.[50] A grocer is defined to sell "general supplied for the table, as flour sugar, coffee, etc., and in other articles of household use".[51] Similarly the *Oxford Dictionary* says a grocer is a person who is a "dealer in esp. dried and preserved foods and other miscellaneous household provisions".[52]

The definition of "groceries" was considered in *CTS Strathpine Pty Ltd v Pine Rivers Shire Council*.[53] In that planning case, it was necessary to consider the meaning of the phrase "food or groceries". It was said that

> [t]he meaning of "food" is straightforward enough. It is "what is eaten or taken into the body, for nourishment". As Brabazon QC DCJ pointed out in *Westfield Management v Pine Rivers Shire Council* at 543 however, the word "groceries" has a less certain scope. Food items would not ordinarily be excluded from qualifying as groceries, although **not all food items would necessarily also be groceries** ... (bold added).[54]

In order for a fresh food retailer to be established in a centre where all retail is prohibited, other than neighbourhood shops, it will be necessary for the proponent to successfully argue groceries include fresh food (which may be difficult) or that fresh food is a form of general merchandise.

General merchandise

As we mentioned earlier, the existing "neighbourhood shop" definition creates difficulties for a range of small businesses that may want to establish in a locality which only permits retail in the form of

[50] A Delbridge, J Bernard, D Blair et al, *Macquarie: Australia's National Dictionary*, Revised third edition (1997) 834.
[51] Ibid.
[52] Oxford University Press, *Shorter Oxford English Dictionary* (2007) 1163.
[53] [2006] QPEC 111.
[54] *Strathpine Pty Ltd v Pine Rivers Shire Council* [2006] QPEC 111 [12] (citation omitted).

neighbourhood shops. For example, a florist will have to argue that flowers are a "small daily convenience good" and "satisfy day-to-day needs" of locals.

If the proposal in the option paper goes forward, a florist will have the added burden of proving that flowers are either items of homeware (unlikely, flowers aren't akin to furniture) or general merchandise.

Similarly, a tobacconist will need to show their products are either "groceries" (unlikely, see discussion above) or "general merchandise".

A DVD shop will need to show their products are either "electrical goods" (difficult, as there are no electrical components) or "general merchandise".

We can see therefore, that a lot may fall on the vague concept of "general merchandise". There is not a huge amount of judicial exposition on this phrase (although one can expect a lot more, unfortunately, if this change proceeds). However, it is clear that the law would draw a line between "general merchandise" and "speciality merchandise".[55] It is clear, that "timber and building boards", for example, are special merchandise,[56] however only a large amount of litigation will tell us if flowers, tobacco and DVDs are "general" or "speciality" merchandise.

Over-regulation

In short, our view is that the options paper's proposed changed to the definition of neighbourhood shop, present a significant step towards increased over-regulation. The public interest will not be served by this addition of a multi-layered complicated definition.

Recommendation 21: Making neighbourhood shop and subspecies of shop

Neighbourhood shop should not be made a subspecies of "shop", but remain a direct subgroup of "retail premises".

3.3 Hardware and building supplies

We congratulate the Department for recognising the problems in the existing definition of "timber and building supplies" (which arises, in part, from the shock amendments made in December 2007).

We support the following definition proposed by the options paper:

> hardware and building supplies means a building or place used for the display, sale (whether by retail or wholesale) or hire of goods or materials that are used in or are ancillary to the construction, improvement, and maintenance and use of buildings and adjacent outdoor areas whether or not landscape and garden supplies are sold on the premises. [57]

We also strongly support the proposal to mandate "hardware and building supplies" along with "landscape and garden supplies" as mandated permitted uses in the B5 business development zone the, IN1 general industrial zone and IN2 light industrial zone. We note that the B5 Development zone originally included "retail premises" as a mandatory permitted use when the Standard Instrument was put in place in 2006, which would have permitted the retail sale of hardware and building supplies, but the use was deleted as part of the shock amendments to the Standard Instrument in December 2007.

[55] *Snowside Pty Ltd v Holroyd City Council* [2003] NSWLEC 136 [82].
[56] Ibid.
[57] NSW Department of Planning, *Draft – Potential Amendments to the Standard Instrument* (2010) 32.

Recommendation 22: Hardware and timber supplies

We support option 3(a) as new definition of "hardware and building supplies" and support the inclusion of this term as a mandatory permitted use in the business development zone and the light Industrial zone. It should also be mandated as a permitted use in the IN1 general industrial zone.

3.4 High technology industry

The options paper proposed a new definition for "high technology industry" which will mean

> a *light industry* that has as its primary functions the manufacture, development, production, processing or assembly of, or research into, any of the following:
>
> (a) electronic or micro-electronic systems, goods or components,
>
> (b) information technology, computer software or hardware,
>
> (c) instrumentation or instruments,
>
> (d) biological, pharmaceutical, medical or paramedical systems, goods or components,
>
> (e) multi-media, production of films and television, including any post production communications,
>
> telecommunications systems, goods or components,
>
> (f) telecommunications systems, goods or components,
>
> (g) sustainable energy technologies, and
>
> (h) other goods, systems or components intended for use in science or technology (emphasis added).

The options paper asserts that this definition is needed:

> In order to encourage and support the research and development of advanced technologies, there may be some merit in differentiating certain specialised fields of industry and providing opportunities for these uses in areas where not all types of industry may be appropriate.

This statement simply does not make sense. To understand why it is necessary to briefly digress and re-cap the current categorisation of "industry" in the Standard Instrument.

Firstly, "industry" means

> the manufacturing, production, assembling, altering, formulating, repairing, renovating, ornamenting, finishing, cleaning, washing, dismantling, transforming, processing or adapting, or the research and development of any goods, chemical substances, food, agricultural or beverage products, or articles for commercial purposes, but does not include extractive industry or a mine.

A subgroup within the description of "industry" is "light industry" which means

> an industry, *not being a hazardous or offensive industry or involving use of a hazardous or offensive storage establishment*, in which the processes carried on, the transportation involved or the machinery or materials used *do not interfere with the amenity of the neighbourhood* by reason of noise, vibration, smell, fumes, smoke, vapour, steam, soot, ash, dust, waste water, waste products, grit or oil, or otherwise (underlining and emphasis added).

The proposed "high technology industry" definition is not a sub-group of "industry", it is a sub-group of "light industry". By definition, all light industry activities are activities which "do not interfere with the amenity of the neighbourhood". Therefore there cannot possibly be a genuine circumstance where it is appropriate to permit "high technology" industry, but not other kinds of light industry.

The author of the options paper has either misunderstood the nature of their own proposal or is being mischievous by asserting that a definition of "high technology industry" is necessary to permit "certain specialised fields of industry" when "not all types of industry may be appropriate".

The options paper goes onto to say that:

> There is ... a need to ensure such uses would not pose a significant risk in the locality to human health, life or property, or to the biophysical environment, and would not emit a polluting discharge in a manner that would have a significant adverse impact in the locality.

This statement again does not make any sense. By definition, a "light industry" cannot have such impacts. The proposal for "high technology industry" is merely a narrower version of "light industry". The forms of "light Industry" that are excluded from the definition of "high technology industry" are no more likely to pose a risk to human health or pollute than the sexier parts of light industry that have been included in the "high technology industry" definition.

> Any high technology industry would need to relate to the on-site manufacturing or research and development of high technology products and not merely the provision of "back of house" facilities (such as a call centre) or office premises.

No justification is given for the proposed restriction. No attempt has been made to support it by reference to the NSW Government's better regulation principles. In fact, the statement is internally inconsistent. For example, the manufacture and research into computer software, by definition, takes place in office premises. Research for multi-media and film and television will often require an outbound call centre. What makes it appropriate for office premises for these kinds of low impact uses to be permissible, while office uses for, say, a supermarket head office, to be prohibited?

The inevitable result of this definition is that in some business areas, "high technology industries" will be permitted, whilst "light industry" generally will not be.

This is clearly nothing more than a desire for a cheap politically sexy press release, allowing someone to claim that they are supporting "high technology industries" when really all they are doing is banning a whole series of entirely inoffensive (but nonetheless job rich) other light industries.

Recommendation 23: High technology industry

We do not support the proposed "high technology industry" definition.

3.5 Retail premises

The options paper says that

> [u]nder the current Standard Instrument definitions, there are a number of land uses (e.g. bulky goods premises, landscape and garden supplies etc.) which may, depending on the nature of the development, fall under more than one group term ... As a matter of clarity, it is suggested that any particular land use should either be part of one group term, or be separated as stand-alone and not be covered by any group terms.

The paper proposes that a series of uses that currently overlap or are included in the definition of "retail premises" will be excluded from the phrase. Namely:

- bulky goods premises;
- hardware and building supplies;
- highway service centres;
- industrial retail outlets;
- landscape and garden supplies;
- restricted premises;
- rural supplies;
- service stations;
- vehicle sales or hire premises

Our concern is always that highly contrived and artificially restricted definitions cause problems, as the authors of local environmental plans often overlook the limited nature of these definitions when listing permitted uses in a land use table.

In fact, the Department itself has made this error when preparing the options paper. If the change were to go ahead without other accompanying changes to the mandatory permissible uses table in the Standard Instrument (and none are suggested) the following zones where it is currently mandatory to permit "bulky goods premises" will no longer require that bulky goods premises be permitted:

- Zone B2 Local Centre
- Zone B3 Commercial Core
- Zone B4 Mixed Use

The reality is, if "retail premises" generally are to be permitted in a zone, there is no good reason why bulky goods premises, hardware stores or car hire premises should not be permitted. The up-shot of this approach is the small-scale TV or whitegoods store (such as a Bing Lee or Retravision) in a town centre will be banned.

Recommendation 24: Artificial limits to the meaning of "retail premises"

We do not support the artificial exclusion from the definition of "retail premises" of bulky goods premises, hardware and building supplies, highway service centres, industrial retail outlets, landscape and garden supplies, restricted premises, rural supplies, service stations, or vehicle sales or hire premises.

In the event that the Department elects to ignore this recommendation, at the very least, the Department needs to ensure that the substance of the list of mandatory permissible uses remains the same by the inclusion of the excluded items wherever "retail premises" is currently a mandatory permissible use.

3.6 Restaurants and wine bars

The current definition of "restaurant" says that such premises are

> a building or place the principal purpose of which is the provision of food or beverages to people for consumption on the premises, whether or not takeaway meals and beverages or entertainment are also provided.

The options paper says that a change is necessary "to further distinguish a restaurant (food primary focus) from a pub (drink primary focus)".[58]

As a consequence the paper proposes amendments which would further balkanise the list of permitted use in the Standard Instrument and take NSW a step further away from the idea of multiple-use zoning.

The reason that "restaurants" currently include premises that are principally about the service of beverages, is that any zone that allows a restaurant should (as far as the zoning is concerned) also allow wine bars and the like. Whether or not a particular wine bar is appropriate in a restaurant district should be judged on the merits of the individual application (based on development assessment and/or under the *Liquor Act 2007*).

The result of this change will mean that there will be restaurant districts where the zoning law does not permit "pubs", and therefore, also does not permit the Melbourne-style wine bars. The Department's proposal will lead to wine bars being discriminated against because of prejudice against pubs.

Recommendation 25: Restaurants and wine bars

The definition of restaurants should not be modified to exclude premises that are engaged in the service of beverages.

3.7 Shop top housing

The options paper proposes to clarify the definition of "shop top housing" inserted into the Standard Instrument in the shock amendments of December 2007. Whilst we agree that the proposed revised definition is superior to the current definition, we would prefer a return to the definition of "shop top housing" based on the original 2006 Standard Instrument. Namely:

> ***shop top housing*** means mixed use development comprising one or more dwellings located above (or to the rear of) ground floor retail premises or business premises.

This would reverse the December 2007 changes which altered the definition of shop-top housing. The effect of this amendment was to ensure that only convenience type shops could go in on the ground floor of a mixed-use development (rather than, say, a supermarket) in:

- Zone R1 General Residential;
- Zone R3 Medium Density Residential;
- Zone R4 High Density Residential; and
- Zone B1 Neighbourhood Centre.

The will help ensure that the benefits of mixed-use zoning, well articulated in the report *Liveable Centres* are often realised.[59]

[58] NSW Department of Planning, *Draft – Potential Amendments to the Standard Instrument* (2010) 44.
[59] S Moore, *Liveable Centres* (2009). The report is available on the internet: <http://www.urbantaskforce.com.au/attachment.php?id=2375>.

Recommendation 26: Shop top housing

While we support the options paper's proposed revision to the definition of "shop housing" as preferable to the current definition, we would prefer a return to definition that more closely resembled the original definition in the 2006 Standard Instrument, which was finalised after extensive consultation with local government, industry and the wider community.

3.8 Medical centres

The options paper says the following:

> The current situation is that medical centre falls under two group terms (ie. business premises and health services facility) which has been raised as being unclear. Also, the ISEPP has made health services facility permissible in RU4-RU6, R1, R3-R5, B2-B7. The Standard Instrument mandates business premises in zones B1-B4 and B6. It is proposed that medical centres only fall under the group term health services facility but can be included as an individual land use in other non-prescribed zones where warranted.[60]

We do not think there is anything particularly difficult about a medical centre being in more than one category. In fact, it makes perfect sense. If a zone permits "business premises" there is no reason why it should also permit "medical centres". Similarly, if a zone permits "health services facilities" it should also permit "medical centres". Please note the definition of "medical centre" does not just include GP clinics, it would include the activities of a single psychologist, a naturopath, a chiropractor and a physiotherapist.

By making the proposed change (to exclude "medical centres" from the definition of "business premises"), if a council does not consciously add "health services facility" to a list of permitted uses, health care professionals will be prohibited from offering services to the public.

A case in point is the immediate consequence, if the Department's change goes ahead. Medical centres are currently mandatory permissible uses (by reason of their inclusion in the definition of "business premises") in the following zones:

- B1 Neighbourhood Centre;
- B2 Local Centre;
- B3 Commercial Core;
- B4 Mixed Use; and
- B6 Enterprise Corridor.

As a result, the provision of services by health care professionals will end up being prohibited in some zones, where the provision of services by lawyers, architects, financial planners and accountants are permitted. This cannot be allowed to happen.

[60] NSW Department of Planning, *Draft – Potential Amendments to the Standard Instrument* (2010) 39.

Recommendation 27: Medical centres

Medical centres should continue to be included in both the definitions of health care facilities and business premises.

In the event that the Department rejects this view, at the very least the status quo should be preserved by mandating "health services facilities" as permissible uses in the neighbourhood centre; local centre; commercial core; mixed use and enterprise corridor zones.

3.9 Entertainment facilities

The Standard Instrument's definition of business premises is currently as follows:

> ***business premises*** means a building or place at or on which:
>
> (a) an occupation, profession or trade (other than an industry) is carried on for the provision of services directly to members of the public on a regular basis, or
>
> (b) a service is provided directly to members of the public on a regular basis,
>
> and may include, without limitation, premises such as banks, post offices, hairdressers, dry cleaners, travel agencies, internet access facilities, medical centres, betting agencies and the like, but does not include sex services premises.

The definition of entertainment facilities is as follows:

> ***entertainment facility*** means a theatre, cinema, music hall, concert hall, dance hall and the like, but does not include a pub or registered club.

We can see that, as the Standard Instrument stands, an "entertainment facility" such as a cinema, disco or nightclub falls square within both definitions. This is entirely appropriate. At a zoning level any locality that is appropriate for business premises is appropriate for entertainment facilities. This is consistent with the principles of multiple use zoning that underlined the original Standard Instrument (but have been so heavily watered down by the December 2007 shock amendments and most of the proposals in the options paper).

The options paper proposes to twist the meaning of "business premises" by excluding "entertainment facilities". This will enable councils to micromanage uses in centres and corridors, by permitting business premises, but not entertainment facilities. A case in point is the immediate consequence, if the Department's change goes ahead. Entertainment facilities are currently mandatory permissible uses (by reason of their inclusion in the definition of "business premises") in the following zones:

- B1 Neighbourhood Centre; and
- B6 Enterprise Corridor.

There is no justification for this discriminatory treatment at a zoning level. Whether or not a particular cinema or nightclub is appropriate in a particular location where business premises generally are permitted can be judged through development assessment against the prevailing development standards. There should not be the ability to make poorly justified sweeping decisions at a zoning level.

Recommendation 28: Entertainment facilities

Entertainment facilities should continue to be included in both the definition of "business premises".

In the event that the Department rejects this view, at the very least the status quo should be preserved by mandating "entertainment facilities" in the neighbourhood centre, and enterprise corridor zones.

3.10 Environment protection works and coastal protection works

The options paper says that:

> It has been raised that there is a need to distinguish coastal protection works from the broader environmental protection works definition and leaving the permissibility of these coastal protection works to council (unless otherwise determined in any ISEPP amendment). The above change clarifies this.

The paper does not say who has raised this proposal. Nor has it been explained why "coastal protection works", which are currently mandatory permissible uses in 10 zones should now only be permitted if council elects to include them in a local environmental plan.

As it stands, coastal protection works are permissible in the following zones (because they are included in the definition of "environmental protection works"):

- RU1 Primary Production;
- RU2 Rural Landscape;
- RE1 Public Recreation;
- RE2 Private Recreation;
- E2 Environmental Conservation;
- E3 Environmental Management;
- E4 Environmental Living;
- W1 Natural Waterways;
- W2 Recreational Waterways
- W3 Working Waterways

We would support an extension of the existing definition of "environmental protection works" to make a stronger reference to "coastal protection works".

We suggest that the existing "environmental protection works" be re-named "environmental and coastal protection works" and the revised definition states that the phrase

> means works either:
>
> (a) associated with the rehabilitation of land towards its natural state or any work to protect land from environmental degradation, and includes bush regeneration works, wetland protection works, erosion protection works, dune restoration works and the like; and/or
>
> (b) for the purpose of protection of development (within or adjacent to any body of water subject to tidal influence) from erosion and recession, and includes seawalls, groynes, beach nourishment, sand bypassing, offshore breakwaters, artificial headlands and reefs.

"Environmental and coastal protection works" should be a mandatory permitted use in the ten zones listed above.

Recommendation 29: Environmental and coastal protection works

That the existing definition of "environmental protection works" be extended to become "environmental and coastal protection works" and that this be a mandatory permissible use in all the existing ten zones where it is currently a mandatory permissible use. Council would have the option of considering the merits of individual applications in development assessment.

3.11 Dual occupancy

The options paper says that:

> Dual occupancy will become a new subset including dual occupancy (attached) and dual occupancy (detached). This change will enable councils to split the permissibility or otherwise of attached and detached dual occupancies where justified. It will provide councils with more flexibility for their land use tables in particular zones to suit local circumstances. It is not proposed that this be a mandated use in any zone, but would be an issue for councils to determine as appropriate.

The paper does not explain why or when it might be necessary for councils to permit one type of dual occupancy, but not another. This is yet another example of fracturing of the land use table and further degrading of the multiple use intent of the original land use table.

Recommendation 30: Dual occupancy

We do not support the proposed splitting of the definition for dual occupancy between attached and detached uses.

4. Further information

The Urban Taskforce is available to further discuss the issues outlined in this submission.

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