Urban Taskforce
AUSTRALIA

Time for some competition

A planning system that gives consumers more choice, lower prices and better service

An Urban Taskforce submission to the NSW Government in response to the exhibition of the *State Environmental Planning Policy (Competition) 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

The planning system restricts competition amongst the owners of commercial and retail land for tenants. It does this by expressly requiring new development proposals for commercial offices, retail facilities, business premises and entertainment facilities to demonstrate that they will not impact on the market share of incumbent players.

There is nothing wrong with planning rules that protect the community from commercial or retail development that generates too much traffic or destroys the visual amenity of an area. However, there is something wrong with blocking a new retail outlet or other commercial development because it will compete with existing businesses.

Such measures are contrary to the public interest for three key reasons:

- Firstly, banning a development in one locality does not necessarily mean the development will proceed in the planning authority's preferred location.
- Secondly, action of this kind by a planning authority confers excessive market power on landholders in the authority's preferred location.
- Thirdly, while the planning authority may feel that infrastructure is being underutilised at their preferred development location, this does not mean that infrastructure is being fully utilised at the developer's preferred location.[1]

The Urban Taskforce commissioned former ACCC Chairman, Professor Allan Fels, to examine some of the most anti-competitive portions of the current planning system – the regulation of retail development. His report, *Choice Free Zone,* was released in 2008.[2] It concluded that shoppers are paying far too much for their groceries because of restrictive out-of-date planning laws. Professor Fels found that an overhaul of the state government's centres' policy would allow greater competition, leading to consumers paying up to 18 per cent less for basic food items and up to 28 per cent less for other household products.

Professor Fels criticisms have since been echoed by the Australian Competition and Consumer Commission (ACCC) who found that competition in grocery retailing was being limited by town planning laws. The *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* concluded that zoning and planning regimes act as an artificial barrier to new supermarkets.

The ACCC found that the limitation on competition was "potentially impacting on competition between supermarkets". The ACCC said that

> [T]he centre's policy... is likely to lead to a greater concentration of supermarket sites in the hands of the [major supermarket chains] ... In particular, such policies, by limiting opportunities for new developments, contribute to increasing the level of concentration in the retail grocery sector.

[1] See for example the detailed explanation in D Adams, A Disberry, N Hutchison and T Munjoma (2002) "Retail Location, Competition and Urban Redevelopment", *The Services Industries Journal*, 22:3, 135-148.
[2] A Fels; S Beare & S Szakiel , *Choice Free Zone* (2008). Available on the internet: <http://www.urbantaskforce.com.au/attachment.php?id=1519>.

Similarly, the Productivity Commission found that planning laws were contributing to the difficulties of small retail tenants negotiating with "oligopolistic" shopping centre landlords.[3]

The provisions of the draft *State Environmental Planning Policy (Competition) 2010* ("the draft SEPP") can be sorted into one of four categories:

- harmful provisions that will deter much needed urban development (clause 8);
- window dressing that achieves little (clause 9);
- well-intended provisions that may be ineffective because they are not wide-ranging enough (clauses 10 and 11); and
- machinery provisions that need further work (clauses 6 and 7).

The draft SEPP is also notable for the matters are completely omitted from its text.

Accordingly, the draft SEPP should not proceed in its current form, and does not have our support. This submissions makes recommendations that will address our concerns.

Clause 8

The proposed clause 8 of the draft SEPP (relating to the viability of proposed commercial development) does not have our support in its current form. Indeed, this clause would be extremely harmful and make the NSW planning system utterly unworkable.

In our view, developers who are prepared to risk their own money on projects should not be forced to justify their commercial judgment to the public service, politicians or the courts. While clause 8 might well achieve that end, it is far too broadly phrased.

If clause 8 was to be introduced in its current form, a consent authority would be precluded from considering a submission from a developer to modify proposed conditions of consent when the argument is based on the economic viability of proposed development. Case law makes it clear that that kind of consideration of commercial viability is lawful.[4] It must not be displaced by the proposed clause 8 of the draft SEPP.

We would support clause 8 if it was re-drafted so that it said that the mere fact that a private-sector proponent is willing to take the entrepreneurial risk and proceed with a project will be sufficient to establish that the project satisfies a community need and will be viable.

However we oppose clause 8 proceeding in its current form in the strongest possible terms. If we were forced to choose between the status-quo and clause 8, as currently drafted, we would support the status-quo.

Clause 9

Clause 9 of the draft SEPP relates to "loss of trade etc for other commercial development".

This clause mimics the existing law on the application of section 79C(1)(b) of the *Environmental Planning and Assessment Act 1979* ("the Act"), which says:

> In determining a development application, a consent authority is to take into consideration ... the likely impacts of that development, including ... social and *economic impacts* in the locality, (emphasis added) ...

[3] Productivity Commission, *The Market for Retail Tenancy Leases in Australia* (2008).
[4] *R v Westminister City Council, Ex parte Monahan* [1990] 1 QB 87; *City West Housing Pty Ltd v Sydney City Council* [1999] NSWLEC 246 [139]; *Randall Pty Ltd v Willoughby City Council* [2005] NSWCA 205 [36] (Basten JA with Giles and Santow JJA agreeing).

The intent of the authors of clause 9 of the draft SEPP appears to have been to codify the 1979 High Court case *Kentucky Fried Chicken Pty Ltd v Gantidis*.[5] This case explains how competition issues are to be dealt with when they arise in the context of section 79C(1)(b).[6]

The *Kentucky Fried Chicken* approach fails to acknowledge:

- the development (or threat) of new property assets competing with existing property assets is an inherently positive thing for society, that should be encouraged for its own sake; and
- that a shopping centre will not necessarily cease trading merely because a business or businesses experience financial difficulties due to competition.[7]

We believe that the planning system is not equipped to assess the costs and benefits of increased competition, and that any attempt to do so is likely to result in inefficient economic outcomes and will disadvantage ordinary consumers. For this reason we have long argued that section 79C should be amended and a provision inserted into Part 3A so as to exclude consideration of this issue in the development assessment process. We have also argued that rules regarding rezoning decisions (through section 117 directions and/or changes to Part 3 of the Act) should be revised to prevent similar problems arising in that context.

As it stands, the proposed new clause 9 appears to merely preserve the status-quo and will do little to stop anti-competitive decisions. In particular, clause 9(2) retains the current anti-competitive loophole which allows local councils to consider the impact of new businesses on the trade of existing businesses.

Under the existing case law, many new retail outlets have been stopped by local councils, and the Land and Environment Court exercising its merits jurisdiction, because of the risk that they will compete with existing businesses. We have included a wide range of typical case studies on developments that have been blocked in the Appendix to this submission. This new state policy will allow this existing anti-competitive conduct to continue. It seems nothing will change.

We draw little comfort from the assurance that competitive impact of a new business will only be considered when there may be an "overall adverse impact on the extent and adequacy of local community services". This giant loophole is not new, it is copied from the existing law, and it authorises almost all of the anti-competitive decisions already routinely made under the current town planning laws.

It means that any groups of businesses impacted by a new entrant will continue to use planning laws to block the competition, by claiming that increased competitive pressure may drive existing businesses away. This objection is often made and it is difficult to disprove, particularly when most local councils have little appreciation of the importance of competition.

The current situation is untenable, and we hope that real reform would still happen. The current mega-shopping centres littering NSW are not the product of consumer choice, but a result of anti-competitive town planning laws that limit smaller-scale retail competition. As the current shopping centres become increasingly congested and expensive, consumers will demand real reform.

The Department of Planning's main justification for its decision to propose a codification of existing law seems to be an assertion that there is uncertainty in the current law, and clause 9 will remove that uncertainty. We do believe the suggested legal uncertainty is present, or if it is, it is grossly exaggerated.

There is, in our view, a great deal of uncertainty when seeking to develop retail, business and entertainment premises. However, that uncertainty is not because of a lack of clarity about the relevant legal principles. The uncertainty arises because there is no objective way a decision can be

[5] (1979) 140 CLR 675.
[6] *Cartier Holdings Pty Ltd v Newcastle City Council* (2001) 115 LGERA 407
[7] Channel nine is still available to the public despite the fact that its owner (Bond Media) experienced severe financial difficulties in the 1980s; the cross city tunnel is still operating, despite the severe financial difficulties faced by its developer (which led to its forced sale in 2007).

made as to whether or not new development will lead to a net loss of shopping facilities in a community. The inherent subjectively of this decision-making process breeds a perception of uncertainty.

This uncertainty will be addressed if the NSW planning system refrains from trying to estimate the competitive impact of new businesses on existing businesses. In part, this will be achieved by deleting clause 9(2) altogether from the draft SEPP.

Nonetheless, if clause 9(2) is to proceed (in spite of our objections) the text "overall adverse impact" should be replaced with "severe, sustained and irreversible" impact.

Such a clause would read

9 Loss of trade etc for other commercial development

(1) The ~~likely~~ impact of proposed commercial development on the commercial viability of other commercial development is not a matter that may be taken into consideration by a consent authority for the purposes of determining a development application under Part 4 of the Act to carry out the proposed development or in connection with an application under Part 3A of the Act for approval to carry out a project or of a concept plan for a project.

(2) However, ~~any~~ such ~~likely~~ impact may be taken into consideration if ~~the~~ there is a high degree of probability that proposed development ~~is likely~~ will have ~~an overall adverse~~ a severe, sustained and irreversible impact on the extent and adequacy of facilities and services available to the local community (having regard to the ~~likely~~ impact on existing facilities and services and the facilities or services to be provided by the proposed development).

(3) ~~Likely i~~Impacts referred to in this clause include ~~likely~~ loss of trade.

It remains a mystery to us why clause 9(1) is only to be applied to decisions under Part 4 of the Act and not Part 3A. It is an even bigger mystery to us that there is no proposal to ensure that the same types of decisions that might be prohibited under Part 4 are not also prohibited in the zoning process. These anomalies should be rectified.

Clauses 10 and 11

Clauses 10 and 11 of the draft SEPP deal with "[r]estrictions on number of particular types of retail premises" and "[r]estrictions on proximity of particular types of retail premises".

We strongly support the thrust of the proposed provisions.

Provisions of this kind in environmental planning instruments and development controls plans are clearly anti-competitive, although this is one of the least common forms of anti-competitive regulation in the NSW planning system.

However, we see no reason why only provisions in environmental planning instruments and development controls plans should be overridden in this way. This limited approach overlooks the very large role given to non-statutory documents in the NSW development assessment process. Clauses 10 and 11 fail to recognise this reality.

There will also be some question as to whether zone objectives in a Standard Instrument complaint local environmental plan are "restrictions" within the meaning of clause 10 and clause 11. Similarly, the status of provisions in environmental planning instruments and development controls plans that are "heads of consideration" rather than mandatory requirements may not be clear.

We ask that the provisions of clauses 10 and 11 should be extended to non-statutory policy documents, strategies and studies, which might be considered in the development process. Zone objectives and other non-mandatory heads of consideration should also be included.

Clause 7

Clause 7 defines the "commercial development" that is to be regulated by the SEPP.

In the event that the Department of Planning proceeds with its proposals (detailed in the paper *Draft – Potential Amendments to the Standard Instrument*)[8] to artificially narrow the definitions of "retail premises" and "business premises", the definition of "commercial development" in the draft SEPP should be broadened to include the excluded categories of uses.

Clause 6

Clause 6 of the draft SEPP sets out the relationship with other environmental planning instruments.

The wording of clause 6 is now regularly used in a large number of state environmental planning policies. In a quick check, we established that at least 19 (and in all likelihood many more) policies use the same clause, almost word-for-word.[9] Multiple state environmental planning policies now each assert that they alone are paramount over all past and future environmental planning instruments.

Ideally, issues of this kind could be resolved by consolidating all state environmental planning policies into a single, state-wide planning framework SEPP, or even better, the Standard Instrument itself – this would require some effort to reconcile all conflicting provisions.

In the event that the Department of Planning is not prepared to consider anything so radical, all of the existing "relationship with other environmental planning instrument" clauses in all SEPPs should be repealed, and instead a single provision should be inserted in a single SEPP, setting out the hierarchy of SEPPs. In such a hierarchy, the Competition SEPP should take precedence over all other SEPPs.

Rationalisation of statutory plans

A very small number of provisions of environmental planning instruments will be immediately overridden by the draft SEPP, if/when it is initially made. However, most anti-competitive provisions will remain untouched. The great bulk of anti-competitive provisions are not addressed by the current SEPP. This section of the submission highlights clauses in existing local environmental plans that will be untouched by the proposed Competition SEPP.

If the planning system is to permit competition, changes will need be made to *Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument") and other local environmental plans.

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

[9] See, for example: *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*, cl 5(4); *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, cl 5(3); *State Environmental Planning Policy No 53—Metropolitan Residential Development*, cl 5(2); *State Environmental Planning Policy No 71—Coastal Protection*, cl (5); *State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes)*, cl 7(1); *State Environmental Planning Policy No 6—Number of Storeys in a Building*, cl(5); *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development*, cl 6; *State Environmental Planning Policy No 64—Advertising and Signage*, cl 7; *State Environmental Planning Policy No 62—Sustainable Aquaculture*, cl 6(1); *State Environmental Planning Policy No 55—Remediation of Land* cl 6(1); *State Environmental Planning Policy No 4—Development Without Consent and Miscellaneous Exempt and Complying Development*, cl 5; *State Environmental Planning Policy No 47—Moore Park Showground*, cl 4(2); *State Environmental Planning Policy No 41—Casino Entertainment Complex*, cl 7; *State Environmental Planning Policy No 36—Manufactured Home Estates*, cl 4(1); *State Environmental Planning Policy No 30—Intensive Agriculture*, cl 4; *State Environmental Planning Policy No 21—Caravan Parks*, cl 5(1) and ; *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*, cl 6.

Table of recommendations

Recommendation 1

Clause 8 should be narrowed so that it creates a conclusive presumption that a private-sector proponent is willing to take the entrepreneurial risk and proceed with a project that satisfies a community need and that the project will be viable.

Any such clause should not prevent an applicant from electing to provide information on commercial viability if they chose to do so. Nor should the clause prevent a consent authority from considering such information as part of its decision-making process. The decision in *R v Westminister City Council, Ex parte Monahan* (applied by the NSW Court of Appeal in *Randall Pty Ltd v Willoughby City Council)* should not be tampered with.

A similar provision to the re-drafted clause 8 should also be included in section 117 directions to govern zoning decisions.

In the event that the Department of Planning is unwilling to consider a narrower version of clause 8, then the clause should be dropped from the draft SEPP altogether.

Recommendation 2

The proposed clause 9(2) should be deleted. In the event that the Department of Planning rejects our preferred position out of hand, clause 9 should be re-drafted as suggested in the body of this paper.

Recommendation 3

Section 79C of the *Environmental Planning and Assessment Act* (NSW), which explains how development applications are to be evaluated by consent authorities under Part 4 of that Act, should be amended and new provisions should be inserted into Part 3 and Part 3A.

The new provisions should make it clear that, when considering a development application or making zoning decisions no direct or indirect consideration may be given by a consent authority to the loss of trade that might be suffered by any other planned or existing business or businesses.

Recommendation 4

In order to reduce the risk of legal challenge, the Department of Planning should clearly explain the statutory basis for the proposed clause 9.

Recommendation 5

The *Right Place for Business and Services, Improving Transport Choice* and *Local Planning Direction 3.4 should* be withdrawn and the text of clause 9(1) should be applied as a section 117 direction to govern zoning decisions. Clause 9(1) should be extended to apply to Part 3A approvals.

Recommendation 6

The provisions of clauses 10 and 11 should be extended to non-statutory policy documents, strategies and studies that might be considered in the development process. Zone objectives and other non-mandatory heads of consideration should also be included.

Recommendation 7

In the event that the Department of Planning proceeds with its proposals (detailed in the paper *Draft – Potential Amendments to the Standard Instrument*) to artificially narrow the definitions of "retail premises" and "business premises", the definition of "commercial development" in the draft SEPP should be broadened to include the excluded categories of uses.

Recommendation 8

All state environmental planning policies should be merged into a single state-wide planning framework SEPP, or, even better, the Standard Instrument itself – this would require some effort to reconcile all conflicting provisions.

In the event that the Department of Planning is not prepared to consider anything so radical, all of the existing "relationship with other environmental planning instrument" clauses in all SEPPs should be repealed, and instead, a single provision should be inserted in a single SEPP, setting out the hierarchy of SEPPs. In such a hierarchy, the Competition SEPP should take precedence over all other SEPPs.

Recommendation 9

"Retail premises" and "business premises" should not be banned in any statutory plan in zones intended for use around centres, including neighbourhood centres, and corridors. Retail and business premises should be permitted (with consent) in such zones. The merits of individual proposals can be considered at the development assessment phase.

Recommendation 10

"Retail premises" and "business premises" should not be banned in any statutory plan in zones intended for use for employment purposes, such as the existing business development zones, business parks and the enterprise corridor zones.

Recommendation 11

At the very least, "bulky goods premises" should be added as a permitted use in Zone IN1 General Industrial and Zone IN2 Light Industrial. Costco-style development should also be permitted, by permitting "retail premises" as a permitted use, with an appropriate supporting zone objective.

Recommendation 12

The use of multiple-use zones should be required - to avoid sterilising land in the event that the market does not seek to develop some or all of the land made available and maximise the opportunities for new retail development.

Recommendation 13

The anti-competitive provisions of the NSW Government's Standard Instrument should be removed. Namely:

- In a "Business Development Zone" retail, office premises and other uses should be permitted, even if it would provide competition to businesses located in established centres.
- In "Enterprise Corridor" "Business Park"; "General Industrial"; and "Light Industrial" zones retail and other uses should be permitted even if it would provide competition to businesses located in established centres.

Specific textual changes are set out in the body of this submission.

Recommendation 14

In the Standard Instrument's "Zone B1 Neighbourhood Centre" the zone objective should be amended to omit the words "small scale". Height and/or FSR controls are sufficient to control the bulk and scale of development; a subjective prohibition imposed through use of the words "small-scale" is inappropriate.

Recommendation 15

Anti-competitive clauses in pre-2006 LEPs should be deleted.

Recommendation 16

Statutory plans should not be permitted to restrict development in one location, merely to funnel development to another location. Development in an area should be permitted or prohibited based on its intrinsic qualities, that is, issues of visual amenity, infrastructure, noise, etc specific to the location concerned.

1. Introduction

The planning system restricts competition amongst the owners of commercial and retail land for tenants. It does this by expressly requiring new development proposals for commercial offices, retail facilities, business premises and entertainment facilities to demonstrate that they will not impact on the market share of incumbent players.

There is nothing wrong with planning rules that protect the community from commercial or retail development that will generate too much traffic or destroy the visual amenity of an area, but there is something wrong with blocking a new retail outlet or other commercial development because it will compete with existing businesses.

The stated reason for restrictions of this kind is to force development into locations where infrastructure is underutilised (a "centre"). In short, if you locate your new development in a "centre", there will be no need to prove your development will not steal someone else's business. On the other hand, if your business is not in a "centre", you may still proceed with the development, but only if you can show (through an economic study) that your development will not detract from the existing trade of incumbent businesses in a centre.

Such measures are contrary to the public interest for three key reasons.

Firstly, banning a development in one locality does not necessarily mean the development will proceed in the planning authority's preferred location. Often there will be sound commercial reasons why the developer has decided not to develop on the land nominated by the planning authority. This could be the price demanded by the property owner, but also could be due to factors such as the existing levels of road congestion, travel time for the likely customer base, car parking limitations, lack of pedestrian traffic, etc. Important projects, and therefore economic and social benefits, are likely to be lost to the community as a whole.

Secondly, action of this kind by a planning authority confers excessive market power on landholders in the authority's preferred location. With few or no landholders competing against each other, landholders do not need to price their land competitively to attract a development proposal. They are also more likely to let a developer walk away when they believe the planning system will prohibit the same development happening anywhere else within the local region. They will have the view that it is only a matter of time until the need for the given development (such as a supermarket) is so great, that a developer will have to pay the inflated prices the landholder is seeking. Even if this turns out to be true the community will lose out on social and economic benefits while the development is delayed. Ultimately the customers of a delayed shopping centre will also end up paying more at the cash register in order to pay back the inflated price charged by the landholder.

Thirdly, while the planning authority may feel that infrastructure is being underutilised at their preferred development location, this does not mean that infrastructure is being fully utilised at the developer's preferred location.[10] In any event, one of the reasons it is attractive to develop outside the existing network of major centres, is that the roads at many of these locations are already heavily congested.

The planning systems many 'centres policies' have become very elaborate and unnecessarily complex. It's worth briefly highlighting some key points about centres policies as they stand:

- definitions of centres are arbitrary – many areas with excellent infrastructure are not designated as centres because:
  - it would have been politically inconvenient,
  - planners have not completed the work to formally assess infrastructure capacity, or

[10] See for example the detailed explanation in D Adams, A Disberry, N Hutchison and T Munjoma (2002) "Retail Location, Competition and Urban Redevelopment", *The Services Industries Journal*, 22:3, 135-148.

- they simply weren't considered when the maps were prepared;

- not all centres are equal – an elaborate artificial legal hierarchy of centres has been constructed that bears little relationship with infrastructure quality or capacity and has more to do with political or historical factors, as a consequence a "higher-order" development in a "lower-order" centre is treated as an "out-of-centre" development even though it may be literally right next to an under-utilised train station;
- corridors may have the same quality of infrastructure as centres, but do not get included in strategies for ideological and/or political reasons.

The net result of these policies is that the rents for some business tenants are much higher than they need to be. The major beneficiaries of such policies are the property owners in the favoured centres.

The Urban Taskforce commissioned former ACCC Chairman, Professor Allan Fels, to examine some of the most anti-competitive portions of the current planning system – the regulation of retail development. His report, *Choice Free Zone,* was released in 2008.[11] It concluded that shoppers are paying far too much for their groceries because of restrictive out-of-date planning laws. Professor Fels found that an overhaul of the state government's centres' policy would allow greater competition, leading to consumers paying up to 18 per cent less for basic food items and up to 28 per cent less for other household products.

Professor Fels warns that under the present planning regime

> governments appear to be up-holding anti-competitive processes that elsewhere would potentially considered to be contravening the *Trade Practices Act*.

The report by Professor Fels was the most detailed analysis of the impact of planning policies on retail competition ever produced in Australia. It supported the role of the planning system in protecting the community from congestion, noise and the loss of cultural and environmental assets. However, it was very critical of planning laws that are protecting existing retail landlords from the threat of competition. It found that new supermarkets and larger food stores are being denied the opportunity to compete with existing shopping centres. Less choice means higher prices for groceries and everyday household goods. Other key points of the Fels *Choice Free Zone* report were:

- Reform of the system could amount to $78 billion in extra income for the NSW economy and $296 billion Australia-wide.
- It would also be a boom for employment, delivering 147,000 jobs nationally and 47,000 jobs in NSW.
- Present planning laws which effectively restrict supermarkets to established shopping centres, resulting in traffic congestion and restrictive trade.
- Major retail landlords in existing shopping centres were taking between 17 and 21 per cent of retail turnover as rent. This compares with 9 to 12 per cent in other countries.

Professor Fels said that retail developments should be encouraged outside established shopping centres, easing the transport burden and encouraging more "pedestrian friendly" communities.

Professor Fels criticisms have since been echoed by the Australian Competition and Consumer Commission (ACCC) who found that competition in grocery retailing was being limited by town planning laws. The *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* concluded that zoning and planning regimes act as an artificial barrier to new supermarkets.

[11] A Fels; S Beare & S Szakiel , *Choice Free Zone* (2008). Available on the internet: <http://www.urbantaskforce.com.au/attachment.php?id=1519>.

The ACCC found that the limitation on competition was "potentially impacting on competition between supermarkets". The ACCC said that

> [T]he centre's policy... is likely to lead to a greater concentration of supermarket sites in the hands of the [major supermarket chains] ... In particular, such policies, by limiting opportunities for new developments, contribute to increasing the level of concentration in the retail grocery sector.

Similarly, the Productivity Commission found that planning laws were contributing to the difficulties of small retail tenants negotiating with "oligopolistic" shopping centre landlords. Its inquiry report: *The Market for Retail Tenancy Leases in Australia* found that zoning and planning controls can:

- limit competition and erode the efficient operation of the market for retail tenancies;
- give extra negotiating power to incumbent landlords and retail tenants;
- particularly advantage owners that have control over large amounts of retail space located some distance from competitors and their tenants; and
- disadvantage businesses that wish to gain access to additional space.

2. Clause 8 – viability of proposed commercial development

The proposed clause 8 of the draft *State Environmental Planning Policy (Competition) 2010* ("the draft SEPP") is set out as follows:

> The commercial viability of proposed commercial development is not a matter that may be taken into consideration by a consent authority for the purposes of determining a development application under Part 4 of the Act to carry out the proposed development.

The clause does not have our support in its current form. Indeed, **this clause would be extremely harmful and make the NSW planning system utterly unworkable.**

We have always sought rules preventing consent and planning authorities from demanding proof that a developer's project is commercially viable and second guessing the commercial judgment of a developer.

Our view is consistent with the traditional view of the planning system, which held that a planning authority

> exercises no paternalistic view or avuncular jurisdiction over would-be developers to protect them from their financial follies.[12]

However, this view has not prevailed.[13] For instance, in NSW, the Land and Environment Court has held that a consent authority (or the Court on appeal) may take into account the economic viability of the proposed use of the site in determining a development application, as a matter of the "public interest', even when the applicant had no desire to have such information considered.[14]

In our view, planning policy and law *should* assume that a developer who is prepared to risk their own money on a project, should be entitled to do so, without having to justify their commercial judgment to the public service, politicians or the courts. While clause 8 might well achieve that end, it is far too broadly phrased.

As a result **it will achieve many other, undesirable, outcomes**. In particular, it seeks to extinguish *R v Westminister City Council, Ex parte Monahan*[15] which has been applied in the context of NSW planning law by both the Land and Environment Court and the Court of Appeal.[16]

Why is that a problem? *R v Westminister City Council* is a crucial decision. It makes it clear, that under existing planning law, a consent authority is lawfully able to consider whether desirable development not economically feasible, and modify apply planning requirements, so as to ensure that such development is still able to take place. The current law allows planning authorities to depart from utopian planning visions, in order to ensure that appropriate development is actually financially robust and is able to proceed. **If clause 8 was to be introduced in its current form, a consent authority would be precluded from considering a submission from a developer to modify proposed conditions of consent when the argument is based on the economic viability of proposed development.**

[12] *J Murphy & Sons Ltd v Secretary of State for the Environment* [1973] 2 All ER 26, 31; qualified in *Hambledon and Chiddingfold Parish Councils v Secretary of State for the Environment* [1976] JPL 502.
[13] *City West Housing Pty Ltd v Sydney City Council* [1999] NSWLEC 246 [142]-[143].
[14] *Patra Holdings Pty Ltd v Minister for Land and Water Conservation* [2001] NSWLEC 265 [16]:
[15] [1990] 1 QB 87.
[16] *City West Housing Pty Ltd v Sydney City Council* [1999] NSWLEC 246 [139]; *Randall Pty Ltd v Willoughby City Council* [2005] NSWCA 205 [36] (Basten JA with Giles and Santow JJA agreeing).

Perhaps this is actually the intention of the Department of Planning? We urge the Department to study closely these extracts from the comments of Lord Justice Kerr in *R v Westminister City Council* which articulately and clearly explain why it may be necessary for a planning decision to be influenced by the need to ensure that project is still feasible:

> **Financial constraints on the economic viability of a desirable planning development are unavoidable facts of life in an imperfect world.** It would be unreal and contrary to common sense to insist that they must be excluded from the range of considerations which may properly be regarded as material in determining planning applications. Where they are shown to exist they may call for compromises or even sacrifices in what would otherwise be regarded as the optimum from the point of view of the public interest. **Virtually all planning decisions involve some kind of balancing exercise.** A commonplace illustration is the problem of having to decide whether or not to accept compromises or sacrifices in granting permission for developments which could, or would in practice, otherwise not be carried out for financial reasons. Another, no doubt rarer, illustration would be a similar balancing exercise concerning composite or related developments, i.e., related in the sense that they can and should properly be considered in combination, where the realisation of the main objective may depend on the financial implications or consequences of others. However, provided that the ultimate determination is based on planning grounds and not on some ulterior motive, and that it is not irrational, there would be no basis for holding it to be invalid in law solely on the ground that it has taken account of, and adjusted itself to, the financial realities of the overall situation (bold added).[17]
>
> Suppose that an urban authority had a policy of requiring the use of green tiles - which are substantially more expensive than others - in areas of residential developments bordering on the countryside. If a developer who wished to erect an otherwise highly desirable housing estate claimed that this would be uneconomic if green tiles had to be used, then the authority would clearly not be bound to reject his application out of hand. It would be bound to consider it on its merits, although it might well be highly sceptical about the assertion that the economic viability of the project would founder if green tiles had to be used. But if, after proper consideration, this were indeed the conclusion reached on a basis which would not admit of a charge of irrationality, then there could be no question about the validity of a decision which permitted the use of red or black tiles in the circumstances.[18]

As the Court of Appeal has said in the context of case dealing with an application by a developer to vary a consent condition which precluded car parking charges:

> If a planning authority can impose a condition regulating the circumstances in which [parking] charges can be levied, it would be absurd to suggest it cannot consider the economic impact of imposing or varying such a condition.[19]

The Court also said that

> as is illustrated by the judgment of Kerr LJ in *R v Westminster City Council; Ex parte Monahan* [1989] 3 WLR 408 at 425 ... the imposition of a condition may involve financial constraints on the economic viability of a particular development, which may be of significance in particular circumstances. At the very least, such a consideration will not necessarily fall outside the boundary of "planning" considerations ...[20]

The Court of Appeal's approach was applied in *Health Projects International Party Limited v Baulkham Hills Shire Council*[21] where Commissioner Moore (as he then was) accepted the evidence that the revenue the company was seeking to obtain from paid parking (via a variation to a development consent) was a matter of financial significance for the applicant.

Of course, this case law is also clear that an ability of a consent authority to consider such factors does not necessarily mean that hardship factors, personal to an applicant, will influence every planning decision.[22]

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[17] *R v Westminister City Council, Ex parte Monahan* [1990] 1 Q.B. 87,111 (Kerr LJ).
[18] Ibid 113.
[19] *Randall Pty Ltd v Willoughby City Council* [2005] NSWCA 205 [38] (Basten JA with Giles and Santow JJA agreeing).
[20] Ibid.
[21] [2008] NSWLEC 1477 [25].
[22] *Hill v Blacktown City Council and the Minister Administering the Environmental, Planning and Assessment Act 1979, Pluijmers and Anor v Blacktown City Council and the Environmental, Planning and Assessment Act 1979* [2008] NSWLEC 203 [28]-[29]

The recent case law on this issue is just plain commonsense and must not be displaced by the proposed clause 8 of the draft SEPP.

For example, *Pafburn v North Sydney Council*[23] sets out now well-established criteria for assessing amenity impact on neighbouring properties. One criterion asks:

> Would it require the loss of reasonable development potential to avoid the impact?

A concept such as "reasonable development potential" would be meaningless if a consent authority was precluded from considering the economic feasibility of development; yet this is what the current drafting of clause 8 requires.

We would support clause 8 if it was re-drafted so that it said that the mere fact that a private-sector proponent is willing to take the entrepreneurial risk and proceed with a project will be sufficient to establish that the project satisfies a community need and will be viable.

However, we oppose clause 8 proceeding in its current form in the strongest possible terms. **If we were forced to choose between the status-quo and clause 8, as currently drafted, we would support the status-quo.**

Recommendation 1

Clause 8 should be narrowed so that it creates a conclusive presumption that a private-sector proponent is willing to take the entrepreneurial risk and proceed with a project that satisfies a community need and that the project will be viable.

Any such clause should not prevent an applicant from electing to provide information on commercial viability if they chose to do so. Nor should the clause prevent a consent authority from considering such information as part of its decision-making process. The decision in *R v Westminister City Council, Ex parte Monahan* (applied by the NSW Court of Appeal in *Randall Pty Ltd v Willoughby City Council)* should not be tampered with.

A similar provision to the re-drafted clause 8 should also be included in section 117 directions to govern zoning decisions.

In the event that the Department of Planning is unwilling to consider a narrower version of clause 8, then the clause should be dropped from the draft SEPP altogether.

[23] [2005] NSWLEC 444.

3. Clause 9 – Overall adverse impact on facilities

Clause 9 of the draft SEPP is set out below:

> **9 Loss of trade etc for other commercial development**
>
> (1) The likely impact of proposed commercial development on the commercial viability of other commercial development is not a matter that may be taken into consideration by a consent authority for the purposes of determining a development application under Part 4 of the Act to carry out the proposed development.
>
> (2) However, any such likely impact may be taken into consideration if the proposed development is likely to have an overall adverse impact on the extent and adequacy of facilities and services available to the local community (having regard to the likely impact on existing facilities and services and the facilities or services to be provided by the proposed development).
>
> (3) Likely impacts referred to in this clause include likely loss of trade.

As we will see from the discussion below, this clause mimics the existing law on the application of section 79C(1)(b) of the *Environmental Planning and Assessment Act 1979* ("the Act").

3.1 The application of section 79C(1)(b) of the Act

Leslie A Stein, a barrister and former Chairman of the Western Australian Town Planning and Appeal Tribunal and former Chief Counsel to the Sydney Metropolitan Strategy, analysed the relationship between the planning law and competition in his work: *Principles of Planning Law*, published by Oxford University Press.[24] The following overview draws on his analysis.

Section 79C(1) of the Act provides that

> In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application: ...
>
> (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and *economic impacts* in the locality, (emphasis added) ...

Thus, the law currently provides that the consideration of "economic impacts" is a necessary part of the development assessment process. This begs the question: if a new development is proposed for an area and it will compete with existing development, is there an obligation for the economic impacts of this competition to be considered? For example, if a new video store will place market pressure on the already over abundant existing video stores, does the planning system have a role to play?

The underlying principle in relation to the relevance of economic considerations in planning is that:

> Town planning is not concerned with general economic regulation or the rationalisation of product; rather it is concerned with the pattern of land use and with promoting consistency between various uses of land. Town planning provides a fetter on our free enterprise market system, but it is not designed to replace that system with a form of centralised decision-making.[25]

[24] L Stein, *Principles of Planning Law* (2008) 178-187.
[25] *Shell Compnay of Australia Ltd v City of Frankston* (1983) 8 APA 126, 135, cited in Pacific Seven Pty Ltd v City of Preston (1986) 24 APA 56; Eighty-First Killenaule Nominees Pty Ltd v City pf <pprabbin (1987) 31 APA 32.

Originally, in NSW, courts and tribunals followed this approach when applying town planning laws. For example, in 1958 it was stated by Justice Sugarman that

> [a]ttempts to regulate the number of businesses of some particular kind to be carried on in an area having regard to the assumed needs of its population may be found to amount to an essay into the field of general economic policy of a kind which was not intended to be entrusted to local councils.[26]

So far so good. In 1962, however, Justice Hardie found that

> ... [T]he area in which the subject land is situated is adequately – in fact more than adequately – supplied by existing services stations; that the capacity of these stations, most of which are modern and up-to-date, is only partially used, and that the demands in the area ... can be met for the present and reasonably foreseeable future by the existing service stations.[27]

The use of the planning system to prevent excessive concentrations of a given development type in an area was also applied in the context of factories in 1965.[28]

The legal relationship between economic consequences of a use and the regulation of competition was clarified in 1979 in a landmark decision by the High Court: *Kentucky Fried Chicken Pty Ltd v Gantidis*.[29] In this case Justice Stephen found that competition issues were relevant to the concept of amenity:

> If the shopping facilities presently enjoyed by a community or planned for in the future are put in jeopardy by some proposed development, whether that jeopardy be due to physical or financial causes, and if the resultant community detriment will not be made good by the proposed development itself, that appears to me to be a consideration proper to be taken into account as a matter of town planning.
>
> It does not cease to be so because of the profitability of individual existing businesses are at one and the same time also threatened by the new competition afforded by that new development. However the mere threat of competition to existing businesses *if not accompanied by a prospect of a resultant overall effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with*, will not be a relevant town planning consideration (underling added).[30]

This case establishes that a rule that the "mere threat of competition" is not a reason to refuse development permission, but a very significant loophole was created. The loophole says a development proposal that reduces "the extent and adequacy of facilities available to the local community" may be refused. The test, as Justice Stephen articulates, is whether the anticipated reduction in "shopping facilities" will "be made good by the proposed development itself".

Under this case regulation of competition, for its own sake, is not possible under town planning laws, but regulation of competition, as a means of protecting community amenity, *is* permitted.[31]

It is not clear what degree of impact is necessary before there is sufficient negative effect to the community. For example, in one decision, the retrenchment of an existing petrol station's staff was said to result in an overall determinant.[32]

It was stated by Justice Stein in the NSW Land and Environment Court that the economic test required a consideration as to whether the economic effect of a development would upset a retailing hierarchy in terms of the optimal distribution of the various forms of shopping opportunities. He also asked whether or not the proposal would "destabilise the economic viability" of other shopping centres".[33]

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[26] *Neptune Oil Pty Ltd v Ku-ring-gai Municipal Council* (1958) 3 LGRA 316, 321 per Sugarman J.
[27] *Total Oil Products (Aust) Pty Ltd v Sydney City Council* (1962) 8 LGRA 217, 220.
[28] Pioneer Concrete (NSW) Pty Ltd v Hornsby Shire Council (1965) 11 LGRA 310.
[29] (1979) 140 CLR 675.
[30] *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675, 687 (Stephen J). Gibb, Mason and Aickin JJ concurred.
[31] *Connelly J in Zieta No. 59 Pty Ltd v Gold Coast City Council* [1987] 2 Qd R 116; *R v City of Salisbury; Ex parte Burns Philp Trustee Co Ltd* (1986) 42 SASR 557, 559; examples are found in *Lewiac Pty Ltd v Errenmore Pty Ltd and Ors* [1994] QPLR 70; *Zylmans v Council of The Shire of Cook and Anor* [1993] QPLR 28.
[32] *Smith v Brisbane City Council* (1980) 2 APA 72.
[33] *Lakeside Plaza Pty Ltd v Legal & General Properties No2 Ltd (*1992) 76 LGRA 60.

In the seminal case of *Fabcot Pty Ltd v Hawkesbury City Council*[34] Justice Lloyd explained how courts should use the *Kentucky Fried Chicken* principle when applying NSW planning law:

> The *Trade Practices Act 1975* (Cth) and the *Fair Trading Act 1987* (NSW) are the appropriate vehicles for regulating economic competition. Neither the Council nor this Court is concerned with the mere threat of economic competition between competing businesses. In an economy such as ours that is a matter to be resolved by market forces, subject to the *Trade Practices Act* and the *Fair Trading Act*. It is not part of the assessment of a proposal under the *Environmental Planning and Assessment Act* for a consent authority to examine and determine the economic viability of a particular proposal or the effect of any such proposal on viability of a competitor ...
>
> It seems to me that the only relevance of the economic impact of a development is its effect 'in the locality'; that is to say, in the wider sense described in *Kentucky Fried Chicken Pty Ltd v Gantidis* (underlining added).[35]

The NSW Land and Environment Court case turned on a predecessor provision to the current section 79C. The Court went on to block a new supermarket on the evidence of an expert witness that there would be a 10 to 15 per cent decline in non-supermarket trading in the Windsor town centre if the proposal for a supermarket outside that town centre was to proceed:

> ... [T]he out of town, stand-alone supermarket now proposed will to a significant extent break the synergy or nexus between supermarket and non-supermarket shopping in Windsor. To "marginalise" the non-supermarket businesses ... would clearly put at risk the viability of those businesses. The effect would be as described in *Kentucky Fried Chicken Pty Ltd v Gantidis*: The facilities presently enjoyed by the community in Windsor would be put in jeopardy by the proposed development and the resultant community detriment would not be made good by the proposed development itself.

If the facilities in Windsor were being enjoyed so much by the community, why would members of the community stop shopping there? The approach outlined in this case has become the standard way of dealing with new retail developments, in councils, at the Department of Planning and in the Land and Environment Court.[36]

In *Cartier Holdings Pty Ltd v Newcastle City Council*[37] Justice Pearlman (as she then was) reviewed *Fabcot Pty Ltd v Hawkesbury City Council*[38] in the context of revised (and still current provisions) set out in section 79C. Justice Pearlman said that

> ... the phrase 'economic impacts in the locality' is to be understood in an environmental and planning sense. Hence I would agree with Lloyd J in [*Fabcot*] that the economic impact of a proposed development upon private individual traders is not per se a proper environmental or planning consideration... It would be unwise to attempt to categorise the type of economic impact which would properly fall to be considered under s 79C(1)(b), for, of course, each case depends upon its own facts, but it is clear, in my opinion, that the section does not require the consideration of economic impact on individual competitors, except to the extent that any impact upon individual competitors, or competition generally, demonstrates economic impact in the locality as an environmental or planning matter (underlining added).[39]

Those that wish to defend the status quo will usually cite the general rule so clearly articulated by Justice Lloyd, without highlighting the exception equally well articulated by Justices Stephen, Lloyd and Pearlman. In practice the exception is a very broad one, allowing the impact of new retail, entertainment and office development to be considered where there is a risk that existing business/landlord may be impacted.

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[34] (1997) 93 LGREA 373.
[35] *Fabcot Pty Ltd v Hawkesbury City Council* (1997) 93 LGREA 373, 377.
[36] For example: *Bongiorno Hawkings Frassetto & Associates v Griffith City Council* [2007] NSWLEC 551; *Woolworths Ltd v Wyong Shire Council* [2005] NSWLEC 400; *GWH Buildings Pty Ltd v Great Lakes City Council* [2004] NSWLEC 557; *Centro Properties Ltd v Warringah Council* (2003) 128 LGERA 17; *Agostino v Penrith City Council* (2002) 123 LGERA 305; and *Jetset Properties v Eurobodalla Shire Council* [2007] NSWLEC 198.
[37] (2001) 115 LGERA 407
[38] (1997) 93 LGREA 373.
[39] *Cartier Holdings Pty Ltd v Newcastle City Council* (2001) 115 LGERA 407 [34].

According to Leslie Stein, author of the *Principles of Planning Law*:

> The test of jeopardy in *Kentucky Fried Chicken* is a resultant overall adverse impact on the extent and adequacy of facilities; it does not mean that the facilities will cease to operate but there is, overall, an adverse effect. It must then be shown that, as a matter of economic analysis impacts can be unacceptable even though they do not put another shopping centre in jeopardy of closing down. ...
>
> In all planning cases in which shopping centres are concerned, the principles of *Kentucky Fried Chicken* will be used as the fulcrum to balance competing interests. Even though competition alone is not relevant it will be examined in detail in order to assess the overall impact on the locality. It will be necessary for the court or tribunal to decide on the level of impact by speculating how many shops will gravitate to the new centre and how many patrons will abandon the existing facilities. The evidence will be that of shopping centre experts who track the expected turnover per square metre and the viability of the existing centre. In the end it is all about competition and nothing more, because it is not possible to determine the exact effect on an existing commercial centre (underlining added).[40]

A difficulty with the test laid out in the *Kentucky Fried Chicken* case is that a planning authority must decide whether there will be numerically more or less retail and commercial premises if the development goes ahead. This in turn will require an economic study to see if the new business will undermine the viability of existing businesses. If studies show this to be a risk of development, the development can be refused because there will (allegedly) be less (not more) businesses in the area if the development proceeds. Case study 3 in the appendix sets out just how complex the routine process of assessing for competitive impact is.

We do not argue that the test is an incorrect application of the law as it stands. We argue the law is wrong and should be changed. The issue is not the numerical amount of retail and commercial premises in the area. One big supermarket can put out of business two smaller supermarkets. Is that bad? Not if the smaller supermarkets are out of business because they were more expensive, shoddily run, had little investment and generally offering poor service. By going out of business the land occupied by the inefficient small supermarkets becomes available for re-development. It's possible a new competitor to the big supermarket may arise. Or some other attractive service for the local community that is able to compete on its own merits may be set up (for example a higher end gourmet food store, which competes on quality, rather than price). The benefits of competition are visible through good services, efficient pricing, innovation and investment. These things cannot be accurately measured by any legal test.

Competition may be present even if there is only one business in an area. The key issue is whether it is easy for rivals to be set up. The threat that other businesses may establish themselves will often be sufficient incentive for a business to offer goods, services and value to its customers.

The *Kentucky Fried Chicken* approach fails to acknowledge:

- the development (or threat) of new property assets competing with existing property assets is an inherently positive thing for society, that should be encouraged for its own sake; and
- that a shopping centre will not necessarily cease trading merely because a business or businesses experience financial difficulties due to competition.[41]

The above discussion has explained how the statutory economic test allows a development application to be refused on the basis that it will put competitive pressure on businesses located in a centre and therefore (supposedly) put the provision of services in a centre at risk.

We believe that the planning system is not equipped to assess the costs and benefits of increased competition, and that any attempt to do so is likely to result in inefficient economic outcomes and will disadvantage ordinary consumers. For this reason we have long argued that section 79C should be

[40] L Stein, *Principles of Planning Law* (2008) 186.

[41] Channel nine is still available to the public despite the fact that its owner (Bond Media) experienced severe financial difficulties in the 1980s; the cross city tunnel is still operating, despite the severe financial difficulties faced by its developer (which led to its forced sale in 2007).

amended and a provision inserted into Part 3A so as to exclude consideration of this issue in the development assessment process. We have also argued that rules regarding rezoning decisions (through section 117 directions and/or changes to Part 3 of the Act) should be revised to prevent similar probloems arising in that context.

3.2 Clause 9 codifies the *Kentucky Fried Chicken* case

If it isn't already apparent from the above discussion, it is necessary to highlight that the intent of the authors of clause 9 of the draft SEPP appears to have been to codify the *Kentucky Fried Chicken* case.

The table below compares the provisions of the clause with the provisions of *Kentucky Fried Chicken*, *Fabcot* and *Cartier Holdings*. The thrust of each point is the same.

	Clause 9	***Kentucky Fried Chicken***	***Fabcot***	***Cartier Holdings***	**Analysis**
9(1)	The likely impact of proposed commercial development on the commercial viability of other commercial development is not a matter that may be taken into consideration by a consent authority for the purposes of determining a development application under Part 4 of the Act to carry out the proposed development.	[T]he mere threat of competition to existing businesses if not accompanied by a prospect of a resultant overall effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration.	Neither the Council nor this Court is concerned with the mere threat of economic competition between competing businesses. In an economy such as ours that is a matter to be resolved by market forces ... It is not part of the assessment of a proposal under the Environmental Planning and Assessment Act for a consent authority to examine and determine the economic viability of a particular proposal or the effect of any such proposal on viability of a competitor...	[T]he economic impact of a proposed development upon private individual traders is not per se a proper environmental or planning consideration ...	Clause 9(1) establishes a general rule which applies in relation to **commercial development**, while *Kentucky Fried Chicken* applies to **businesses** generally, *Fabcot* refers to **competing businesses** and *Cartier Holdings* refers to **private individual traders**. Clause 9(1) refers to the **likely impact** on **commercial viability**, while *Kentucky Fried Chicken* and *Fabcot* talks of the **mere threat of competition** and *Cartier* speaks of the **economic impact**.

	Clause 9	***Kentucky Fried Chicken***	***Fabcot***	***Cartier Holdings***	**Analysis**
9(2)	However, any such likely impact may be taken into consideration if the proposed development is likely to have an overall adverse impact on the extent and adequacy of facilities and services available to the local community (having regard to the likely impact on existing facilities and services and the facilities or services to be provided by the proposed development).	If the shopping facilities presently enjoyed by a community or planned for in the future are put in jeopardy by some proposed development... and if the resultant community detriment will not be made good by the proposed development itself, that appears to me to be a consideration proper to be taken into account as a matter of town planning. It does not cease to be so because of the profitability of individual existing businesses are at one and the same time also threatened by the new competition afforded by that new development.	[T]he only relevance of the economic impact of a development is its effect 'in the locality'; that is to say, in the wider sense described in *Kentucky Fried Chicken Pty Ltd v Gantidis.*	It would be unwise to attempt to categorise the type of economic impact which would properly fall to be considered under 79C(1)(b), for, of course, each case depends upon its own facts, but it is clear, in my opinion, that the section does not require the consideration of economic impact on individual competitors, except to the extent that any impact upon individual competitors, or competition generally, demonstrates economic impact in the locality as an environmental or planning matter.	Clause 9(2) creates an exception to the general rule in relation to **facilities and services**; for *Kentucky Fried Chicken* it is for **present and planned shopping facilities.** *Cartier* is non-specific. For clause 9(2) the exception is invoked when there is a **likely overall adverse impact**, while the *Kentucky Fried Chicken* applies when situations of **jeopardy**, *Cartier* applies to **any impact**. Clause 9(2) evaluates the impact by reference to **existing facilities and services** and the **facilities or services to be provided by the proposed development**, while *Kentucky* whether resultant community detriment **will not be made good by the proposed development itself** Clause 9(2) speaks of the **local community** while *Kentucky* refers to **a community,** *Fabcot* refers to **the locality,** *as does Cartier.*

	Clause 9	***Kentucky Fried Chicken***	***Fabcot***	***Cartier Holdings***	**Analysis**
9(3)	Likely impacts referred to in this clause **include** likely **loss of trade**.	... whether that jeopardy be due to **physical or financial causes** ...		upon **individual competitors**, or **competition** generally	Clause 9(3) targets **loss of trade** and other unspecified impacts. Kentucky embraces **physical or financial causes** while *Cartier* relates to, but is not limited to, **competition.**

While different language is used across the three cases and clause 9, the basic principles are clearly the same.

As it stands, the proposed new clause 9 appears to merely preserve the status-quo and will do little to stop anti-competitive decisions. In particular, clause 9(2) retains the current anti-competitive loophole which allows local councils to consider the impact of new businesses on the trade of existing businesses.

There is nothing wrong with planning rules that protect the community from retail development that will generate too much traffic or destroy the visual amenity of an area, but there is something wrong with blocking a new retail outlet because it will compete with existing businesses."

Under the existing case law, many new retail outlets have been stopped by local councils, and the Land and Environment Court exercising its merits jurisdiction, because of the risk that they will compete with existing businesses. **We have included a wide range of typical case studies on developments that have been blocked in the Appendix to this submission.** This new state policy will allow this existing anti-competitive conduct to continue. It seems nothing will change.

We draw little comfort from the assurance that competitive impact of a new business will only be considered when there may be an "overall adverse impact on the extent and adequacy of local community services". This giant loophole is not new, it is copied from the existing law, and it authorises almost all of the anti-competitive decisions already routinely made under the current town planning laws.

It means that any groups of businesses impacted by a new entrant will continue to use planning laws to block the competition, by claiming that increased competitive pressure may drive existing businesses away. This objection is often made and it is difficult to disprove, particularly when most local councils have little appreciation of the importance of competition.

The current situation is untenable, and we hope that real reform would still happen. The current mega-shopping centres littering NSW are not the product of consumer choice, but a result of anti-competitive town planning laws that limit smaller-scale retail competition. As the current shopping centres become increasingly congested and expensive, consumers will demand real reform.

In terms of the specific language, we note that some, but not all, of the differences in language are significant.

Firstly, clause 9(1) has been limited to "commercial development" which has a special definition (in clause 7) and is narrower than the concept of "businesses" or "competitors" in the existing law. While we make some specific suggestions about clause 7 separately in this submission, **we also think that, like the existing case law, any provisions of this kind should simply apply to business activity generally.**

Secondly, clause 9(2) measures impacts by considering existing facilities and services and the facilities or services to be provided by the proposed development, but not planned facilities. While we don't think clause 9(2) should be retained, if such a clause is to be included in a final SEPP, the omission of planned facilities is appropriate. Facilities that are planned, but not built, are hypothetical and may ultimately turn out not to be feasible. Opportunities for new facilities and services should not be denied based on protecting theoretical development possibilities that may never be realised.

We note that clause 9(2) can only be invoked when a development is likely to have an overall adverse impact. A casual reader might assume "likely" to mean more often than not (i.e. more than 50 per cent chance of occurring). However in *Almona Pty Ltd v Newcastle City Council*[42] the Court considered the words

> ... *unlikely* to prejudice the viability of existing commercial centres (emphasis added); ...

[42] [1995] NSWLEC 55.

The Court ruled that:

> [A] proposed development is permissible *if there is no real chance or possibility* that it will disadvantage or detrimentally affect the life or existence of existing commercial centres (italics added).

So "likely" will mean "any real chance or possibility". This is an extremely low threshold for the invocation of clause 9(2). If clause 9(2) is to proceed the word "likely" should be substituted with the phrase "a high degree of probability".

Similarly, the idea of "overall adverse impact" blocks any effective competition. Competition inherently requires an adverse impact on those who are exposed to it (all businesses are better off in the absence of competition, but the same cannot be said for their customers). If clause 9(2) is to proceed (in spite of our objections) the text "overall adverse impact" should be replaced with "severe, sustained and irreversible" impact.

Such a clause would read

9 Loss of trade etc for other commercial development

(2) The ~~likely~~ impact of proposed commercial development on the commercial viability of other commercial development is not a matter that may be taken into consideration by a consent authority for the purposes of determining a development application under Part 4 of the Act to carry out the proposed development or in connection with an application under Part 3A of the Act for approval to carry out a project or of a concept plan for a project.

(2) However, ~~any~~ such ~~likely~~ impact may be taken into consideration if ~~the~~ there is a high degree of probability that proposed development ~~is likely~~ will have ~~an overall adverse~~ a severe, sustained and irreversible impact on the extent and adequacy of facilities and services available to the local community (having regard to the ~~likely~~ impact on existing facilities and services and the facilities or services to be provided by the proposed development).

(3) ~~Likely i~~Impacts referred to in this clause include ~~likely~~ loss of trade.

Recommendation 2

The proposed clause 9(2) should be deleted. In the event that the Department of Planning rejects our preferred position out of hand, clause 9 should be re-drafted as suggested in the body of this paper.

3.3 Is there uncertainty that can be removed by codifying *Kentucky Fried Chicken*?

3.3.1 Is there legal uncertainty?

We are disappointed that the proposed clause 9 does little more than codify existing case law. The Department of Planning's main justification for this approach seems to be an assertion that there is uncertainty in the current law, and clause 9 will remove that uncertainty. Department officials appeared be concerned that ambiguity in the case law was leading to competitive impacts being overtly considered in development assessment even when there was no argument accepted about a reduction in the availability of facilities to the public. This surprised us, because we have not been aware of such a case (covert consideration happens all the time, but change to the law won't eliminate that).

We can only assume the legal uncertainty perceived by the Department arises from:

- the relatively minor differences in language between *Fabcot* and *Cartier Holdings* (the latter leaves open the prospect of other unspecified loopholes); and/or
- the decision of the NSW Court of Appeal in *Randall Pty Ltd v Willoughby City Council.*[43]

In *Randall Pty Ltd v Willoughby City Council* Justice Basten (with Justices Giles and Santow agreeing) said that:

> ... [W]ithout seeking to identify precisely the limit sought to be imposed in *Fabcot* and *Cartier Holdings*, it is at least arguable from the analysis set out above that a broader construction of s 79C(1)(b) should be adopted than those cases in the Land and Environment Court would indicate.[44]

However, this comment was not made as part of chain of reasoning necessary to determine the case at issue. As such, it was *dicta* and is not a binding precedent. The matter before the Court of Appeal on that occasion

> ... was not a case in which either the purpose or the effect of the decision was or would be to interfere with market forces.[45]

In relation to competition issues, we have not been able to discern any substantive shift in the judicial approach before or after *Randall Pty Ltd v Willoughby City Council.*

In *The Village Mcevoy Pty Limited v Council of the City of Sydney (No 2)*[46] Justice Pepper considered the validity of decision by a Land and Environment Commissioner to refuse development consent to a new supermarket. It was to be situated within and at the western edge of Green Square about 850 metres from the town centre and roughly equidistant between the Erskineville and Green Square railway stations. The consent had been refused because it was outside the Council's retail hierarchy and was alleged that the project would adversely impact on the "primacy and vibrancy" of the Green Square town centre.[47] Justice Pepper found that the approach of the Commissioner was consistent with both the "broader construction" of section 79C(1)(b) flagged in *Randall Pty Ltd v Willoughby City Council*, but that it was also in conformity with the *Kentucky Fried Chicken* case.[48]

In *Metricon Qld v Tweed Shire Council*[49] a proposed supermarket in an estate was refused consent due to its potential impact on an existing centre. In making this decision, *Randall Pty Ltd v Willoughby City Council* and the *Kentucky Fried Chicken* case were cited and the relevant principles were stated to be:

- the mere threat of competition between commercial interests is not a planning consideration;
- the threat to the viability of a whole shopping centre is a relevant planning consideration;
- the relevant "locality" must be determined in each case.[50]

These principles broadly reflect the case law in place since 1979. The principles were also cited and relied upon in *Jetset Properties v Eurobodalla Shire Council*.[51] They were again stated in *Bongiorno Hawkins Frassetto and Associates v Griffith City Council*.[52]

In *Sun and Anor v Campbelltown City Council*,[53] *Kentucky Fried Chicken* was applied to rule out consideration of the economic impact that the proposed brothel would have on any other similar commercial competing enterprise.[54]

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[43] [2005] NSWCA 205.
[44] *Randall Pty Ltd v Willoughby City Council* [2005] NSWCA 205 [45].
[45] *Randall Pty Ltd v Willoughby City Council* [2005] NSWCA 205 [38].
[46] [2010] NSWLEC 17 [62].
[47] *The Village Mcevoy Pty Limited v Council of the City of Sydney (No 2)* [2010] NSWLEC 17.
[48] *The Village Mcevoy Pty Limited v Council of the City of Sydney (No 2)* [2010] NSWLEC 17 [60]-[61].
[49] [2008] NSWLEC 1453
[50] *Metricon Qld v Tweed Shire Council* [2008] NSWLEC 1453 [43]-[44].
[51] [2007] NSWLEC 198 [46].
[52] [2007] NSWLEC 551 [87].
[53] [2005] NSWLEC 518

In *Urbanesque Planning Pty Ltd v Singleton Shire Council*[55], *Randall Pty Ltd v Willoughby City Council*[56] was cited as an authority for the proposition that the commercial impact of a new bottle shop upon an established hotel is not a relevant consideration.[57] (No argument was accepted that there would be an overall loss of facilities to the public.)

We think the Department of Planning should be using the Competition SEPP to reform the law, rather than merely codify 31 years of bad law.

Recommendation 3

Section 79C of the *Environmental Planning and Assessment Act* (NSW), which explains how development applications are to be evaluated by consent authorities under Part 4 of that Act, should be amended and new provisions should be inserted into Part 3 and Part 3A.

The new provisions should make it clear that, when considering a development application or making zoning decisions no direct or indirect consideration may be given by a consent authority to the loss of trade that might be suffered by any other planned or existing business or businesses.

3.3.2 Uncertainty arises because of difficulties in applying the legal principles to factual situations

In our view, there is a great deal of uncertainty when seeking to develop retail, business and entertainment premises. However, that uncertainty is not because of a lack of clarity about the relevant legal principles. The uncertainty arises because there is no objective way a decision can be made as to whether or not new development will lead to a net loss of shopping facilities in a community. The inherent subjectively of this decision-making process breeds a perception of uncertainty.

That's because (as case study 3 in the Appendix clearly shows) the decisions are based on studies of both existing unmet retail demand and projected future retail demand. Different experts will come to different conclusions, if for no other reason that predicting the future is an extremely uncertain science. These studies have the following inherent problems:

- Any assessment of the demand depends on a series of assumptions and that some assessments can be highly sensitive to the assumptions that are made. It is often not possible to decide which assumptions are correct and as a result, different experts may come to different conclusions about the level of demand.
- Floorspace demand assessments are partially based on population projections. Population projections can be subject to quite significant revisions over time, based on the uncertainty of key inputs, such as immigration levels, interstate and interregional migration, fertility rates, mortality rates, household size and housing supply. Population projections are not intended as predictions or forecasts, but are illustrations of growth and change in the numbers of households and families which would occur if certain assumptions hold. There is no way of measuring the probability of the assumptions accuracy. For example, recent immigration figures have significantly exceeded the estimates laid down by demographers and were not anticipated in retail studies.
- The Australian Bureau of Statistics copes with the inherent uncertainty of population projection by providing 72 multiple alternative projections (each of which it readily concedes may be

[54] Sun and Anor v Campbelltown City Council [2005] NSWLEC 518 [15].
[55] [2010] NSWLEC 1047.
[56] (2005)144 LGERA 119.
[57] *Urbanesque Planning Pty Ltd v Singleton Shire Council* [2010] NSWLEC 1047 [38].

incorrect),[58] however the Department of Planning typically releases and relies on a single projection, creating a misleading impression of certainty, when no such certainty exists.

- Floorspace demand assessments are also partly based on the historical behaviours of consumers at given levels of income. The actual levels of income may be more or less than originally projected, and consumer behaviour may change (particularly in response to new technology, formats, competition or services) in ways that are inconsistent with historical averages. The dynamic impact of innovative market activity remains unaddressed.
- The composition of individual households – mainly the balance between households occupied by individuals, family and group households has the potential to significantly change – this will impact on retail consumption patterns over time. For example, in recent years a mini-baby boom has been underway. This was not anticipated by demographers, and therefore not included in retail studies that pre-dated the boom.
- Assessments of anticipated supply will often be inaccurate because of lack of consistent and complete data on floorspace supply in the pipeline (particularly infill land), uncertainty about the rate of development and the production capacity of the construction industry.
- The particular needs of new entrants and their willingness to compete head-to-head with incumbent retail players is unlikely to be reflected in any analysis prepared prior to the new entrant seeking to establish themselves in the market.

This uncertainty will be addressed if the NSW planning system refrains from trying to estimate the competitive impact of new businesses on existing businesses. In part, this will be achieved by deleting clause 9(2) from the draft SEPP.

3.3.3 Can the application of section 79C be changed via an environmental planning instrument?

In any event, it is not entirely clear to us that an environmental planning instrument, such as the draft SEPP, can be used to narrow the range of matters that are to be considered under section 79C(1)(b). It is clear that such provisions can prevent development that might otherwise be permissible. SEPP provisions can also add additional heads of consideration in decision-making processes. But is a SEPP able to narrow provisions of 79C(1)(b) without explicit statutory authorisation?

This issue was considered by Justice McColl of the Court of Appeal in *Hastings Point Progress Association v Tweed Shire Council:*[59]

> Primacy must be given to the statutory scheme in the EP&A Act: unless that Act permits otherwise, an instrument made under it cannot affect its operation. On that approach, it would be necessary to consider the relationship between the various factors which, to the extent that they are relevant, are mandatory considerations prescribed by s 79C(1). Thus, although an environmental planning instrument may affect aspects of the considerations identified in paras (b)-(e) of the subsection, arguably it cannot remove the obligation of the consent authority to take such matters into account. On that approach, it is not possible for a State environmental planning policy, or a local environmental plan, to mandate the outcome of the consent authority's consideration by restricting the matters to which it is required to have regard... As that approach raises large questions as to the scope of an environmental planning instrument to limit the operation of s 79C, and as that was not the way in which this case was argued it is necessary to leave that approach out of consideration, at least for the present.

It is important to note, as the quote says, the case at hand did not require this issue to be resolved, and the other members of the Court of Appeal passed no comment on the issue.

However, if the concerns of Justice McColl are correct, clause 9(1) would override other inconsistent environmental planning instruments, but would not override section 79C(1)(b). Clause 9(2), with its slightly different wording, would form a new *additional* basis to block competing development on top

[58] Australian Bureau of Statistics, 3222.0 - *Population Projections, Australia, 2006 to 2101*.
[59] 168 LGERA 99,113

of the existing provisions of section 79C(1)(b) and relevant provisions in environmental planning instruments (see section 7 below for more on this).

Recommendation 4

In order to reduce the risk of legal challenge, the Department of Planning should clearly explain the statutory basis for the proposed clause 9.

3.4 Application to Part 3A and zoning decisions

It remains a mystery to us why clause 9(1) is only to be applied to decisions under Part 4 of the Act and not Part 3A. It is an even bigger mystery to us that there is no proposal to ensure that the same kinds of decisions that might be prohibited under Part 4 are not also prohibited in the zoning process.

Local Planning Directions issued under section 117 of the Act in July 2007 state that

> A draft LEP shall locate zones for urban purposes and include provisions that give effect to and are consistent with the aims, objectives and principles of:
>
> (a) Improving Transport Choice – Guidelines for planning and development (DUAP 2001), and
>
> (b) The Right Place for Business and Services – Planning Policy (DUAP 2001).[60]

These two "Integrated Land Use and Transport" policy documents ("the ILUT policies") are clearly very important.[61]

The policy *Improving Transport Choice - Guidelines for Planning and Development* betrays an extremely poor understanding of basic economics. In a free market economy, investment decisions are risky. The presence of risk does not preclude an investment decision from taking place. Instead, an investor will seek returns, consistent with the risk. Only if the risks outweigh the expected retains will the investment decision not take place. Yet the policy deliberately sets out to reduce the commercial risk of investing in (some) centres by eliminating the prospects of competition in a region.[62]

We are not aware of any convincing economic analysis that demonstrates that existing centres are so unattractive to consumers that they will only attract investment with a system of regulatory protection.

The Right Place for Businesses and Services seeks to avoid the "unnecessary" creation of new centres. It is a policy statement that would be very much at home in a policy document of the former Soviet Union's State Planning Commission (Gosplan). Imagine if we had a law in place to ensure that we had no more petrol stations than 'necessary' or no more video stores than 'necessary'. Who decides what's necessary?

In our market economy, it should be consumers who ultimately decide whether or not new retail facilities are necessary, not government planners. If an existing retail facility is doing a poor job of servicing consumers, or is charging its tenants excessive rents, which is reflected in artificially high prices to consumers, then an entrepreneur should be free to establish a new competitor retail facility. Our

[60] *Local Planning Directions*, Direction 3.4(4) issued Section 117(2) of the *Environmental Planning and Assessment Act 1979*, direction issued 19 July 2007.
[61] They have a curious history, because they were released by the government as drafts, in the *Integrated Land Use and Transport* (ILUT) planning package, which was never formally agreed to by cabinet. Yet these two policies have been formalised and do apply by reason of the above direction, even though the related draft *SEPP 66 - Integration of Transport and Land Use* has been withdrawn.
[62] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development* (2001) 27.

market economy tells us that even the threat of a new facility can be effective in ensuring that incumbent retail property owners invest in their assets to keep them fresh and work to keep costs down. However, these planning rules protect incumbent landlords from that necessary competitive threat by ensuring there are no "unnecessary" retail facilities.[63]

In the absence of a designated new centre, you may assume that the private sector might be able to propose a new retail facility, outside of the official centres. But this is prevented too.[64]

To determine whether a new cluster is justified or whether a development proposal is suitable for a cluster location, one of the criterion to be addressed is the "the demand for the amount of floor space for trading bulky goods and the potential impact any oversupply would have on existing centres".[65]

Here again we see the obsession with preventing an "oversupply" and considering the economic impact on existing centres. Additionally there is an inappropriate policy to seek to depress the price of industrial land by prohibiting the conversion of that land to its most efficient economic use.

An oversupply of a particular good or service is beneficial to consumers because it means lower process and better services, as those who are supplying the service compete fiercely by:

- cutting costs (sometimes accepting lower profits); and
- innovating (e.g. new formats, new add-ons services) to distinguish themselves from their competitors.

Sometimes an oversupply can create the sort of shake-up that every industry needs from time-to-time. Complacent businesses can be placed under pressure, and even exit the market, while innovative new businesses take their place.

A centre will not 'die' merely because a particular business, such as an aging stale shopping mall, is unable to compete with a fresh new competitor in a neighbouring suburb. Perhaps the management of the mall may change; the ownership may change. A new owner may choose to invest in the shopping mall, or redevelop the asset to meet a market demand that is not being addressed.

For example, who, 25 years ago, could foresee that the decline of strip shopping would herald a new use for the thousands of retail shops sitting outside of the new shopping malls? The emergence of restaurant districts of Leichhardt, Crows Nest, etc were not predicted, but nonetheless were made possible by the inability of the traditional retailers in these areas to compete with new innovative retail formats.

Academic research has identified that local retailers can and do modify their business models' response to increased competition by (for example) big box retail. For many independent retailers, a key method of competing with large format stores is differentiation.[66] That is, providing specialised products that cater to particular needs in way that a large format store cannot. This necessarily involves providing a higher level of services and product knowledge.[67] In relation to books, in response to increased competition from a large-format store, a bookstore may re-stock based around a highly specialised product line.[68] This approach may benefit consumers by increasing the diversity of books available in the local community. Similarly independent toy stores may respond to a new discount department store by choosing to focus on high quality educational toys. Consumers again win because they kind a wider choice and better service.

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[63] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 6.
[64] Ibid 5.
[65] Ibid.
[66] K Jones and M Doucet, "Big-box retailing and the urban retail structure: the vase of the Toronto area" *Journal of Retailing and Consumer Services* 7 (2000) 233-247, 246.
[67] Ibid.
[68] Ibid.

The Metropolitan Strategy supporting information says that a 'net community benefit test' applies where local environment plans

> have not yet been modified as a result of subregional planning or other spatial planning which identifies zones for future trip generating activities (retail and commercial) using section 117 directions.[69]

Yet this test is impossible to meet. It says there must be "private investment certainty in centres",[70] therefore strongly mitigating against any business that may increase the market risk to landlords in existing centres. That is, existing 'oligopolies' (to quote the Productivity Commission) are enforced.

In any event, the nominal flexibility of the net community benefit test ends when a local environment plan is modified as a result of a subregional strategy.

The ILUT policies severely undermine the operation of a free-market economy in the provision of retail services, office development and entertainment facilities. They discourage multi-purpose trips because they ignore the significant trips that are already going to be taken by most households, irrespective of the concentration of activities in centres.

They reflect an outdated planning approach that regards the separation and regulation of different land-uses as critical, rather than regulation of the scale of buildings. Light industrial areas, business parks and business development zones are intended to be centres of employment. These environments function best when people working in these areas have somewhere to go to shop and socialise before work, at lunch time and after work. Light industrial areas have a particularly important role to play in accommodating very large-format retail premises, such a bulky-goods and Costco-style stores.

The reasons why planning authorities are ill-equipped to assess, predict and provide community needs are summarised well in an academic paper by Dr Sam Staley, Director of Urban and Land Use Policy for the Reason Foundation in Los Angeles and a Senior Fellow at The Buckeye Institute for Public Policy Solutions in Columbus . In *Urban Planning, Smart Growth, and Economic Calculation: An Austrian Critique and Extension* Dr Staley explained that:

> [F]ormal public planning [is] inherently incapable of collecting or processing the information that would be socially relevant. Producers (and by extension planners) are faced with a "knowledge problem," understanding what consumers want and finding the most efficient means for producing those goods and services. Knowledge itself is comprised of two components: articulate and inarticulate (Lavoie 1985). Articulate knowledge represents the tangible expression of wants and preferences. This is the kind of information that could be gleaned from market surveys, focus groups, or interviews with buyers. Moreover, this is information that can be objectively measured. In the residential housing market, objective information could include criteria such as the size of a preferred house in square feet, the number of bedrooms, the size of the lot, access to shopping or work in time or linear miles, etc.
>
> The more important component, however, is inarticulate or implicit knowledge. While consumers may be able to express certain aspects of their preferences, other key ingredients may not be articulable. Often, customers will buy a product based its look or feel and an expectation about whether that product will satisfy their needs. Some of this inarticulate knowledge may be aesthetic; other aspects may be functional. In the real-estate market, how a house sits on a lot may have important impacts on the perception (or expectation) of privacy, or its functionality (e.g., steep driveways in winter climates). Similarly, objective criteria may not be able to capture key aspects of a neighborhood that are important to future residents and consumers.
>
> Actual buying behavior reflects a complex interaction of articulate and inarticulate knowledge. Part of the consumer's decision reflects an assessment of measurable tradeoffs—how much lot is the consumer willing to trade off for the size of a house? Other parts of the decision are inarticulable or unknowable—will this house serve the needs of a growing family?
>
> These are tradeoffs that consumers make based on objective information, experience, expectations about future events, and personal preference. Inarticulate knowledge is the source of most uncertainty in the market

[69] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.
[70] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 5.

and the primary component of its dynamic nature. Articulate knowledge by its very nature can be measured and, in theory, be forecasted with a reasonable degree of precision.

Market prices serve as an intermediating data point that provides summary information to consumers about products (and potential revenue for producers). (Horwitz 1998) The decision to purchase (or produce) a product depends on a synthesis of our understanding of preferences as well as hunches, "feelings," and judgements based on inarticulable information from experience. Economic preferences can only be known when they are "revealed" through their decisions about what to buy and for how much. The inarticulate knowledge cannot be replicated in formal planning, and thus accurate predictions or forecasts about consumer buying patterns are virtually impossible.

Markets, in contrast, are capable of processing this knowledge because of the dynamic institutional context in which consumer information is processed. Money prices provide a commonly accepted metric that intermediates between entrepreneurs and consumers who can act only on partial information. Money facilitates these transactions because it is tangible, has a commonly accepted value (under a stable monetary regime), and is fungible. Thus, movements in prices emerge as reflections of the subjective values of consumers and producers about goods and services available in the market (Horwitz 1998).

But the information provided by market transactions in not completely transparent. On the contrary, entrepreneurs are constantly looking for market opportunities "missed" by others (Kirzner 1973). Thus, the market process is an institution of discovery, where buyers and sellers are constantly assessing what customers want, what consumers are willing to pay for, and what production methods most effectively and efficiently provide those goods and services (Hayek 1978). The dynamism of the market process allows the revealed preferences of consumers to be incorporated into future decisions on both the producer and consumer side of the ledger. The market is disciplined by the profit and loss system (absent third-party intervention such as a government).[71]

Recommendation 5

The *Right Place for Business and Services, Improving Transport Choice* and *Local Planning Direction 3.4 should* be withdrawn and the text of clause 9(1) should be applied as a section 117 direction to govern zoning decisions. Clause 9(1) should be extended to apply to Part 3A approvals.

4. Quotas on premises

Clauses 10 and 11 of the draft SEPP are set out below:

10. Restrictions on number of particular types of retail premises

(1) A restriction in an environmental planning instrument or development control plan on the number of a particular type of retail premises in any commercial development, or in any particular area, does not have effect.

(2) This clause applies to a restriction imposed expressly or by necessary implication, but does not apply to a restriction that arises because of development controls relating to the scale of development or any other aspect of development that is not merely the number of particular types of premises.

11. Restrictions on proximity of particular types of retail premises

(1) A restriction in an environmental planning instrument or development control plan on the proximity of a particular type of retail premises to other retail premises of that type does not have effect.

[71] Samuel Staley, Urban Planning, "Smart Growth, and Economic Calculation: An Austrian Critique and Extension", *The Review of Austrian Economics*, 17:2/3, 265–283, 2004, 274-275.

(2) This clause applies to a restriction imposed expressly or by necessary implication, but does not apply to a restriction that arises because of development controls relating to the scale of development or any other aspect of development that is not merely the proximity of particular types of premises.

We strongly support the thrust of the proposed provisions.

Provisions of this kind in environmental planning instruments and development controls plans are clearly anti-competitive, although this is one of the least common forms of anti-competitive regulation in the NSW planning system.

The change will override provisions such as clause 59(1) of *Wyong Local Environment Plan 1991* which limits an area of the Central Coast to a single shopping centre (and was unsuccessfully litigated under the terms of the current law in *Woolworths Ltd v Wyong Shire Council and Ors*[72]).

The change will also nullify provisions that set minimum distances between retail shops heavily criticised by Professor Allan Fels in his report, *Choice Free Zone*. The City of Sydney and Penrith are well-known for enforcing anti-competitive rules of this kind.[73] Competition and consumer convenience are heavily impacted by this kind of restriction.

4.1 Non-statutory documents

However, we see no reason why only provisions in environmental planning instruments and development controls plans should be overridden in this way. This limited approach overlooks the very large role given to non-statutory documents in the NSW development assessment process. We've argued against the current free range approach to planning policy. The very large number of documents is currently used to block development and breeds confusion and uncertainty. Clauses 10 and 11 fail to recognise this reality.

In *Direct Factory Outlets Homebush v Strathfield Municipal Council*[74] the Land and Environment Court established a planning principle on the role of non-statutory regional planning policies:

> The role of regional planning policies is to guide the development of a region, such as the Sydney metropolitan area. ... The fact that they are non-statutory is not an indication of their subservience to statutory plans. ... Where the provisions of an environmental planning instrument are clear, unequivocal and do not require value judgment (for example numerical development standards or zonings where the character of a use is not in dispute), they take precedence over non-statutory regional planning policies. However, where those provisions can be applied only on the basis of value judgments (for example, where the character of a use is in dispute, a development standard is to be varied, or where imprecise terms like "appropriate", significant", "detrimentally affect" or "ecological sustainability" need to be given meaning in the context of a development application), non-statutory regional planning policies provide the background against which those value judgments should be made.[75]t.

Ten draft subregional strategies have been released by the Department of Planning, and are subject to this planning principle. As a result of the Court's planning principle, these documents can be relied upon by consent authorities and the Court in their decision-making process.

The draft subregional strategies impose numerical restrictions on the numbers of different types of retail outlets in different areas.

For example, town centres have only one "small" shopping mall, and just one to two supermarkets. Villages may only have a single "small" supermarket. Small villages cannot have any supermarkets at all. Neighboured centres are only permitted five shops.

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[72] [2005] NSWLEC 400.
[73] *Penrith Local Environmental Plan No 201 (Rural Lands)*, cl 18; *City of Sydney Convenience Store Development Control Plan 2004* cl 4.2.3
[74] [2006] NSWLEC 318.
[75] *Direct Factory Outlets Homebush v Strathfield Municipal Council* [2006] NSWLEC 318 [25]-[26].

It's not just these kinds of documents that may have numerical restrictions. Draft development control plans, draft environmental planning instruments, studies (particularly retail studies) are all capable of having other impressible numerical restrictions, and the "public interest" provisions of section 79C of the Act may still require them to be taken into consideration.

For example, *The Village Mcevoy Pty Limited v Council of the City of Sydney (No 2)*[76] related to a mixed use (including retail) development which was permitted under the relevant zoning. The development was refused by a Commissioner, because, in part, it was inconsistent with the retail hierarchy recommended in the City of Sydney's *Retail Study*. The study was not part of any adopted development control plan or environmental planning instrument. The Commissioner said that the existence and content of these non-statutory documents were, in themselves, "a sufficient reason to refuse the application".[77] Justice Pepper upheld the validity of the Commissioner's decision.[78] This is despite the fact that the development was consistent with relevant environmental planning instruments and development control plans.

This case illustrates that almost any document is capable of blocking otherwise permitted development. (It also shows how uncertain the NSW planning system is, but that is another matter.) As was observed in another court case:

> Nothing in the Environmental Planning and Assessment Act stipulates that environmental planning instruments are the only means of discerning planning policies or the "public interest". For one thing, the government is not the only source of wisdom in this area. A consent authority may range widely in the search for material as to the public interest.[79]

4.2 Zone objectives and non-mandatory heads of consideration

Until recently, the neighboured centre zone objectives for *Liverpool Local Environmental Plan 2008* envisaged a single small supermarket for each such centre. A zone objective in a Standard- Instrument complaint local environmental plan is merely something that a consent authority has regard to, it is not determinative.[80]

There will be some a question as to whether provisions such as these are "restrictions" within the meaning of clause 10 and clause 11. Similarly, the status of provisions in environmental planning instruments and development controls plans that are "heads of consideration" rather than mandatory requirements may not be clear.

We ask the restrictions be defined to include zone objectives and heads of considerations.

Recommendation 6

The provisions of clauses 10 and 11 should be extended to non-statutory policy documents, strategies and studies, that might be considered in the development process. Zone objectives and other non-mandatory heads of consideration should also be included.

[76] [2010] NSWLEC 17.
[77] *The Village Mcevoy Pty Limited v Council of the City of Sydney (No 2* [2010] NSWLEC 17 [15].
[78] Ibid [48].
[79] *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195 [81]
[80] *Standard Instrument—Principal Local Environmental Plan* cl 2.3(2).

5. Definition of "commercial development"

Clause 7 of the draft SEPP provides that:

> For the purposes of this Policy, commercial development is development for purposes of or including or any combination of the following:
>
> (a) retail premises,
>
> (b) business premises,
>
> (c) office premises.

Under the terms of the draft SEPP the expressions "retail premises", "business premises" and "office premises" will have the meaning as they are given in the *Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument").[81]

5.1 Retail uses which might be inappropriately excluded

In a separate process, the NSW Department of Planning has recently released a paper (titled *Draft – Potential Amendments to the Standard Instrument)* proposing significant changes to the definitions contained in the Standard Instrument. Relevantly, the paper says:

> [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.[82]

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

In our separate submission responding to the Department of Planning's proposals, [83] we expressed the concern that such highly contrived and artificially restricted definitions cause problems. The authors of environmental planning instruments often overlook the limited nature of these definitions when listing permitted uses in a land-use table. It appears that the Department's intention (to reduce the scope of the "retail premises" definition) has also not been considered in the context of the Competition SEPP. If these other changes are to proceed (and we hope they do not) then the definition of "commercial development" will need to be extended to embrace the matters that are excluded.

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[81] cl 4(3).
[82] NSW Department of Planning, *Draft – Potential Amendments to the Standard Instrument* (2010) 45.
[83] Our submission is titled Walking away from multiple use zoning and is available on the internet: <http://www.urbantaskforce.com.au/attachment.php?id=3315>.

5.2 Inappropriate exclusion of health care services

Similarly, the Department of Planning has also proposed that

> medical centres *only* fall under the group term health services facility ... (emphasis added).[84]

This means that "medical centres" would be excluded from the definition of "business premises". If this change was to proceed, and medical centres were not included in the definition of "commercial development" then the provision of services by health-care professionals, including naturopaths, physiotherapists and chiropractors, will not be covered by the Competition SEPP, while lawyers, architects, financial planners and accountants will be so covered. Such an inconsistency cannot be justified.

5.3 Inappropriate exclusion of some business premises

The recent Department of Planning paper proposes to twist the meaning of "business premises" by excluding "entertainment facilities" and veterinary hospitals.[85] Again, there would be no logic for such uses to be excluded from the draft SEPP's definition of "commercial development".

Recommendation 7

In the event that the Department of Planning proceeds with its proposals (detailed in the paper *Draft – Potential Amendments to the Standard Instrument*) to artificially narrow the definitions of "retail premises" and "business premises", the definition of "commercial development" in the draft SEPP should be broadened to include the excluded categories of uses.

6. Relationship with other environmental planning instruments

Clause 6 of the draft SEPP provides that:

> If this Policy is inconsistent with any other environmental planning instrument, whether made before *or after* this Policy, this Policy prevails to the extent of the inconsistency (emphasis added).

This wording is now regularly used in a large number of state environmental planning policies. In a quick check, we established that at least 19 (and in all likelihood many more) policies use the same clause, almost word-for-word.[86] Multiple state environmental planning policies now each assert that they alone are paramount over all past and future environmental planning instruments.

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[84] NSW Department of Planning, *Draft – Potential Amendments to the Standard Instrument* (2010) 39.
[85] NSW Department of Planning, *Draft – Potential Amendments to the Standard Instrument* (2010) 20.
[86] See, for example: *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*, cl 5(4); *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, cl 5(3); *State Environmental Planning Policy No 53—Metropolitan Residential Development*, cl 5(2); *State Environmental Planning Policy No 71—Coastal Protection*, cl (5); *State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes)*, cl 7(1); *State Environmental Planning Policy No 6—Number of Storeys in a Building*, cl(5); *State Environmental Planning Policy No 65—Design Quality of Residential Flat Development*, cl 6; *State Environmental Planning Policy No 64—Advertising and Signage*, cl 7; *State Environmental Planning Policy No 62—Sustainable Aquaculture*, cl 6(1); *State Environmental Planning Policy No 55—Remediation of Land* cl 6(1); *State Environmental Planning Policy No 4—Development Without Consent and Miscellaneous Exempt and Complying Development*, cl 5; *State Environmental Planning Policy No 47—Moore Park Showground*, cl 4(2); *State Environmental Planning Policy No 41—Casino Entertainment Complex*, cl 7; *State Environmental Planning Policy No 36—Manufactured Home Estates*, cl 4(1); *State Environmental Planning Policy No 30—Intensive Agriculture*, cl 4; *State Environmental Planning Policy No 21—Caravan Parks*, cl 5(1) and ; *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*, cl 6.

For example, an almost identical clause appears in the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*.[87] According to that SEPP, an assessment of a proposed development of a neighbourhood shops in zone IN2 "Light Industrial" in the Riverstone West precinct will need to address whether or not the development "support[s] the viability of centres" as per the zone objective. Ordinarily, this would include a consideration on the potential impact on the trade of businesses in nearby centres. Such an assessment would be inconsistent with clause 9(1) of the Competition SEPP and, in some circumstances, may not be permitted under clause 9(2).[88] Yet, provisions in each SEPP assert that they take prevail over inconsistencies in the other.[89]

In *Baker v Gosford City Council*[90] Bignold J considered clause 5(2) in *State Environmental Planning Policy No 5* which is drawn in similar terms to clause 6 of the Competition SEPP.[91]

Bignold J queried

> whether a provision like cl 5(2) of SEPP No 5 ..., will to be effective to prevent an implied repeal by a later inconsistent environmental planning instrument ...[92]

This issue, once an inconsistency is established, is likely to be resolved in one of two ways.

Firstly, the paramountcy of the earlier SEPP is maintained. If this is true, then the Competition SEPP fails to achieve its purpose, because it does not override the SEPPs that have gone before it.

Secondly the Competition SEPP is held to implicitly repeal the earlier inconsistent SEPP.[93]

If this second scenario applies, there is another problem. Since it has become standard for nearly all SEPPs to assert their paramountcy over all other instruments, later inconsistent SEPPs may implicitly repeal the Competition SEPP.

Ideally, issues of this kind could be resolved by consolidating all state environmental planning policies into a single, state-wide planning framework SEPP, or even better, the Standard Instrument itself – this would require some effort to reconcile all conflicting provisions. In the event that the Department of Planning is not prepared to consider anything so radical, all of the existing "relationship with other environmental planning instrument" clauses in all SEPPs should be repealed, and instead a single provision should be inserted in a single SEPP, setting out the hierarchy of SEPPs. In such a hierarchy, the Competition SEPP should take precedence over all other SEPPs.

[87] cl 6.
[88] Although not necessarily clause 9(2), but we've dealt with that complication separately.
[89] We are aware that clause 1.9(1) of the precinct plan says that it "is subject to the provisions of any State environmental planning policy that prevails over this Precinct Plan as provided by section 36 of the Act", however, this provision appears to be negated by clause 1.9(3) which says that, aside from future amendments "in the event of an inconsistency between this Precinct Plan and any other provision of this or any other environmental planning instrument whether made before or after the commencement of this Precinct Plan, this Precinct Plan prevails to the extent of the inconsistency".
[90] [2004] NSWLEC 167.
[91] *State Environmental Planning Policy No 5* cl 5(2)/
[92] *Baker v Gosford City Council* [2004] NSWLEC 167 [38].
[93] See the comments of Justice Sheller in *Coffs Harbour Environment Centre Inc v Ministers for Planning & Coffs Harbour City Counci* (1994) 84 LGERA 324.

Recommendation 8

All state environmental planning policies should be merged into a single state-wide planning framework SEPP, or, even better, the Standard Instrument itself – this would require some effort to reconcile all conflicting provisions.

In the event that the Department of Planning is not prepared to consider anything so radical, all of the existing "relationship with other environmental planning instrument" clauses in all SEPPs should be repealed, and instead, a single provision should be inserted in a single SEPP, setting out the hierarchy of SEPPs. In such a hierarchy, the Competition SEPP should take precedence over all other SEPPs.

7. Rationalisation of statutory plans

A very small number of provisions of environmental planning instruments will be immediately overridden by the draft SEPP, when it is initially made. However, **most anti-competitive provisions will remain untouched.** The great bulk of anti-competitive provisions are not addressed by the current SEPP. This section of the submission highlights clauses in existing local environmental plans that will be untouched by the proposed Competition SEPP.

If the planning system is to permit competition, changes will need be made to *Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument") and other local environmental plans.

7.1 Narrow range of retail and business uses in lower-order centres

The current Standard Instrument permits local council to allow only a narrow range of retail and business uses in so-called "lower-order" centres. An example of this problem appears in the *Draft Penrith Local Environmental Plan 2008*.[94] In this plan, neither "retail premises" nor "shops" are generally permitted uses in a village zone. Only neighbourhood shops are permitted, however these are defined to be

> 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).

This means a shop in a village zone (other than on those specifically listed sites) must:

- sell "small daily convenience goods";
- ensure the purpose of the goods are to satisfy day-to-day needs; and
- be directed to people who live or work locally.

In short, shops of any size are banned in neighbourhood centres if their purpose is to sell large grocery items, clothing, music, home-wares or electrical goods.

A florist who wants to set up shop in a neighbourhood centre will have to argue that flowers are a "small daily convenience good" and "satisfy day-to-day needs" of locals. A small shop that sells iPods, mobile phones and personal radios will be banned. As will a baby clothes shop.

Additionally, "business premises" will also be banned in the village zone. This means that locals will be unable to set up a shopfront to engage in a profession or trade that provides services directly to

[94] See also the *Draft Greater Taree Local Environmental Plan 2008*.

members of the public. This means local communities will be deprived of internet access facilities, hairdressers, video libraries and dedicated banks, post offices and dry cleaners. Why is it okay to have banking services provided as an ancillary service in a neighbourhood shop, but unlawful to open a bank branch as a standalone service?

Where is the public interest in prohibiting these low impact uses? None of these retail and business types are inconsistent with the character of a centre.

Furthermore, the Standard Instrument limits the floor area of all neighbourhood shops, which makes it impossible for even a moderate scale supermarket to be established.[95] This limits the opportunity for competition, ensuring that the community pays more than they should. Limiting the opportunity for a competitive retail environment (by restricting the type of goods sold and/or limiting floor area) robs the community of the opportunity to access a wide variety of competitively priced grocery items in their locality.

What this prohibition really means is that people need to drive further to satisfy their general grocery and shopping needs. The argument that limiting floor area and seeking to control the type of goods sold from retail premises, by way of plan, does not stand up to scrutiny. Local amenity can be properly and appropriately considered at the development application stage. Limiting retail by way of a statutory plan does little more than protect existing retail landlords.

The Land Use Table in the Standard Instrument should be amended so that "retail premises" and "business premises" are permitted uses in Zone B1 Neighbourhood Centre, Zone R4 High Density Residential and Zone RU5 Village. Retail and business premises should be permitted (with consent) in such zones. The merits of individual proposals can be considered at the development assessment phase.

Recommendation 9

"Retail premises" and "business premises" should not be banned in any statutory plan in zones intended for use around centres, including neighbourhood centres, and corridors. Retail and business premises should be permitted (with consent) in such zones. The merits of individual proposals can be considered at the development assessment phase.

7.2 Lack of retail and business uses in employment zones

Many statutory plans do not permit "retail premises" and/or "business premises" (other than bulky goods premises, landscape and garden supplies, timber and building supplies) in business development and enterprise corridor zones.[96] For example, *Ryde Local Environmental Plan 2010* does not even allow "business premises" in the business park zone!

Business development zones, business parks and enterprise corridors are intended to be centres of employment. These environments function best when people working in these areas have somewhere to go to shop and socialise before work, at lunch time and after work.

Those working in a business development, business park or enterprise corridor zone should be entitled to have lunch in a restaurant, get a haircut or visit a local hotel after work. Surely these uses go hand-in-hand with business activity?

[95] cl 5.4(7).
[96] For example, the *Draft Greater Taree Local Environment Plan 2008*.

A prohibition on retail premises really means that people need to drive further to satisfy their shopping needs. Planning rules should be encouraging behaviour that reduces vehicle kilometres travelled, not reinforcing old-style separations of land use that force people to drive further.

The Land Use Table in the Standard Instrument should be amended so that "retail premises" and "business premises" are always permitted uses in Zone B5 Business Development, Zone B6 Enterprise Corridor and Zone B7 Business Park. "Retail premises" and "business premises" should not be banned in any statutory plan in zones intended for use for employment purposes.

Recommendation 10

"Retail premises" and "business premises" should not be banned in any statutory plan in zones intended for use for employment purposes, such as the existing business development zones, business parks and the enterprise corridor zones.

7.3 Large format retail unwelcome in industrial zones

Many industrial zones recently published statutory plans to not permit retail premises or business premises in light industrial zones.[97] Sometimes food and drink premises, landscape and garden supplies, service stations, timber and building supplies are permitted, and occasionally bulky good premises are allowed, but almost always retail premises generally are prohibited.

This means large format grocery stores, such as Costco, are prohibited in light industrial areas. Large format business supplies retailers, such as Officeworks, or large format hardware suppliers, such as Bunnings, will often have great difficulty in finding sites. Smaller retail supermarkets, such as Aldi, also end up being excluded.

The 2005 Metropolitan Strategy offered a sensible approach to this issue. The Metropolitan Strategy stated that, for example, retailing for bulky goods might be permitted in industrial areas.[98] There was also a promise of a new approach to reinvigorate employment lands, including flexible zonings for industrial and commercial activities.[99]

However, the statutory plans that have been exhibited since the 2005 Metropolitan Strategy have not implemented this provision. There is potential to include a wider range of retail activities in industrial areas without jeopardising industrial activities.

At the very least, "bulky goods premises" should be added as a permitted use in Zone IN1 General Industrial and Zone IN2 Light Industrial. Costco-style development should also be permitted by permitting "retail premises" as a permitted use, with an appropriate supporting zone objective.

Recommendation 11

At the very least, "bulky goods premises" should be added as a permitted use in Zone IN1 General Industrial and Zone IN2 Light Industrial. Costco-style development should also be permitted, by permitting "retail premises" as a permitted use, with an appropriate supporting zone objective.

[97] For example, see *Draft Greater Taree Local Environment Plan 2008*.
[98] NSW Department of Planning, *City of Cities: Sydney's Metropolitan Strategy – Supporting Information* (2005) 105, B4.1.2.
[99] Ibid 63, A1.4.2.

7.4 Promote multiple-use zoning

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 NSW system favours single use zoning evidenced by the proliferation (in the new standard-instrument compliant plans/draft plans), for example:

- business development zones that do not permit retail premises;[100]
- light industrial zones that do not permit retail premises or bulky goods premises;[101]
- business parks that do not permit retail premises or bulky goods premises;[102]
- neighbourhood centres zones without retail premises;[103]
- village zones without retail or business premises; and[104]
- high density residential zones without retail premises;[105]

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.

Recommendation 12

The use of multi-use zones should be required - to avoid sterilising land in the event that the market does not seek to develop some or all of the land made available and maximise the opportunities for new retail development.

7.5 Zone objectives that stop permissible development

Even if a given development is permissible under the land use table in a statutory plan, it can easily be refused if it is inconsistent with the zone objectives

Plans prepared in-line with the Standard Instrument[106] requires a consent authority to have regard to the objectives for development in a zone.[107] This makes a zone objective an incredibly important factor in the development assessment process.

[100] See for example the land use table the *Liverpool Local Environmental Plan 2008*.
[101] See for example the land use table the *Draft Ryde Local Environmental Plan 2008*.
[102] See for example the land use table the *Draft Ryde Local Environmental Plan 2008*.
[103] See for example the land use table the *Draft Lane Cove Local Environmental Plan 2008*.
[104] See for example the land use table the *Draft Penrith Cove Local Environmental Plan 2008*.
[105] See for example the land use table the *Draft Lane Cove Local Environmental Plan 2008*.
[106] That is the Standard Instrument contained in the *Standard Instrument (Local Environmental Plans) Order 2006*.
[107] Cl 12 of the Standard Instrument, the *Standard Instrument (Local Environmental Plans) Order 2006*.

The key Land and Environment Court case, which deals with the operation and effect of zone objectives clauses, that frustrate new retail and commercial premises development, is *Almona Pty Ltd v Newcastle City Council.*[108]

In this matter, Justice Pearlman, of the NSW Land and Environment Court, heard a merits appeal from a decision by Newcastle City Council to refuse an application for the "establishment of bulky goods retail, hardware and retail plant nursery" in Kotara, about seven kilometres from the Newcastle central business district.

The site was zoned as light industrial 4(a) under the *Newcastle Local Environmental Plan 1987*. The site was directly opposite a large shopping complex known as Garden City.

A key issue related to the LEP. One of the applicable zone objectives was to allow commercial, retail or other development only where it is

> ... unlikely to prejudice the viability of existing commercial centres; ...

The permissibility of a proposed development depended upon it being consistent with that objective.[109] The council argued that the development could not satisfy the zone objective and therefore should be refused.

Justice Pearlman rejected the developers' argument that the carrying out of the development would only be inconsistent with the zone objective if there was a real chance or possibility that the proposed development would bring into question the existence of the Newcastle CBD.

Instead Justice Pearlman ruled that the zone objective permitted

> only those developments which do not negatively affect the maintenance and reinforcement of the life or existence of existing commercial centres, of which the Newcastle CBD is, in the terms of the relevant planning instruments, of a higher order or paramount.
>
> [A] proposed development is permissible *if there is no real chance or possibility* that it will disadvantage or detrimentally affect the life or existence of existing commercial centres. In this case, the existing commercial centre in question is the Newcastle CBD which itself enjoys some paramountcy over other centres (italics added).

The proposed development would have placed other businesses in the region under competitive pressure, including those in the Newcastle CBD. That means, the project did not comply with the zone objective, and the Court refused the development application. On this occasion it did not matter, but analogous provisions existed in the regional environmental plan and the development control plan – and these too would have stopped the development dead in its tracks.

This case shows how zone objectives, that seek to support the viability of centres, operate to exclude the entry of new businesses that offer any "real chance" of competition with incumbent centre-located businesses. It's worth noting that the decision of Justice Pearlman made it clear that a "centre" is defined by reference to business and commercial zones, not the presence of any particular infrastructure. That is, it is lines on maps that drive the process, rather than the fundamentals of good planning.

Regretfully, there are numerous examples of expressly anti-competitive provisions of this kind, in both the statutory plans and in the small number of more recent plans, prepared in compliance with the Standard Instrument.

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[108] [1995] NSWLEC 55.

[109] That follows from cl 12(3) of the LEP which obliged the council not to grant consent to the carrying out of development unless the council is of the opinion that the development is consistent with the objectives of the relevant zone. It also follows from the specific wording contained in zone 4(a), cl 3 of which provides that the only development which is permissible with consent is development for a purpose "... which, in the opinion of the Council, is consistent with the objectives of this zone ...".

The zonings under the plan set out to prevent competition businesses located in certain zones from competing with businesses in "centres". Centres are not defined in the Standard Instrument, so it is presumably the intention to protect the business located in the "centres" identified in regional and subregional strategies from competition.

7.5.1 Business development zone

In the Standard Instrument the zone B5 "Business Development Zone" permits retail, but its objective is to

> enable a mix of specialised retail uses that require a large floor area and warehouse uses in locations which are close to, and which support the viability of, centres.

So developments that do not support the viability of centres, such as those with the potential to attract customers away from centres, will not satisfy the objectives of the zone.

The Department of Planning says this about the intended use of business development zones:

> This zone is generally intended for land where employment generating uses such as offices, warehouses, retail premises (including those with large floor areas) are to be encouraged. The zone supports the initiatives set out in the Metropolitan Strategy *City of Cities: A Plan for Sydney's future* (NSW Government 2005) but might also be suitable for application in urban areas in regional NSW.
>
> The zone may be applied to locations that are located close to existing or proposed centres, and which will support (and not detract from) the viability of those centres.[110]

So, even though the government's strategic policies envisage the use of these zones in areas with infrastructure sufficiently robust to support offices and retail, businesses that may compete with centres cannot be established in these areas.

Incidentally, the Zone B5 Business Development was, until recently, marginally broader. Since December 2007 the zone objective has now limited retail to "specialised retail" – a limitation of this kind was not previously considered necessary. It reduces the flexibility that was previously available.

7.5.2 Enterprise corridor

Zone B6 "Enterprise Corridor" exists to promote businesses along main roads and to encourage a mix of compatible uses. It is also intended to enable a mix of employment (including business, office, retail and light industrial uses) and residential uses. However, it is also an objective of the zone to

> Maintain the economic strength of centres by limiting retailing.

So, developments concerned with retail are discouraged in zone B6.

Enterprise corridor zones benefit from passing traffic (over 50,000 vehicles per day).[111] The Department of Planning says that

> [t]he zone is generally intended to be applied to land where commercial or industrial development is to be encouraged along main roads such as those identified by the Metropolitan Strategy *City of Cities: a plan for Sydney's future* (NSW Government 2005).[112]

Enterprise corridor zones have been proposed for Victoria Road, Parramatta Road, the Pacific Highway, Anzac Parade, Pittwater Rd, Canterbury Rd and Gardeners Rd.[113] These areas all have excellent

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[110] Department of Planning, Practice Note PN06-022, 12 April 2006, "Preparing LEPs using the Standard Instrument: standard zones" 4.
[111] Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 41; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 41; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 35.
[112] Ibid.

infrastructure which can fully support high intensity uses such as offices and retail development – yet retail development, which may put businesses in centres under pressure, is to be "limited".

7.5.3 Light industrial

In December 2007, the objectives for Zone IN2 Light Industrial were amended so that development in these areas must now "support the viability of centres". This means retail developments, such as bulky goods facilities, will be much harder to locate in light industrial areas, even if "retail premises" or "bulky goods premises" are included in the list of permitted uses in a particular local environmental plan.

We are in possession of internal Department of Planning documentation (obtained through a freedom of information request) which says that this change was made at the instigation of the Shopping Centre Council and the Property Council – organisations that represent the interests of major incumbent retail landlords.

The above discussion shows how the Standard Instrument creates areas where businesses are unable to be established if they would provide competition to businesses in established centres.

The anti-competitive provisions of the NSW Government's Standard Instrument should be removed. Namely:

- in a "Business Development Zone" retail, office premises and other uses should be permitted, even if it would provide competition to businesses located in established centres; and
- in "Enterprise Corridor" ; "Business Park"; "General Industrial"; and "Light Industrial" zones retail and other uses should be permitted even if it would provide competition to businesses located in established centres.

This means, in the Standard Instrument's Land Use Table:

- in a "Business Development Zone" the existing zone objective ("[t]o enable a mix of business and warehouse uses, and specialised retail uses that require a large floor area, in locations that are close to, and that support the viability of, centres") should be deleted and the following instead inserted: ("[t]o enable a mix of retail, business and warehouse uses");
- in an "Enterprise Corridor Zone" the existing zone objective ("[t]o maintain the economic strength of centres by limiting retailing activity") should be deleted;
- in a "Business Park" the existing zone objective ("[t]o enable other land uses that provide facilities or services to meet the day to day needs of workers in the area") should be amended to omit the words "to meet the day to day needs of workers in the area"; and
- in a "Light Industrial" the existing zone objective ("[t]o encourage employment opportunities and to support the viability of centres") should be amended to omit the words "support the viability of centres" and the existing zone objective ("[t]o enable other land uses that provide facilities or services to meet the day to day needs of workers in the area") should be amended to omit the words "to meet the day to day needs of workers in the area".

A direction should be inserted into the Standard Instrument ensuring that additional zone objectives are not inserted by councils to have the same effect as the above deleted provisions.

[113] Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 31; Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 40; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 40; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 34.

Recommendation 13

The anti-competitive provisions of the NSW Government's Standard Instrument should be removed. Namely:

- In a "Business Development Zone" retail, office premises and other uses should be permitted, even if it would provide competition to businesses located in established centres.
- In "Enterprise Corridor" "Business Park"; "General Industrial"; and "Light Industrial" zones retail and other uses should be permitted even if it would provide competition to businesses located in established centres.

Specific textual changes are set out in the body of this submission.

7.6 Prohibition on medium sized and large retail and business uses

In the Standard Instrument's "Zone B1 Neighbourhood Centre" the zone objective is

> [t]o provide a range of *small-scale* retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood (emphasis added).

A subjective phrase such as "small-scale" should never have appeared in a statutory plan. The term "small-scale" is vague and undefined. True supermarkets or large format stores range from 1,500 square metres (six checkouts) for a typical Aldi or IGA Supa store to 2,500 to 3,500 square metres (12 to 16 checkouts) for a full-line Woolworths, Coles, Franklins or Superbarn. So, in industry terms, a small scale supermarket will have a floor area of 1,500 square metres. However, some government and local council planners have been known to argue that a store of 700 square metres is a larger retail establishment – an idea that is rejected by both industry and consumers.

The *Liverpool Local Environmental Plan 2008* takes the extra step of banning shops with a gross floor area of more than 1,500 square metres.[114] So clearly, a supermarket of 2,000 square metres – which would still be small by industry standards – will be prohibited in Liverpool's neighbourhood centres. However, the fact is, even a "supermarket" of 1,000 square metres may be deprived of development consent, because of the objective that supermarket retailing must be "small". There is nothing in the *Liverpool Local Environmental Plan 2008* which says that a supermarket of 1,500 square metres satisfies the "smallness" criteria set out in the neighbourhood zone objectives.

The reference to "small scale" in the zone objective should be removed. By depriving local consumers from full-line supermarkets, locals will be forced to drive further to access lower cost groceries and those that are unable to drive will be deprived of the full-range of groceries that are only available at full-sized supermarkets.

Recommendation 14

In the Standard Instrument's "Zone B1 Neighbourhood Centre" the zone objective should be amended to omit the words "small scale". Height and/or FSR controls are sufficient to control the bulk and scale of development; a subjective prohibition imposed through use of the words "small-scale" is inappropriate.

[114] Clause 7.25.

7.7 Examples of anti-competitive zone objectives in pre-2006 statutory plans

The vast bulk of the local environmental plans in force today are not prepared under the 2006 Standard Instrument. While in theory all local environmental plans are to be replaced in the near future this has proven to be an extremely slow process. Our expectation is that a majority of the statutory plans, for the foreseeable future, will not be in the Standard Instrument format.

That's why it's important not to overlook the pre-2006 plans.

The first example offered is the zone objective for the business development area zone in the *Shoalhaven Local Environmental Plan 2005* says that the zone is to provide for

> a strategic development area providing both for a variety of uses and for varying combinations of such uses including higher density residential, commercial and tourist combinations but not including ordinary retail uses that would compete with the local retail centre (underlining added).[115]

Even though the zone clearly contemplates high intensity uses – and therefore the infrastructure for the area presumably is capable of supporting such uses –competition with the businesses in the local retail centre is not permitted.

The *South Sydney Local Environmental Plan 1998* says, of the Moore Park Supa Centre site

> development must not be carried out on land to which this clause applies for the purpose of the retail sale of objects which generally have a high return per unit floor area such as perishable commodities, groceries, clothing, alcohol, fashion accessories or other basic consumer goods (with the exception of bulky goods). ...
>
> The Council must not grant consent to an application for consent to carry out development referred to in this clause unless it is satisfied that the proposed development will not detrimentally affect: ... the range of services offered by existing shops located in any nearby business centre (underlining added) ....[116]

The site, which is well located to road transport infrastructure, enjoys considerable patronage from the region, yet is barred from hosting businesses that may compete with nearby business centres. Shoppers visiting the Moore Park Supa Centre cannot buy their full needs there and must instead make secondary trips to other locations.

In *Canterbury Local Environmental Plan No 140* the zone objectives for one zone with main road frontages are

> to allow low density retail, display, commercial and office development which does not ... significantly compete with or detract from existing retail centres within the Area (underlining added).[117]

So businesses are not to be permitted if they are in competition with businesses located in retail centres *even* when they are low density retail or office uses.

The *Wyong Local Environmental Plan 1991* provides a centre support zone whose objective says the area is to

> to provide opportunities for development having relatively low traffic-generating characteristics but not high turnover shops and offices that might more properly be located in the Business Centre Zone (underlining added).[118]

So, even if a high turnover shop is able to demonstrate it will have low traffic impacts, it will not satisfy the requirements of this zone objective.

[115]Clause 9, zone 3(g).
[116] Cause 8.
[117] Clause 8
[118] Clause 10, Zone No 3 (b).

In the *Hastings Local Environmental Plan 1987*, in relation to the neighbourhood centre zone, there is an objective

> to ensure that the neighbourhood centres are viable and not in competition with one another and are compatible with a hierarchy of business centres (underlining added).[119]

The traditional public policy presumption that competition is healthy has been completely turned on its head in the Hastings area!

Recommendation 15

Anti-competitive clauses in pre-2006 LEPs should be deleted.

7.8 Limiting development to preserve a centres hierarchy in recent LEPs

Many recent standard-instrument compliant statutory plans attempt to introduce and/or maintain a centres hierarchy. Such provisions typically restrict commerce, limit choice and will often hamper the evolution of centres.

For example, the *Lane Cove Local Environmental Plan 2009* attempts to faithfully translate the NSW Government's draft subregional strategies into reality. The plan says it is an objective for the Lane Cove town centre

> [t]o ensure that this centre functions as a Town Centre in the hierarchy of Inner North Sub-region retailing.[120]

What this really means is that growth in this centre will be limited with the objective of protecting and ensuring greater growth in other centres in the subregion. This approach is not responsive to community needs. In particular, it fails to recognise that restricting development in one locality will not necessarily mean the same level of development will occur in the favoured location. Development opportunities are likely to be lost to the community as a whole.

The "hierarchy of lower North Shore retailing" can only be taken to mean the hierarchy of centres outlined in the subregional strategy along with centre typology and radii. This is nothing less than a defacto incorporation of the subregional strategies directly into a statutory plan. Courts will only be able to apply and make sense of this requirement, by reference to the subregional strategies and are empowered by this provision to apply them direct when determining development applications.

How will this work? Well, Lane Cove has been defined as a "town centre" under the applicable draft subregional strategy. "Town centres"

> have one or two supermarkets, community facilities, medical centre, schools, etc. Contain between 4,500 and 9,500 dwellings. Usually a residential origin than employment destination. Radii – 800m

Therefore, because Lane Cove already contains its quota of supermarkets, a decision-maker is obliged to have regard to the objectives for a zone when considering development applications. An additional supermarket would be inconsistent with the objectives for the zone and therefore is unlikely to be approved.

[119] Clause 32A.
[120] *Lane Cove Local Environmental Plan 2009, Part 2,* Land Use Table.

If there was any doubt about interpretation of the reference to the hierarchy in the objective for Lane Cove town centre, it would be cleared up by reference to the aims of the *Lane Cove Local Environmental Plan 2009*.[121] Clause 1.2(d) says

> in relation to economic activities, to provide a hierarchy of retail, commercial and industrial activities that enable the employment capacity targets of the Metropolitan Strategy to be met, provide employment diversity and are compatible with local amenity, including the protection of the existing village atmosphere of the Lane Cove Town Centre...

Another example is offered by the *Greater Taree Local Environmental Plan 2010* which states an objective for a neighbourhood centre as

> [t]o strengthen the local community and *support the role of the local centres* (emphasis added).

A local centre has an objective

> [t]o strengthen the local community and *support the role of Taree central business district* (emphasis added).

The commercial core zone has an objective

> [t]o reinforce the role of Taree central business district as *the major regional centre* (emphasis added).

Determining if a development proposal is "supporting" or "reinforcing" the role of centres means asking whether or not businesses located in a 'subsidiary' centre will compete with businesses in a larger centre. Furthermore, including objectives such as these will introduce more uncertainly to the development determination process. That is, even applications for permitted land uses will be open to challenge by competitors on the grounds that the development does not support the role of a higher order centre.

In a final example, the *Ryde Local Environment Plan 2010* includes an objective for its mixed-use zone

> [t]o create vibrant, active and safe communities and economically sound employment centres.

Is it truly necessary or appropriate to instruct a consent authority to consider whether a development contributes to the creation of "economically sound employment centres"?

The objective may require a consent authority to refuse a development because it will undermine some other employment centre. The objective may also lead to a consent authority refusing a development application because local traders allege that the development will push them out of business and therefore economically weaken the centre. In our market economy, *consumers* should be in charge. That means that consumers ultimately decide whether or not new retail, entertainment or office development should proceed.

Recommendation 16

Statutory plans should not be permitted to restrict development in one location, merely to funnel development to another location. Development in an area should be permitted or prohibited based on its intrinsic qualities, that is, issues of visual amenity, infrastructure, noise, etc specific to the location concerned.

[121] Section 25(3) of the Environmental Planning and Assessment Act makes it clear that if a provision of a local environment plan is genuinely capable of different interpretations, that interpretation which best meets the aims stated in that instrument is preferred.

8. Further information

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

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Appendix: case studies

1. Permissible supermarket within walking distance of public transport refused consent

The Village Mcevoy Pty Limited v Council of the City of Sydney (No 2)[122]

In this matter, Justice Pepper heard a legal challenge against a decision by a Land and Environment Court Commissioner to refuse development consent to an application for a four level building envelope with a mix of commercial and retail uses and 470 car parking spaces. The building was to include a full-line supermarket. Development of this type was permitted in the existing mixed-use zone.

The new building was to be located within and at the western edge of Green Square about 850 metres from the town centre and roughly equidistant between the Erskineville and Green Square railway stations.

While not cited in the case, the Department of Planning's *Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development* describes a centre as

> containing the highest appropriate densities of housing, employment, services, public facilities within an acceptable walking distance - 400 to 1000 metres - of major public transport nodes, such as railway stations and high frequency bus routes with at least a 15 minute frequency at peak times.[123]

This development is clearly within an easy walk of a wide range of current and planned high density residential development and convenient public transport. It would have helped create a vibrant, pedestrian friendly, compact community.

The locality in which the proposed site is situated is predominantly developed with industrial and mixed-use developments. Residential development exists to the north beyond the site.

Justice Pepper found that the Commissioner's decision was lawful. The critical consideration in the determination of the application before the Commissioner was the strategic planning context and the fact that the Green Square town centre is to be "the major commercial, retailing, cultural and entertainment centre within that area". The impact on the Town Centre therefore needed to be assessed and its importance was not to be "underestimated". The developer's economic evidence was that the proposed development would not affect the City of Sydney's "Retail Hierarchy" because there would be a sufficient retail spend to support it without affecting the town centre. While the Commissioner described this evidence as "compelling", it was nevertheless found to be incomplete and that "significant concerns remain regarding impacts of the proposal on the Town Centre itself in the context of the adopted strategic "more broadly".

The Commissioner found that the planned town centre would be "put in jeopardy" by the proposed development. While the Commissioner "doubted" that the proposal would completely undermine the role of the Town Centre, the Commissioner was not confident that the proposal would be able to make good the resultant "community detriment". (Apparently competitive pressure and the lower prices and better service it brings is a detriment, rather than something positive).

The Commissioner stated that the proposal was a threat to the Town Centre's commercial success "in part because the land market will react unfavourably if private investment is undermined by ad hoc competing developments" resulting in "significant community costs" and adversely affecting the

[122] [2010] NSWLEC 17.
[123] Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport*: *Improving Transport Choice - Guidelines for Planning and Development* (2001) 9.

"primacy and vibrancy of the Town Centre". Thus "these concerns point to the need to ensure that the present investments in it are not put at risk especially during the start-up phases".

Of course, this logic overlooked the fact that free markets are full of commercial risk for the average entrepreneur. The mere existence of a risk of competitive pressure is not, in itself, a reason not to proceed with investment, if someone is confident about their business, their effectiveness and the quality of their offer. This approach followed by the Commissioner, and upheld by Justice Pepper, rewards and encourages businesses which offer poor service and charge high prices; because businesses will be safe in the knowledge that their competition will be prevented from establishing nearby.

2. Shopping centre approved because it is not a competitive threat

Lakeside Plaza Pty Ltd v Legal & General Properties No2 Ltd[124]

In these proceedings a development consent had been granted by a council for proposed extensions to a shopping centre known as the Bay Village at Bateau Bay on the New South Wales Central Coast.

The owners of Lakeside Plaza, a shopping centre at The Entrance, some four kilometres from Bateau Bay, initiated legal proceedings alleging that the Council had failed properly to address its statutory obligation to consider the economic effect of the proposed development on the existing retailing area at The Entrance including the Lakeside Plaza Shopping Centre.

Justice Stein held that there was a statutory requirement, under the 'economic impacts' test for

> the consideration of the economic effect of the proposed development on the existing retailing centre at The Entrance, which is acknowledged to be in the locality. In my opinion the decision-maker *is required* to consider the economic effect of the development on the existing retail centre at The Entrance, including Lakeside (emphasis added)[125]

His honour then went on to find that

> It is apparent to me that the decision-maker considered that the economic effect of the development, by the provision of additional floor space, would not upset the retailing hierarchy, including The Entrance Shopping Centre. ...
>
> The conclusion, that the extension to Bay Village would not upset the established retailing hierarchy, ... [The proposal will not] effectively destabilise the economic viability of a shopping centre of the size of The Entrance.

The incumbent shopping centre landlord failed in its attempt to have the development consent set aside. However, it only failed because the council was able to demonstrate that it considered the potential for the expanded shopping centre to place the shopping district in The Entrance under competitive pressure. Had there been a risk of increased competition, the decision might easily have gone the other way.

This case encouraged developers to ensure their proposals for new and expanded shopping centres did not compete with existing shopping centres.

3. Warring consultants reports on the impact on existing traders

Schroders Australia Property Management Ltd v Shoalhaven City Council and Anor[126]

In this matter Shoalhaven City Council had issued a development consent for a Nowra Woolworths retail development, comprising a supermarket, a discount department store, specialty shops, a community

[124] (1992) 76 LGRA 60
[125] *Lakeside Plaza Pty Ltd v Legal & General Properties No2 Ltd* (1992) 76 LGRA 60, 65-66.
[126] [1999] NSWLEC 251.

centre, and associated car parking, streetscaping and landscaping -.it was to be known as the Nowra Marketplace.

There were already two other comparable shopping centres in Nowra. One of them was Nowra Mall (containing a Coles supermarket), extensions to which were already the subject of a development application which was ultimately granted. The other shopping centre was Nowra Fair which was owned by Schroder Australia.

Schroder challenged the validity of the development consent in the Land and Environment Court. The decision is a useful illustration of the routine processes that needs to be followed to get a new retail development approved in NSW.

The economic effect was regarded by the council as a relevant consideration in deciding the development application. As a result, the proponent, Fabcot, lodged with the council an economic impact assessment prepared by Jebb Holland Dimasi (JHD) which examined the economic impact under two scenarios - first, if Nowra Marketplace alone proceeded, and, secondly, if both Nowra Marketplace and the extensions to Nowra Mall proceeded. The JHD report concluded that

> by the year 2000 there would be ample market scope for both proposals to trade successfully, without any significant impact on the current trading performance of existing retailers at Nowra Fair or in the Nowra CBD.

BBC Consultant Planners lodged with the council on behalf of Schroder, a detailed submission opposing the Nowra Marketplace development. Annexed to that submission was a KPMG report entitled "Nowra economic impact assessment" prepared by KPMG Management Consulting. The KPMG report concluded that the likely economic impact of the Nowra Marketplace would be a "blighting" of the existing retail heart of Nowra. The KPMG report also contained detailed criticism of the material in the JHD report.

The council's planning services manager reviewed the JHD report, the KPMG report and a third economic report, prepared by Leyshon Consulting and concluded that all three reports were unreliable.

Council then engaged Intergrowth Property Group to provide an economic overview and to assess the JHD report and the Leyshon report. In its report, Intergrowth considered that the CBD was likely to be adversely affected by the Nowra Marketplace development and it outlined a number of economic consequences if that development was to proceed.

A further report commissioned by the council reviewed the JHD report, the Leyshon report and the Intergrowth report, and then concluded:

> In summary, the proposal in its present form would seem likely to have adverse social and economic effects on the Nowra Town Centre. Locating Woolworths Market Place outside the designated strategic development zone creates a donut effect which has the potential to polarise shoppers' patterns at the eastern and western ends of the Nowra Town Centre to the detriment of existing traders.

Coles Myer Ltd then wrote to the mayor and all councillors, setting out its concerns with the economic impact of the Nowra Marketplace development, and urging the council to carefully consider all the relevant information.

In the court proceedings, Justice Pearlman observed that the JHD report, the Leyshon report and the KPMG report were contradictory, in the sense that their respective predictions, as to the social and economic effect of the Nowra Marketplace were different.

The council had been supporting the development of a Woolworths shopping centre for over five years and was of the view that this position outweighed the social and economic impacts identified by the GSA report and the Intergrowth report.

Justice Perlman found that the council did properly consider the social and economic effects of the proposed development in the locality, and was entitled to give more weight to its support for a

Woolworths development, than the documents economic costs of that development. Significantly, there was no suggestion that it would have been wrong for the council to rely on some of the adverse economic studies as a reason to refuse the development application, had it been minded to do so.

4. A supermarket in Wyong – anti-competitive rules fine

Woolworths Limited v Wyong Shire Council & Ors[127]

The applicant lodged a number of development applications with Wyong Shire Council for the construction of a supermarket and other uses of a site from October 2003. None of these were approved by the Council.

In April 2004, a competitor lodged a development application for a supermarket on another site. The competitor's application was approved by Wyong Shire Council.

Under the *Wyong Local Environmental Plan* ("the LEP') all the development applications related to land zoned as an urban release area. A "local shopping centre" was permissible in the zone subject to certain limitations, including that only one centre was permissible in Wadalba and Blue Haven.

The LEP's provisions meant that the applicant's application for a rival local shopping centre could not be approved. As a consequence it launched a legal challenge arguing that the LEP's limitation (that there could be only one local shopping centre) was invalid.

The applicant argued the limitation to a single shopping centre was invalid because it was not a bona fide attempt to exercise power under the *Environmental Planning and Assessment Act*. They said that the primary operation and effect of the restriction was the protection, of other retail development in the area, from the threat of competition. The applicant submitted that the protection of retailers from competition is not an end or object within the scope of the *Environmental Planning and Assessment Act*. The applicant said that restriction in the LEP does not take as its reference point, any actual use or development of land, nor does it take as its reference point any assessment of the needs of the locality nor the continued viability of retail facilities in the locality.

The applicant claimed, that the effect of the limitations was to immunise the person, holding the consent from the threat of competition. By taking the grant of consent as its reference point, the applicant said that "protectionism" was unconnected with the statutory objects of the Act.

Wyong Shire Council claimed that the LEP was made for a proper purpose, namely the preservation of a hierarchy of retail centres between regional, district, neighbourhood and local areas. This purpose was generally reflected in the *Wyong Shire Council Retail Centres Strategy Plan 1996* ("the Retail Centres Strategy Plan"). The Retail Centres Strategy Plan included several objectives, one of which was about "protecting the integrity of existing major centres to the extent that they continue to perform a useful community function".

The Council argued that the limitation was not a protectionist provision. Rather it operated to enable a retail centre to be established in Wadalba, to prevent the expansion of retail centres that might exceed the environmental capacity of the land.

The Council also argued that even if the effect of the limitation is protectionist, its purpose is not. In any event, the Council argued, it was in the public interest that such prohibitions are available to ensure that the local shopping centre consent is implemented for the benefit of the community.

The NSW Land and Environment Court found that the objects of the *Environmental Planning and Assessment Act* provide wide powers, to a council and to the Minister for Planning, to prepare and

[127] [2005] NSWLEC 400.

make an LEP which controls development. The Court said that a broad prohibition, on a second local shopping centre in Wadalba, is a legitimate purpose under the Act.

5. A bulky goods retail outlet in Warringah Council will compete

Centro Properties Limited v Warringah Council & Anor[128]

Centro Properties Limited commenced court action to invalidate a 2002 development approval, from the construction of bulky goods retail outlet, shops, restaurants and associated parking, granted by Warringah Council.

The development application proposed the erection of a multi-tenancy bulky goods centre with ancillary access roads, signage and landscaping, comprising proposed uses of bulky goods shops, and restaurants. The development was to be located in Austlink Business Park.

Since 1999 Centro had been the owner of a shopping complex in nearby Warriewood (just over eight kilometres away), which included two supermarkets and a discount department store.

The local environment plan (LEP) permitted bulky goods shops, other shops and restaurants as appropriate development for the Austlink Business Park.

Centro argued that the Council had failed to consider economic impact in the locality.

Specifically they said that the council had not properly applied section 79C(1)(b) of the *Environmental Planning and Assessment Act* which imposes a mandatory relevant consideration to consider the likely impacts of the development on economic impacts in the locality.

Since the proposed development comprises a large bulky goods retail centre together with retail shops comprising 4 per cent of the proposal, the Court said it was plain that economic impacts in the locality were a relevant consideration and an essential part of the issues to be considered.

The Court found said that the "economic impact in a locality (for example, marginalising other developments in the locality that provide a facility presently enjoyed by the community) is a proper consideration to be taken into account as a matter of town planning".

The Court said that the absence of specification of the proposed uses within bulky goods shops, combined with the numerous small tenancy areas, would lead to the bulky goods retail centre functioning, in practice, as a retail shopping centre.

The Court observed that the Council considered the market share which the proposed development might successfully attract, but did not consider the impacts that attraction might have elsewhere. The Court said that section 79C requires consideration of the impacts of the proposed development on the locality, not the success of the proposed development.

Centro argued the council's staff had asserted that there would not be any significant impact on the viability of other centres in the Warringah local government area, without any evidence.

The Court upheld Centro's argument. It found that since:

- there was no information addressing the issue before the Council;
- the proposed development potentially draws trade from a large area including areas well outside the local government area; and
- there is no assessment of the likely uses within the bulky goods component of the proposed development because the development application does not nominate those uses,

[128] [2003] NSWLEC 145.

the consent should be invalidated.

The Court said that "it is not adequate to say that because no similar development exists in this area that the Council can be assumed to know what the impact on traders in the locality, is likely to be."

Such information was "essential for the proper consideration of the development application."

6. A bulky goods outlet next to an existing shopping centre will compete with Newcastle CBD

Almona Pty Ltd v Newcastle City Council[129]

In this matter Justice Pearlman of the NSW Land and Environment Court heard a merits appeal from a decision by Newcastle City Council to refuse an application for the "establishment of bulky goods retail, hardware and retail plant nursery" in Kotara, about seven kilometres from the Newcastle central business district.

The local environmental plan zone objective

The site was zoned as light industrial 4(a) under the *Newcastle Local Environmental Plan 1987*. The site was directly opposite a large shopping complex known as Garden City.

A key issue related to the LEP. One of the applicable zone objectives was

> to allow commercial, retail or other development only where it is ... unlikely to prejudice the viability of existing commercial centres; ...

The permissibility of a proposed development depended upon it being consistent with that objective.[130]

The council argued that the development could not satisfy the zone objective and therefore should be refused.

Justice Pearlman rejected the developers' applicant argument that the carrying out of the development would only be inconsistent with the zone objective if there was a real chance, or possibility, that the proposed development would bring into question the existence of the Newcastle CBD.

Instead Justice Pearlman ruled what the zone objective permitted

> It permits only those developments which do not negatively affect the maintenance and reinforcement of the life or existence of existing commercial centres, of which the Newcastle CBD is, in the terms of the relevant planning instruments, of a higher order or paramount.
>
> [A] proposed development is permissible if there is no real chance or possibility that it will disadvantage or detrimentally affect the life or existence of existing commercial centres. In this case, the existing commercial centre in question is the Newcastle CBD which itself enjoys some paramountcy over other centres.

Having established that the threshold was much lower than the one argued by the developer, Justice Pearlman considered the economic and planning evidence before her.

An economist appointed by the council had undertaken an exhaustive field audit of every shop in Newcastle, Lake Macquarie, Port Stephens, parts of Cessnock and parts of Maitland over the previous 12 months. He estimated the impact of the proposed development, upon directly competing shops,

[129] [1995] NSWLEC 55.

[130] That follows from cl 12(3) of the LEP which obliged the council not to grant consent to the carrying out of development unless the council is of the opinion that the development is consistent with the objectives of the relevant zone. It also follows from the specific wording contained in zone 4(a), cl 3 of which provides that the only development which is permissible with consent is development for a purpose "... which, in the opinion of the Council, is consistent with the objectives of this zone ...".

that is, bulky goods retail shops, in the Newcastle CBD, would be immediate losses of trade in the range of 7 to 13 per cent.

The council expert also carried out a survey of local shopkeepers, who were asked about their viability if they were affected by a loss in sales. The result of this survey was that 58 per cent of those surveyed said they could not afford to lose between zero and 5 per cent of their current sales. A further 23 per cent could not afford to lose between 5 to 10 per cent of their current sales. Thus, he concluded, a total of 81 per cent of traders in the Newcastle CBD in shop categories, which would be directly affected by the proposed development, could not afford to lose up to 10 per cent of their current sales. The expert conclusion was that there would be substantial hardship incurred by many retailers in the Newcastle CBD and many of those traders would close their shops.

He also concluded that there would be "blighting" where large vacant retail shops lead to a blighted appearance of the retail precinct, which dissuades shoppers and potential shopkeepers, and results in adverse flow-on of the impact.

An economic expert, appearing for the developer, said that between 5 per cent and 10 per cent of total available bulky goods retail expenditure is likely to be redirected from existing centres to the proposed development. He concluded that impact will be dispersed over a wide range of centres and a number of retailers, principally in the Newcastle CBD, Hamilton/Broadmeadow, department and discount departments stores in Charlestown, Garden City and Bennetts Green. He said that, no single centre, nor any individual retailer would experience a severe impact from the proposed development. Hence he concluded that the proposed development would not prejudice the viability of any existing commercial centre, either in the Newcastle local government area or in adjoining local government areas. However, he did concede that a retailer could go out of business and therefore cause the "blighting" effect.

Justice Pearlman favoured the evidence of the council expert but went onto to say:

> [I]t perhaps does not matter too much whose evidence is accepted, because both experts concluded that there would be an impact from the proposed development upon the Newcastle CBD which might force some retailers to close their businesses and cause blight in the west end area. Whilst some doubt was cast … upon the accuracy of … [the] survey of local retailers, it does tend to reinforce a conclusion that there would be a detrimental impact upon retailers in the Newcastle CBD.

Justice Pearlman also made it clear that

> [e]ven if [the zone] objective … is an undesirable policy objective, and I express no opinion on the matter, it nonetheless is clearly the basis upon which the permissibility of the proposed development depends …

Which confirms the Urban Taskforce's consistent argument; once these matters are law all inquiry as to their appropriateness tends to get thrown out the window.

The proposed development's inconsistency with the zone objective was fatal to the development application, however, for the sake of completeness, Justice Pearlman considered whether other plans would also block development.

<u>The local environmental plan overall objective</u>

The local environmental plan included an objective for the whole plan, in relation to "retailing and commerce"

> to maintain and reinforce the role of the Central Business District as the Hunter Region's major commercial, administrative, cultural and entertainment centre …[131]

Justice Pearlman found that the development proposal was contrary to the plan aim.

[131] Cl 2(2)(c)(i).

The regional environmental plan

The council argued for refusal of the development approval because of provisions of the *Hunter Regional Environmental Plan 1989*. The plan said:

> The Newcastle central business district *should be promoted* as the major commercial, retail and service centre in the region, comprising a wide range of office and entertainment facilities and establishments providing high quality goods and services. [132]

Justice Pearlman found that the development proposal was contrary to the regional environmental plan. Her decision in this respect illustrates how apparent 'soft' phrases like 'promotion' are given 'hard' means like 'prohibition' in the NSW planning system.

Development control plan

The council said that the proposed development is inconsistent with the objectives, goals and policies specified in paragraphs 1, 2 and 16 of the *City of Newcastle Development Control Plan Number 1* which said:

> 1 The goals, objectives and policies of the Newcastle Central Area Strategy Plan and Structure Plan are affirmed and supported by this Plan.
>
> 2 Recognising the primacy of Newcastle Central Business District as the Regional Centre, promote the consolidation and development of existing business centres within the City to achieve a balanced development of each, according to its role and appropriate level of function, justified by potential demand generated within the trade area ...
>
> 16 Support the consolidation of existing business centres by preventing the uncontrolled dispersion of retail, business and commercial activities into zones other than recognised business zones, for example by careful monitoring of retail developments in industrial zones ..." (underlining in quoted text)

Justice Pearlman found that the development proposal was contrary to the development control plan.

In this case study there was no argument or consideration about the issues of infrastructure capability, urban amenity or reduction in vehicle kilometres travelled. Indeed, it would have been difficult to successfully mount such a case, because the proposed bulky goods retail facility was right next to an existing shopping centre. In the end, the development proposal was unable to proceed solely because of the risk increased competition to other businesses.

7. An extension of a fruit and vegetable store

Agostino & Anor v Penrith City Council [2002] NSWLEC 222

In this case study, the applicant operated an existing fruit and vegetable store in Llandilo. Llandilo is a rural area with residences and paddocks dominating street frontages. Properties adjoining the site are used for residential and rural activities including grazing and horticulture. Llandilo Village is situated at a distance of 1.4 kilometres from the store and includes a supermarket, post office and produce store.

The fruit and vegetable store had a gross retail area of 150 square metres. It was located on a 2 hectare site with an 82 metre long street frontage. A 200 square metre rural shed used for storage and packaging of products was situated adjacent to the store. The store is serviced by a car park having 32 marked parking spaces and a 9 metre wide driveway.

The store owner lodged a development application to increase the retail area of the store from approximately 150 square metres to 286 square metres. The application also proposed the addition of a "deli counter". Such a section was to be used for the retail sale of a range of products currently offered

[132] Cl 20(1).

for sale including ready-made pasta, bread and dairy products such as milk. The store owner also wanted to sell cheese from the deli counter. Cheese was not within the range of products already authorised for sale from the store under the original planning approval.

Penrith City Council refused the development application and it was appealed to the Land and Environment Court.

The local environment plan (LEP) had an exhaustive list of all goods which may be retailed from the store. The Land and Environment Court rejected the application to sell cheese, because it was not listed as an item permitted for sale in the LEP. The Court also rejected the application to increase the size the retail floor area, because it exceeded the limit imposed under the LEP (150 square metres).

The refusal was given, despite the fact that the Court agreed that the extension of the building (as proposed in the application) would not adversely impact the rural character of the surrounding locality. The Court said the existing store was located on a large block of land and is positioned to the left side of the block when viewed from the street frontage. It said that the proposed extension would locate the store more evenly on the site and would not adversely impact on the scenic quality of the landscape.

The Court said it would have granted the extension in size of the building if it were able to determine this issue on its merits. However, the Court went onto to say that it would have still rejected the proposed increase in the range of retail items proposed by the applicants and the addition of a deli counter, even if the LEP had not already expressly prohibited the change.

The Court said that the increased range of goods proposed to be sold would alter the character of the "fruit and vegetable store" to a vegetable store and delicatessen, akin to a convenience or general store". The LEP contains a prohibition upon general stores being located within three kilometres of one another. An existing general store is distanced approximately 1½ kilometres from the applicants' premises.

The Court also said that the economic impact of increasing the product range of the store would adversely affect the supermarket at Llandilo Village. The testimony of the proprietor of the village's supermarket included the argument that a substantial component of the local trade, attracted to Llandilo Village, would be diverted to the store if it were permitted to retail items typically found in a convenience or general store.

The Court said the potential loss of the valuable service which the Llandilo Village supermarket provides the community was an important planning issue. The Court said that both the Llandilo supermarket and the store provide important but distinct services to the Llandilo community and the approval of the deli counter and conferring the right to sell cheese would "disturb the present balance".

8. Supermarket in a centre not "small-scale" enough

Artro Management Pty Limited v Council of the City of Sydney[133]

Situated on the corner of Erskineville Road and Gowrie Street Newtown, a short distance from the Newtown railway station, is a single storey industrial building known locally as "the hive". It was vacant and is in a generally poor condition. It was constructed around 1943.

An application was made to partially demolish the building, excavate the site and construct a two-storey plus basement building that retains much of the building's existing character. The new building was to contain a gross leaseable floor area of about 200 square metres, of which about 1,900 square metres will be used for a two-level supermarket with pedestrian access off Gowrie Street. The remainder of the floorspace will be utilised for a single specialty shop at ground level with access off Erskineville Road.

[133] [2009] NSWLEC 1007.

Despite its Newtown address, being located on the south side of the railway line and being proximate to the Erskineville business area, the site could just as easily be described as being in Erskineville

The application was advertised and about 260 letters of objection plus a petition containing about 4,500 signatures was received. Among other things the petitioners said that

> Erskineville is already well served by supermarkets and another supermarket is not needed. ... Existing retailers will also be adversely affected.

The council refused the development application and that decision was appealed to the Land and Environment Court where it was dealt with by Commissioner Bly.

Under the local environmental plan the site was zoned "Mixed-Uses" and the proposed development was permissible. However, as is standard, consent could not be granted unless the proposal was consistent with the zone objectives. The zone objectives, highlighted the need to avoid adverse impacts on residential amenity and relied upon particular provisions of development control plans for specific impact mitigation measures.

Under the development control plan (DCP) the site was part of the "Urban Village of Erskineville". DCP says the planning intent for the area, among other things is for

> [a] range of small-scale shops, offices and cafes compatible with the urban village character of the surrounding area.
>
> Development that meets the needs of the local community and encourages social interaction.

Commissioner Bly accepted expert economic evidence that there was an undersupply of supermarket floorspace in the Erskineville/Newtown area based on a comparison of available sales and existing supermarket/grocery store floorspace. This was calculated to be around 8,000 square metres. He found that about 40 per cent to 50 per cent of the sales of the proposed supermarket, will come from an area bounded by a radius of 500 metres from the proposed store, the balance is likely to come from a wider catchment.

Commissioner Bly agreed that there is no reason why there should not be a supermarket in the Erskineville Urban Village Centre:

> [I]ndeed an appropriately sized supermarket would ... anchor the centre and improve its vitality and sustainability to the benefit of the local community. ... However in the light of the provisions ... the DCP it is clear that a supermarket in the order of 2,000 m2 cannot be described as a small-scale shop, particularly by comparison with the average size of shops in the village and even by comparison with other supermarkets in the area that have areas of around 1,000 m2. ...
>
> It is therefore plain that, the proposed supermarket's total turnover will be generated by a population living in a catchment that is considerably larger than the local catchment. ...
>
> It can be accepted that a local shop will still attract non-local customers, but what cannot be accepted in the light of the requirements of the DCP is a relatively large shop that is designed to accommodate a trade area well beyond the local catchment. ...
>
> There can be little doubt that the proposal will enliven surrounding streets by generating additional pedestrian activity and meet the shopping needs of the local community. It is also likely that it will provide a support function for the Erskineville Road Shopping Precinct and be of some commercial benefit of the other shops, but these matters are not sufficient to overcome the planning intent of the DCP to encourage a range of small-scale shops for the local population. ...
>
> A supermarket is permissible with consent in the Mixed-Use zone and, in this location would have commercial and social benefits for the Urban Village of Erskineville. The redevelopment of the existing dilapidated buildings would benefit the area and would probably even be a catalyst for further redevelopment. However, these benefits are not sufficient to overcome the fundamental concerns ... .

The Court refused development consent.

In this matter, a DCP requirement, that a "shop" be small-scale, outweighed the other benefits that a development offered and meant that an acknowledged undersupply of retail services within the region remained unaddressed. This is despite the fact that the development was in a recognised "centre", within walking distance of a wide range of high quality public transport.

In theory, a "supermarket" is permitted in Erskineville, but this decision and the planning rules on which it is based means its only likely to get an approval if its 1,000 square metres or less. True supermarkets or large format stores range from 1,500 square metres (six checkouts) for a typical Aldi or IGA Supa store to 2,500 to 3,500 square metres 12 to 16 checkouts for a full-line Woolworths, Coles, Franklins or Superbarn. So, in industry terms, a small scale supermarket will have a floor area of 1,500 square metres. 1,000 square metres would not be regarded by the industry as genuine supermarket and would not have the necessary sale volume to defray its fixed costs in the way that a proper supermarket could; that it would be unable to offer the lower-cost groceries that the public expects from a genuine supermarket.