



The impact of the NSW planning system on retail competition

Public Submission to Australian Consumer and Competition Commission Grocery
Inquiry by Urban Taskforce Australia on 11 March 2008

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The **Urban Taskforce** is an industry organisation representing Australia's most prominent property developers and equity financiers. Our membership also includes key infrastructure providers, economists, planners, architects and lawyers involved in property development. 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

This submission focuses on potential barriers competition at the retail level of the grocery industry.

This submission argues that, in NSW, access to suitable sites is a significant impediment to the entry or expansion of supermarket chains. We also argue that local planning and zoning laws impede access to suitable sites.

There are substantial anti-competitive provisions in both the NSW *Environmental Planning and Assessment Act* and in the plans and policies made under the Act. These anti-competitive provisions are so severe that they cannot be justified by any expressly stated public policy goal.

These anti-competitive provisions have their greatest impact in the provision of new retail property assets for the benefit of the shopping needs of households. Under the NSW planning system supermarkets and shopping malls are one of the most heavily regulated sectors of the economy, alongside mines, casinos and brothels. Frankly, this is bizarre.

The NSW economy should be able to depend on a fiercely competitive market for the provision of supermarkets and shopping malls, but the planning system is instead working to prevent competition and protect incumbent owners of retail property assets from competitive pressure.

Draft SEPP 66

Draft 66 severely undermines the operation of a free-market economy in the provision of retail services to the public. It discourages multi-purpose trips because it ignores the significant trips that are already going to be taken by most households, irrespective of the concentration of activities in centres.

It reflects an outdated planning approach that regards the separation and regulation of different land-uses as critical, rather than regulation of the scale of buildings.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.

We support a planning scheme that permits the integration of housing, workplaces, shopping, and recreation areas into compact, pedestrian-friendly, mixed-use neighbourhoods. Pedestrian-oriented amenities such as retail and cafes should not be discouraged or prohibited in any centre of employment, including light industrial zones, general industrial zones, business development zones, neighbourhood centres and business parks.

Draft 66 ensures that bureaucrats, rather than consumers, ultimately decide whether or not new retail facilities are necessary. If an existing retail facility is doing a poor job of servicing consumers, or is charging its tenants excessive rents (which mean artificially high prices to consumers) then an entrepreneur should be free to establish a new competitor retail facility.

By preventing a new single retail property being recognised as a new centre, the policy effectively precludes the private sector from successfully initiating a new centre. As a result the decision to create new centres is reserved for the bureaucracy. Given that the bureaucracy has, to date, been eager to

'protect' consumers from any oversupply in retail property assets (which would actually benefit consumers), it is unlikely that they will take the initiative to establish new centres. Private sector operators are also prevented from establishing new retail facilities outside of centres.

We believe that draft 66 and its associated policies should be formally withdrawn.¹

Draft subregional strategies

The draft SEPP 66 means that the formal identification and categorisation of centres will govern if, when and how new retail facilities are to be developed. The subregional strategies are the documents that will prescribe a list of smaller centres ("local centres") across Sydney for the life of the Metropolitan Strategy (i.e. until 2031).²

Eight subregional strategies have been released by the Department of Planning in draft form. The Urban Taskforce has undertaken a detailed analysis of the North-East, Inner North and East subregional strategies. Our views are detailed extensively in our September 2007 submission to the NSW government: *Getting Life's Essentials - Planning for where we will live, work and shop over the next three decades*. We concluded the subregional strategies fail to pay any significant attention to the retail needs of Sydney over the next 25 years. Our submission shows that the Sydney metropolitan area will need an additional four million square metres of occupied retail space by 2031 - a 50 per cent increase over current levels.

Where retail is mentioned in the draft strategies, it is usually in the context of preventing it or capping it. For example, in the case of local centres, the prescriptive hierarchy proposed will strangle the growth of vibrant retail communities. The limitation of "villages" to one "small" supermarket and banning supermarkets in "small villages" and neighbourhood centres is outdated 1950s planning. Town centres are limited to one "small" shopping mall – they're banned altogether in other local centres.

Provisions in the sub-regional strategies that attempt to separate retail uses from other uses should be abandoned. The separation and regulation of different land-uses, particularly retail, should no longer be a key planning objective. The planning system should be concerned with:

- the "form" (shape/configuration) of a structure; and
- the relationship of buildings to each other, to streets and to open spaces.

Compact, mixed-used areas, making efficient use of land and infrastructure, make good planning sense. They create more attractive, liveable, economically strong communities. They facilitate a development pattern that supports pedestrian based communities and reduces dependence on motor vehicles by putting residents' and (in centres of employment such as business parks and light industrial areas) employees' daily needs within a short walk of home or work.

We ask the NSW Government to review and adopt the recommendations made by the Urban Taskforce in *Getting Life's Essentials - Planning for where we will live, work and shop over the next three decades*. Our recommendations included the following:

- Each subregional strategy should incorporate a subregional and local government area target for shopfront space alongside the targets for dwellings and employment capacity.
- Provisions in the sub-regional strategies that attempt to separate retail uses from other uses should be abandoned.
- The sub-regional strategies should actually encourage amenities such as retail in all of the local centres, employment lands and major arterial roads.
- All four categories in the local centres hierarchy should simply be regarded as "local centres" and should permit the full range of retail premises.³

¹ Recommendation 1 (section 2.4).

² Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 93.

³ Recommendation 2 (section 3.4).

The standard instrument

In March 2006, the NSW Government gazetted the *Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument") for preparing new local environmental plans. The idea was sound: for the first time, local plans across NSW will use the same planning language, making it easier for communities to understand what is planned for their local area and the zoning controls. All councils are required to use the Standard Instrument to prepare a new principal local environmental plan for their area, to be completed by 2011. An amendment to the Standard Instrument gazetted on 14 December 2007 took effect from 1 January 2008.

The Standard Instrument now creates areas where businesses are unable to be established if they would provide competition to businesses in established centres.

The Urban Taskforce has, in section 7.1 of this submission made recommendations for a dramatic streamlining of the current system of zoning. We would prefer that the anti-competitive elements of the Standard Instrument were removed as part of this simplification process. If that's not possible, then it will be necessary (in our view) to at least remove the specific anti-competitive provisions of the Standard Instrument. Namely:

- In a "Business Development Zone" all retail and 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 all retail premises should be permitted, even if would provide competition to businesses located in established centres.
- The definition of "shop top housing" should be returned to its pre December 2007 state so that any retail premises could go into a ground floor of a mixed use development in "General Residential", "Medium Density Residential", "High Density Residential" and "Neighbourhood Centre".⁴

Development assessment under Part 4

The planning system 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 what the costs and benefits of increased competition and that any attempt to do so is likely to disadvantage ordinary consumers result in inefficient outcomes.

For this reason section 79C of the *Environmental Planning and Assessment Act*, which explains how development applications are to be evaluated by consent authorities under Part 4 of that Act, should be amended. The amended provision should make it clear that, when considering a development application, no direct or indirect consideration may be given by a consent authority to any possible loss of trade that might be suffered by any other planned or existing business or businesses.⁵

A planning system that encourages competition

The Urban Taskforce fundamentally believes that the planning system should actively encourage competition and consumer choice. In effect this means planning authorities

- should not try and exactly align the supply of appropriately zoned land with the likely demand for such land, but instead ensure that there is significantly more rezoned land available to permit a given use (whether it be retail, residential, light industrial, office, etc) than is likely to be required within coming decades; and

⁴ Recommendation 3 (Section 4).

⁵ Recommendation 4 (section 5).

- should not consider the impact on development approvals on other businesses (including groups of businesses in a centre).

To facilitate this approach, the objects of the *Environmental Planning and Assessment Act* should be amended so that the Act's existing objective of

the promotion and co-ordination of the orderly and economic use and development of land

be re-written to read

the promotion of competition and the economic use and development of land.⁶

The description of the Minister for Planning's role set out in the *Environmental Planning and Assessment Act* should be amended so that the existing provision giving the Minister responsibility

to promote planning of the distribution of population and economic activity within the State

be re-written to read

to promote planning of the distribution of population within the State;

to promote planning which facilitates the operation of competitive markets within the State's economy;⁷

⁶ Recommendation 5 (section 6.1).

⁷ Recommendation 6 (section 6.2).

Table of recommendations

Recommendation 1 (section 2.5)

The NSW Government's Draft SEPP 66 and its associated policies should be formally withdrawn

Recommendation 2 (section 3.4)

The NSW Government should review and adopt the recommendations made by the Urban Taskforce in its September 2007 submission to the NSW government: *Getting Life's Essentials - Planning for where we will live, work and shop over the next three decades*, included in this submission's recommendations were the following:

- Each subregional strategy should incorporate a subregional and local government area target for shopfront space alongside the targets for dwellings and employment capacity.
- Provisions in the sub-regional strategies that attempt to separate retail uses from other uses should be abandoned.
- The sub-regional strategies should actually encourage amenities such as retail and cafes in all of the local centres, employment lands and major arterial roads.
- All four categories in the local centres hierarchy should simply be regarded as "local centres" and should permit the full range of retail premises.

Recommendation 3 (Section 4)

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.
- The definition of "shop top housing" should be returned to its pre December 2007 state so that any retail premises could go into a ground floor of a mixed use development in "General Residential", "Medium Density Residential", "High Density Residential" and "Neighbourhood Centre".

Recommendation 4 (section 5)

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. The amended provision should make it clear that, when considering a development application, 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 5 (section 6.1)

The object of the *Environmental Planning and Assessment Act* (NSW) should be amended so that the Act's existing objective of

the promotion and co-ordination of the orderly and economic use and development of land

be re-written to read

the promotion of competition and the economic use and development of land.

Recommendation 6 (section 7.2)

The statutory summary of the NSW Minister for Planning's role set out in the *Environmental Planning and Assessment Act* (NSW) should be amended so that the existing provision giving the Minister responsibility

to promote planning of the distribution of population and economic activity within the State

be re-written to read

to promote planning of the distribution of population within the State;

to promote planning which facilitates the operation of competitive markets within the State's economy;

1. Introduction

The Australian Competition and Consumer Commission ("the Commission") is undertaking a broad-ranging inquiry into a number of matters that may affect competition in the grocery industry.

This submission focuses on potential barriers competition at the retail level of the grocery industry.

This submission argues (as suggested by question 39 in section C of the Issues Paper) that, in NSW, access to suitable sites is a significant impediment to the entry or expansion of supermarket chains. We also argue that local planning and zoning laws impede access to suitable sites.

In 1995 the NSW Government entered into the *Competition Principles Agreement* with the Commonwealth Government. The agreement stated that legislation should not restrict competition, unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.⁸

The State Government committed itself to a program of legislative competition reviews, each review was required to:

- clarify the objectives of the legislation;
- identify the nature of the restriction on competition;
- analyse the likely effect of the restriction on competition and on the economy generally;
- assess and balance the costs and benefits of the restriction; and
- consider alternative means for achieving the same result including non-legislative approaches.⁹

However, in 2002, some seven years later, the NSW Government advised the National Competition Council that it had not listed the *Environmental Planning and Assessment Act* for review under the Competition Principles Agreement.¹⁰ This meant, unlike hundreds of other pieces of legislation, the *Environmental Planning and Assessment Act* escaped any serious review of its impact on competition.

There are substantial anti-competitive provisions in the *Environmental Planning and Assessment Act* itself, and in the plans and policies made under the Act. These anti-competitive provisions are so severe, that they cannot be justified by any expressly stated public policy goal.

These anti-competitive provisions have their greatest impact in the provision of new retail property assets for the benefit of the shopping needs of households. Under the NSW planning system supermarkets and shopping malls are one of the most heavily regulated sectors of the economy, alongside mines, casinos and brothels. Frankly, this is bizarre.

The NSW economy should be able to depend on a fiercely competitive market for the provision of supermarkets and shopping malls, but the planning system is instead working to prevent competition and protect incumbent owners of retail property assets from the pressure that competition can place on a business.

This submission identifies the various breaks on competition and proposed changes that will free up the provision of retail services, more consistent with other sectors of our market economy.

⁸ cl 5(1).

⁹ cl 5(9).

¹⁰ National Competition Council, *National Competition Policy Legislation Review Compendium* (5th edition 2004) 3.21.

The focus of this submission on NSW is not intended to imply that these planning restrictions don't exist in other States. NSW has merely been used as a case study and as an example where these restrictions are likely to be having the greatest impact.

2. Draft SEPP 66

The provisions of the draft *SEPP 66 - Integration of Transport and Land Use*, which was released as part of the governments' Integrated Land Use and Transport (ILUT) package in 2001. This says that businesses and services, which generate transport demand, should be in locations that offer a choice of transport, and increase opportunities for people to make fewer and shorter trips. This draft policy generally applies to trip generating services that have a gross floor space of 1,000 square metres, or more.

This draft policy was published in 2001 and has not been finalised. Nonetheless it still is considered in development assessment: *Terrace Holdings Pty Ltd v Sutherland Shire Council*¹¹.

Clause 7 of draft SEPP 66 identifies the types of development that are intended to be subject to the policy as those to which the objectives of the policy relate which:

will generally comprise development having a gross floorspace of more than 1 000 square metres and includes, but is not limited to the following ... development for the purposes of ... retailing, such as shopping centres, large specialist shops, department stores, supermarkets, bulky goods, big box format stores, markets, factory outlets, warehouse retail, service stations and fast food outlets ...

Clause 9 of draft SEPP 66 provides that:

Before granting consent for development to which any of the planning objectives of this Policy relate, the consent authority must consider the following:

- (a) whether carrying out the development will further the aims and the planning objectives of this Policy,
- (b) whether the development is consistent with ... the general policies in the Integrated Land Use and Transport Policy Package ...

Other documents released as part of the ILUT Package were:

- *Integrating Land Use and Transport-Overview;*
- *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy;*
- *Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development;* and
- *Employment and Journey to Work Patterns in the Greater Metropolitan Region: An Analysis of 1996 Census Data.*

The centres policy can be implemented in two ways – by application to individual proposals as part of the development assessment process and in the plan-making process through zoning.

2.1 Definition of centres

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.¹²

¹¹ [2003] 129 LGERA 195.

Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy identifies preferred locations for large-scale office development and higher order retail, entertainment, commercial and public facilities.¹³ Since then the list of major centres in the ILUT has been superseded by the list of strategic centres set out in the 2005 Metropolitan Strategy.¹⁴ This strategy defines 25 current centres and eight emerging strategic centres as part of the NSW Government's 25 year strategy.¹⁵ No specific process is identified for the designation of any further emerging strategic centres in the future.

A list of smaller centres ("local centres") across Sydney is also being identified for additional jobs and dwellings over the life of the Metropolitan Strategy.¹⁶ These will be listed in the subregional strategies.

Given that an estimated 85 per cent of shopping trips made into existing centres are by car, rather than public transport, it is unclear why new retail sites should be exclusively located in areas serviced by public transport. This precludes the location of retail in, say, business parks, where those employed on site might choose to walk to, or catch a shuttle bus to, the local shopping facilities. It would also preclude locating a shopping centre on a major corridor experiencing a high volume of traffic. Shopping centres in such locations can divert cars from the narrow streets of already heavily congested centres such as Burwood and Chatswood.

2.2 Investment in centres favoured

The policy sets out to influence investment decisions in favour of centres:

Centres with a mix of land uses are well established in existing urban areas but their success relies on continued investment. Investment confidence must be cultivated through consistent decision-making that supports centres. This approach enjoys widespread appreciation by the community and business sectors.

Retail, intensive entertainment and other commercial development should be located in town centres, preferably with high frequency rail or bus services. The scale and density of development should match centre public transport service levels. Similarly, the trade area of services, including retail, should match the reach of the public transport network.¹⁷

The policy's understanding of basic economics is extremely poor. 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 returns will the investment decision not take place.

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 policy goes on to say that

concentrating activities lets people make a single trip for a range of purposes.¹⁸

It is not hard to demonstrate that this statement is not correct. Most importantly it ignores the significant trips that are already going to be taken by most households, irrespective of the concentration of activities in centres.

¹² Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development* (2001) 9.

¹³ Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 8.

¹⁴ Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.

¹⁵ Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 23.

¹⁶ Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 93.

¹⁷ Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development* (2001) 27.

¹⁸ Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: Improving Transport Choice - Guidelines for Planning and Development* (2001) 8.

For example, most households will undertake one or more of the following trips on a daily or weekly basis:

- travelling to work by car, and returning home;
- dropping children at school and picking them up again;
- taking children to sports games; and
- travelling to neighbouring suburbs, or even different parts of the city to visit friends, family.

These trips, by themselves are single purpose trips. By concentrating retail in places that are:

- away from areas people are working in (such as business parks, light industrial areas and other centres of employment);
- away from major arterial roads such as Victoria Road, Parramatta Road, the Pacific Highway, Parramatta Rd, Anzac Parade, Pittwater Rd, Canterbury Rd and Gardeners Rd; and
- away from local schools, sports fields and other community facilities,

more single-purpose car trips are made necessary, and, even when shopping is combined with some of these trips, more kilometres have to be travelled (because of the need to divert off the direct route).

The Department of Planning says that its 2005 Metropolitan Strategy incorporates the principles of the *Right Place for Businesses and Services* policy.¹⁹ In describing the policy the Department said that it

aimed to eliminate proliferation of retail in industrial areas, and included locational criteria for emerging retail forms.²⁰

This approach is not only bad economics; it reflects an outdated planning approach that fails to acknowledge the modern needs of communities.

This old approach regards the separation and regulation of different land-uses as crucial, rather than regulation of the scale of buildings. This approach is out-of-keeping with modern developments in planning which emphasise that the planning system should concentrate on:

- the "form" (shape/configuration) of a structure; and
- the relationship of buildings to each other, to streets and to open spaces,

rather than trying to micromanage the uses that different pieces of land may be put.²¹

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. Preventing retail in these areas:

- reduces opportunities to get a good mix of commercial and retail uses, and
- reduces the opportunity to have transit and pedestrian oriented communities.

We support a planning scheme that permits the integration of housing, workplaces, shopping, and recreation areas into compact, pedestrian-friendly, mixed-use neighbourhoods. Pedestrian-oriented amenities such as retail and cafes should not be discouraged or prohibited in any centre of employment, including light industrial zones, business development zones, neighbourhood centres and business parks.

Compact, mixed-used areas, making efficient use of land and infrastructure, make good planning sense. They create more attractive, liveable, economically strong communities. They facilitate a development pattern that supports pedestrian based communities and reduces dependence on motor vehicles by putting employees' daily needs within a short walk of work.

¹⁹ Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.

²⁰ Ibid.

²¹ See A Duany, E Plater-Zyberk and J Speck *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* (2000).

2.3 New centres

The Right Place for Businesses and Services acknowledges the possibility that there may be a need for new centres:

New centres are required in expanding urban areas, and they may also be needed in existing areas because of significant population growth or social trends.²²

However, the criteria for identifying new centres is unclear, referring back to text on locating development which substantively exhorts consent authorities to locate development in centres, rather than setting out criteria that would assist in creating new centres.²³

The Right Place for Businesses and Services states that

[r]etail is essential to the activity and viability of most centres because of its dominance of economic activity and relationship with personal and other services. ... Supermarkets and large specialist and department stores have an important role in anchoring a broad range of shopping and other services and thereby allow single multi-purpose trips. Retail proposals should be accommodated in centres to allow choice and free pedestrian movement. Ideally, a single retail property should not comprise the whole centre so as to allow for new market entrants and competition and avoid the unnecessary creation of new centres. It is particularly important for decision makers to be consistent and fair because of the competitive nature of the industry.²⁴

This paragraph talks about 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 cinemas 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 State 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. Market economic 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 from that necessary competitive threat by ensuring there are no “unnecessary” retail facilities.

The policy effectively prevents a new single retail property comprising a whole centre. This is actually anti-competitive rather than pro-competitive for two reasons.

Firstly, in almost all existing incumbent centres there is an existing dominant incumbent retailer occupying the key site(s) with little prospect of other sites becoming available (reinforced by zoning and the drafting subregional strategies).

Secondly, by definition, private sector proponents are only able to advance proposals for new centres based on their projects they are seeking to develop. This policy effectively precludes the private sector from successfully initiating the creation of a new centre under the planning system, and therefore leaves the creation of new centres as entirely a matter for the bureaucracy. Given that the bureaucracy has, to date, been eager to ‘protect’ consumers from any oversupply in retail property assets (which would actually benefit consumers), it is unlikely that they will take the initiative to establish new centres.

²² Department of Urban Affairs and Planning and Transport NSW, *Integrating Land Use and Transport: The Right Place for Businesses and Services – Planning Policy* (2001) 8.

²³ *Ibid.*

²⁴ 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.

In the absence of a designated new centre, you might assume that the private sector might be able to propose a new retail facility, outside of the official centres. But this is prevented too. The policy declares that:

Development on isolated, stand-alone sites is generally not acceptable. However, alternatives may be acceptable when a net community benefit can be clearly established.²⁵

The location of bulky goods retailing is given marginally more flexibility with a recognition that it may not always be realistic to locate bulk good retailing in centres:

When it is not realistic for bulky goods outlets to be in centres, they should be located in one or two regional clusters to moderate travel demand and allow for public transport accessibility. Existing clusters should be reinforced. If justified, new clusters should be in areas that would indirectly support major centres and link to public transport corridor.²⁶

The percentage of people who go to a bulk-goods retailer on public transport is exceptionally low. Almost by definition, people overwhelmingly (more than 95 per cent) travel to these centres by car. After all, they are bulky-goods centres. Have you ever tried to take a new flat screen television home on the train?

To determine whether a new cluster is justified or whether a development proposal is suitable for a cluster location, the following issues, additional to the net community benefit criteria, must be assessed:

- the economic and social impact on existing and planned centres;
- the demand for the amount of floor space for trading bulky goods and the potential impact any oversupply would have on existing centres;
- the degree and potential of short and long-term accessibility by public transport;
- the effect on the demand for travel and impact of increased traffic to the arterial road network;
- where industrial areas are proposed to be used, the operational and access needs of existing and future industry and the impact on property prices for industrial development.²⁷

Here again we see the obsession with preventing an “oversupply” and considering the economic impact on existing centres.

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? That is, the restaurant

²⁵ 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.

²⁶ Ibid.

²⁷ Ibid.

districts of Leichhardt, Crows Nest, etc were not able to be predicted, but were made possible by the inability of the traditional retailers in these areas to compete with new innovative retail formats.

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.²⁸

Under the 'net community benefit' test (which is able to be applied by a council during a rezoning process):

proposals must ensure that there will be no detrimental effect on public investment in centres and that private investment certainty in centres is maintained. They should also be able to provide the same performance as a centre, with suitable accessibility to:

- manage travel demand
- utilise public transport
- moderate car use. ...

In determining the net community benefit or cost, the following assessment criteria must be considered:

- the degree to which the policy and its objectives can be satisfied
- the proposed level of accessibility to the catchment of the development by public transport, walking and cycling
- the likely effect on trip patterns, travel demand and car use
- the likely impact on the economic performance and viability of existing centres (including the confidence of future investment in centres and the likely effects of any oversupply in commercial or office space on centres ...)
- the amount of use of public infrastructure and facilities in centres, and the direct and indirect cost of the proposal to the public sector
- the practicality of alternative locations which may better achieve the outcomes the policy is seeking
- the ability of the proposal to adapt its format or design to more likely secure a site within or adjoining a centre or in a better location.

Any proposal to rezone land for trip-generating businesses or services should conform to a local strategy which incorporates the policy objectives.²⁹

However, as mentioned above, the flexibility of the net community benefit test, to the extent that there is any, ends when a local environment plan is modified as a result of a subregional strategy. This means an examination of the Metropolitan Strategy and the (still draft) subregional strategies under it is necessary to see what, if any, flexibility for new centres or centre-like development outside of existing centres is provided for.

The Metropolitan Strategy identifies eight emerging strategic centres.³⁰ In the first three draft subregional strategies there are no future centres identified and no clear process to permit future centres to emerge. The only reference to new local centres in the Metropolitan Strategy (which is reproduced in identical terms in each of the three draft subregional strategies) is the statement that "new centres may be possible if transport services improve". There is no provision in these strategies for new centres to be recognised:

- when it can be demonstrated that existing transport services can accommodate the demands of a new centre; or
- when it is apparent that there is a community need for a new centre; or

²⁸ Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.

²⁹ 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.

³⁰ Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy* (2005) 23.

- when it can be argued that the increased competition generated by a new centre will be beneficial to consumers.

The Department of Planning declared in 2005 that the ILUT package remains government policy, but that the draft SEPP 66 will cease to operate as a draft statutory instrument when new ministerial directions are issued to councils under section 117 of the Act.³¹ This new direction will provide advice and guidance on the zoning for all types of retail and commercial activity.³² The centres policy will be substantially implemented through the zoning made pursuant to this direction. Local councils will not be free to provide for new centres in the zonings in their local environmental plans if those zonings are not sanctioned by a state regional or subregional strategy.

2.4 UK Competition Inquiry

In the United Kingdom the Competition Commission considered the impact on supermarket competition of planning policies similar to those set out in draft SEPP 66. *The Supply of Groceries in the UK market investigation: Provisional findings report* found that:

An inevitable consequence of a plan-led system that seeks to meet these overarching objectives is that grocery retailers are not able to open a new larger grocery store in any location of their choice. That is, the planning system will, quite deliberately for the purposes of meeting its objectives, act—to some extent—as a barrier to entry and/or expansion for larger grocery stores..³³

...[W]e consider that... for larger grocery stores, the planning system constrains overall entry and also acts in favour of the existing national-level grocery retailers, while controlled land holdings are likely to be impeding entry into a number of areas of high concentration ...³⁴

We provisionally find that a combination of one or more of the following features prevent, restrict or distort competition in certain local markets for the supply of groceries by larger grocery stores:

... The planning regime (in particular, PPS6 in England, SPP8 in Scotland, PPS5 in Northern Ireland and MIPPS 02/2005 in Wales), and the manner in which the planning regime is applied by Local Planning Authorities, acts as a barrier to entry or expansion in a significant number of local markets:

- (i) by limiting construction of new larger grocery stores on out-of-centre or edge-of-centre sites; and
- (ii) by imposing costs and risks on smaller retailers and entrants without pre-existing grocery retail operations in the UK that are not borne to the same extent by existing national-level grocery retailers.³⁵

2.5 Withdrawal of draft SEPP 66

Draft 66 severely undermines the operation of a free-market economy in the provision of retail services to the public. It discourages multi-purpose trips because it ignores the significant trips that are already going to be taken by most households, irrespective of the concentration of activities in centres.

It reflects 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

³¹ Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 104.

³² Ibid.

³³ Paragraph 25.

³⁴ Paragraph 30.

³⁵ Paragraph 47.

best when people working in these areas have somewhere to go to shop and socialise before work, at lunch time and after work.

We support a planning scheme that permits the integration of housing, workplaces, shopping, and recreation areas into compact, pedestrian-friendly, mixed-use neighbourhoods. Pedestrian-oriented amenities such as retail and cafes should not be discouraged or prohibited in any centre of employment, including light industrial zones, business development zones, neighbourhood centres and business parks.

Draft 66 ensures that bureaucrats, rather than consumers, ultimately decide whether or not new retail facilities are necessary. 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.

By preventing a new single retail property being recognised as a new centre, the policy effectively precludes the private sector from successfully initiating the creation of a new centre. As a result the decision to create new centres is reserved for the bureaucracy. Given that the bureaucracy has, to date, been eager to 'protect' consumers from any oversupply in retail property assets (which would actually benefit consumers), it is unlikely that they will take the initiative to establish new centres. Private sector operators also prevented from establishing new retail facilities outside of centres.

Recommendation 1

The NSW Government's Draft SEPP 66 and its associated policies should be formally withdrawn.

3. Draft subregional strategies

The centres policy described above means that the formal identification and categorisation of centres will govern if, when and how new retail facilities are to be developed. The subregional strategies will prescribe a list of smaller centres ("local centres") across Sydney for the life of the Metropolitan Strategy (i.e. until 2031).³⁶

Eight subregional strategies have been released by the Department of Planning in draft form. The Urban Taskforce has undertaken a detailed analysis of the North-East, Inner North and East subregional strategies. We concluded that they fail to pay any significant attention to the retail needs of Sydney over the next 25 years. Our submission to the Department shows that the Sydney metropolitan area will need an additional four million square metres of occupied retail space by 2031 - a 50 per cent increase over current levels.

Where retail is mentioned in the draft strategies, it is usually in the context of preventing it or capping it. For example, in the case of local centres, the prescriptive hierarchy proposed will strangle the growth of vibrant retail communities. The limitation of "villages" to one "small" supermarket and banning supermarkets in "small villages" and neighbourhood centres is outdated 1950s planning. Town centres are limited to one "small" shopping mall – they're banned altogether in other local centres.

Enterprise zones are proposed for a wide range of areas – but the retail is specifically limited – increasing the number of single purpose car trips and unnecessarily contributing to traffic congestion.

Only the strategic centres are free from express rules limiting retail growth. But we firmly believe any plan that tries to provide for all of Sydney's retail growth in the strategic centres is doomed to failure. Perhaps that's why, even in the strategic centres, the draft strategies only provide for a tiny proportion of Sydney's needs over the next 25 years.

³⁶ Department of Planning, *A City of Cities: A Plan for Sydney's Future – Metropolitan Strategy – Supporting Information* (2005) 93.

Our submission to the Department of Planning shows the North-East, Inner North and East will need another 893,000 square metres of shopfront space over the next 25 years, including 51 new supermarkets. Yet all three draft strategies, taken together, only promise 100,000 square metres of additional shop-front space – and only in Chatswood and Bondi Junction. These subregional strategies only plan for 11 per cent of what the community will need.

In any event, the strategic centres are to be burdened with new rules that have the potential to cripple their capacity to support retail growth in the future. The foreshadowed metropolitan parking policy threatens to impose a command and control approach on parking in and around strategic centres. This will limit the value of strategic centres for any form of retail where the use of a car is considered desirable by the community (bulky goods, large family grocery purchases, etc).

3.1 Local centres

The Metropolitan Strategy proposed a hierarchy for “smaller centres and places”.³⁷ The draft sub-regional strategies use an amended hierarchy for “local centres”.³⁸

All of the local centre classifications heavily fence in the capacity for retail services in the local centres to grow in line with community need.

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. This ban was not included in the Metropolitan Strategy released by the NSW Government in 2005.

Neighbourhood centres are only permitted five shops – and the radius for a neighbourhood centre has been cut back to as low as 150 metres (it was 200 metres in the Metropolitan Strategy).

There is a repeated emphasis on “small” retail facilities.

3.2 Application of the local centres hierarchy

This nature of the restrictions on retail inherent in the hierarchy can be illustrated by examining how the hierarchy has been applied by the draft subregional strategies to everyday communities in the North East, Inner North and East.

Table 1: Proposed “villages” that currently have more than the mandated one supermarket.

Sub-regional strategy	Village	No. of supermarkets	Names of supermarkets
North East	Avalon	2	Franklins, Food for Less
	Balgowlah	2	Franklins, Food For Less
Inner North	Crows Nest	2	Franklins, Woolworths
East	Hillsdale	2	Franklins, Woolworths
	Paddington, Oxford Street	2	IGA. There is also a Woolworths on Glenmore Road - a one minute walk from Oxford Street
No. of excess supermarkets		5	

³⁷ Ibid 31.

³⁸ Department of Planning- NSW, *East Subregion: Draft Subregional Strategy* (2007) 139; Department of Planning- NSW, *Inner North Subregion: Draft Subregional Strategy* (2007) 139; Department of Planning- NSW, *North-East Subregion: Draft Subregional Strategy* (2007) 128.

Table 1 shows that at least five of the proposed “villages” already have two supermarkets, which is, in itself, inconsistent with the definition of a village. This is by no means an exhaustive examination. There may be other inconsistencies of a similar kind with other “villages”.

Table 2: Proposed “small villages” that currently have a supermarket not permitted by the proposed Department of Planning classification.

Sub-regional strategy	Small village	No. of Supermarkets	Names of supermarket(s)
North East	Frenchs Forest	1	Woolworths
Inner North	Boronia Park	1	Woolworths Metro
	Coxs Rd, North Ryde	1	Franklins
	Putney	1	IGA
	Willoughby	1	IGA
East	Vaucluse & Old South Head Road	1	Franklins
No. of excess supermarkets		6	

Table 2 shows that at least six of the proposed “small villages” already have a supermarket, which is again inconsistent with the definition of a “small village”. This is by no means an exhaustive examination. There may be other inconsistencies of a similar kind with other “small villages”.

The Urban Taskforce’s analysis of the recently released draft North subregional strategy is not yet complete.

However it seems at least some of the problems with these earlier draft subregional strategies also appear in this draft subregional strategy. For example, Cherrybrook, St Ives and Turrumurra are named as villages, which may only have one “small supermarket”, but each currently has two supermarkets.

Lindfield and Berowra are named as “small villages” (which are not supposed to have any supermarket), but both already have a supermarket. The draft subregional strategy is currently being reviewed by the Urban Taskforce and a detailed submission will be made to the Department of Planning.

3.3 No new centres, no upgraded centres?

With some limited exceptions, no clear mechanism is given in the subregional strategies on how centres will grow and be upgraded in the hierarchy over the next thirty years. The only new town centre flagged in the first three draft subregional strategies is Mascot Station. Otherwise the classification of the various different kinds of centres appears to be based largely on the current condition of the centres (although as tables 3 and 4 show, there is some reductions in retail capability).

There is a brief acknowledgement in the definition of neighbourhood centres, that there may be new neighbourhood centres in the future – but no such acknowledgement for small villages, villages, town centres or strategic centres.

3.4 Revision of the draft subregional strategies

The Urban Taskforce has provided detailed recommendations on the draft sub-regional strategies in our September 2007 submission to the NSW government: *Getting Life’s Essentials - Planning for where we will live, work and shop over the next three decades*.

Among other things, our submission recommended that each subregional strategy should incorporate a subregional and local government area target for shopfront space alongside the targets for dwellings and employment capacity.

Provisions in the sub-regional strategies that attempt to separate retail uses from other uses should be abandoned. The separation and regulation of different land-uses, particularly retail, should no longer be a key planning objective. The planning system should be concerned with:

- the "form" (shape/configuration) of a structure; and
- the relationship of buildings to each other, to streets and to open spaces.

We support a planning scheme that permits the integration of housing, workplaces, shopping, and recreation areas into compact, pedestrian-friendly, mixed-use neighbourhoods. The sub-regional strategies should actually encourage amenities such as retail and cafes in all of the local centres, employment lands and major arterial roads. All four categories in the local centres hierarchy should simply be regarded as "local centres" and should permit the full range of retail premises.

Compact, mixed-used areas, making efficient use of land and infrastructure, make good planning sense. They create more attractive, liveable, economically strong communities. They facilitate a development pattern that supports pedestrian based communities and reduces dependence on motor vehicles by putting residents' and (in centres of employment such as business parks and light industrial areas) employees' daily needs within a short walk of home or work.

Recommendation 2

The NSW Government should review and adopt the recommendations made by the Urban Taskforce in its September 2007 submission to the NSW government: *Getting Life's Essentials - Planning for where we will live, work and shop over the next three decades*. Included in this submission's recommendations were the following:

- Each subregional strategy should incorporate a subregional and local government area target for shopfront space alongside the targets for dwellings and employment capacity.
- Provisions in the sub-regional strategies that attempt to separate retail uses from other uses should be abandoned.
- The sub-regional strategies should actually encourage amenities such as retail and cafes in all of the local centres, employment lands and major arterial roads.
- All four categories in the local centres hierarchy should simply be regarded as "local centres" and should permit the full range of retail premises.

4. Standard Instrument

Draft SEPP 66 operates both through development assessment and through the zoning scheme. It is to be implemented for zoning through local environmental plans prepared in-line with the *Standard Instrument (Local Environmental Plans) Order 2006* ("the Standard Instrument").

The Standard Instrument sets out a standard local environment plan (LEP) that will progressively be rolled out across NSW in the coming years.³⁹ The zonings under the plan create the potential for less than favourable treatment for some categories of retail when individual projects are assessed.

Clause 12 of the standard LEP states that the system of zones laid down under the LEP categorises development as:

- being development that may be carried out without consent;

³⁹ As provided for in s 33A of the Act.

- development that can occur only with consent; and
- development that is prohibited.⁴⁰

The consent authority must also have regard to the objectives for development in a zone when determining a development application in respect of land within the zone.⁴¹

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 business away from centres, may 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.⁴²

The Zone B5 Business Development was, until recently, marginally broader. Until 14 December 2007 its objective included the provision of "offices", but this has now been deleted. It also previously permitted retail generally, but this was also deleted. The zone objective is now limited retail to "specialised retail" – a limitation of this kind was not previously considered necessary. It reduces the flexibility that was previously available.

Office premises and retail premises have been deleted from the list of development "permitted with consent".

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 zones benefit from passing traffic (over 50,000 vehicles per day).⁴³ 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).⁴⁴

Enterprise zones have been proposed for Victoria Road, Parramatta Road, the Pacific Highway, Parramatta Rd, Anzac Parade, Pittwater Rd, Canterbury Rd and Gardeners Rd.⁴⁵

⁴⁰ As provided for in s 30(1) of the Act.

⁴¹ CI 12 of the Standard Instrument, the *Standard Instrument (Local Environmental Plans) Order 2006*.

⁴² Department of Planning, Practice Note PN06-022, 12 April 2006, "Preparing LEPs using the Standard Instrument: standard zones" 4.

⁴³ 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.

⁴⁴ Ibid.

⁴⁵ 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.

There are a number of zones identified in the Standard Instrument for job generating activities. These include: B7 "Business Park"; IN1 "General Industrial"; IN2 "Light Industrial"; and IN3 "Heavy Industrial".

An objective of each of these zones is to "encourage employment opportunities". However, the biggest single job generating sector of the Australian economy (retail premises) are not included in the range of matters permitted with consent in the zone. Curiously, even though business parks will create concentrations of people engaged in employment, it is not intended that they access retail premises on site, but instead, that they travel somewhere else for supermarket and related shopping.

On 14 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" retailing is included in the list of permitted uses for a particular local environmental plan.

Also on 14 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.

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

The Urban Taskforce has, in section 7.1 of this submission, made recommendations for a dramatic streamlining of the current system of zoning. We would prefer that the anti-competitive elements of the Standard Instrument were removed as part of this simplification process. If that's not possible, then it will be necessary (in our view) to at least remove the specific anti-competitive provisions of the Standard Instrument.

Recommendation 3

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.
- The definition of "shop top housing" should be returned to its pre December 2007 state so that any retail premises could go into a ground floor of a mixed use development in "General Residential", "Medium Density Residential", "High Density Residential" and "Neighbourhood Centre".

5. Development assessment under Part 4

A series of key decisions in the Land and Environment Court have set precedents and given consent authorities guidance on how the draft SEPP66 and its associated policies are to be used in the development assessment process.

In *Bonim Stanmore Pty Ltd v Marrickville Council*⁴⁶, Hoffman C refused a development application for the demolition of a club and construction of a supermarket, based partly on the traffic impacts and associated provisions of draft SEPP 66. He concluded at paragraph 64 that

it is obvious from the government documents that good planning would require locations for new supermarkets within existing centres or designated new centres, or on the edges of such centres such as the consolidation of the centre might occur.

*Stadum Pty Limited v Blacktown City Council*⁴⁷ dealt with an appeal against refusal of development consent for the construction of a bulky goods retail establishment at Kellyville Ridge. The site was zoned 3(d) Special Business and the proposed use was permissible in the zone.

A number of regional and State planning policies applied to the proposal considered in that case. Chief among these was *Sydney Regional Environmental Plan No 19: Rouse Hill Development Area* (SREP 19) which provides a framework for co-ordinated planning and decision making in relation to the Rouse Hill Development Area. Additionally, the Rouse Hill Regional Centre (RHRC) is identified in draft SEPP 66 itself as a major urban centre. The Minister intervened in the proceedings in support of the refusal of consent, arguing that the proposal was inconsistent with the aims of Draft SEPP 66 in that it does not moderate unsustainable growth in car travel and threatens the integrity of the RHRC by creating a dispersed retail centre.

Due to the provisions of the ILUT the Land and Environment Court considered whether or not the proposed development was sufficiently well located to public transport. The court accepted expert evidence that the site has good access to public transport and that this will be further improved with the construction of the bus transit ways along Windsor Road. However this was held to be insufficient to overcome the benefits of co-locating bulky goods establishments within the centre.⁴⁸ It was found that the thrust of the principles incorporated in Draft SEPP 66 provide for the concentration of retail, commercial and other activities in major centres. In the words of an expert witness quoted with judicial approval in the case, this:

... supports public transport services and thus helps to ensure that there is a public transport choice available to shoppers visitors and workers. Disbursed activities have the opposite effect, watering down the concentration of workers and visitors and hence making it less viable to provide a high frequency and convenient public transport service.

The court found that the proposed development would have an adverse impact on the RHRC taking into account the myriad of regional and State planning policies and instruments that supported the RHRC's development. Also, that it was realistic and appropriate that bulky goods retailing should be part of the RHRC rather than creating another separate area to accommodate that use.

Section 79C of the *Environmental Planning and Assessment Act* explains how development applications are to be evaluated by consent authorities under Part 4. Among other things a consent authority must take into consideration:

- any environmental planning instrument;
- any draft environmental planning instrument;
- any development control plan;
- the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality;
- the suitability of the site for the development;
- any submissions made; and
- the public interest.

⁴⁶ [2006] NSWLEC 771.

⁴⁷ [2004] NSWLEC 348.

⁴⁸ *Stadum Pty Limited v Blacktown City Council* [2004] NSWLEC 348 [72]

The Act, in itself, does not explicitly state how the “economic impacts in the locality” are to be identified and considered. However, a predecessor provision in substantially the same terms was considered by the Land and Environment Court in *Fabcot Pty Ltd v Hawkesbury Shire Council*⁴⁹, where it was found that the provision, section 90(1)(d), was:

... limited to environmental and planning considerations (*Lui v Fairfield City Council*, 10384/96, 23 December 1996, Murrell AJ). For example, s90(1)(d) relating to the social effect of a proposal does not relate to moral considerations, for which the criminal law is the appropriate regulatory vehicle: it is not for local government councils nor for this court to assume the mantle of moral arbiter (*Lui v Fairfield City Council*).

Similarly, economic competition between individual trade competitors is not an environmental or planning consideration to which the economic effect described in s90(1)(d) is directed. The *Trade Practices Act 1974* (Cth) and the *Fair Trading Act 1987* 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 the economic viability of a trade competitor. Moreover, it is at least arguable from the fact that the *Trade Practices Act* now applies to local government councils, that if a local council were to refuse or to limit a proposal for development on the ground of competition with a trade competitor, it could be guilty of anti-competitive conduct contrary to Pt4 of that Act.

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* ((1979) 140 CLR 675, at 687).

While at first blush this quote may appear to suggest that the development assessment process would not protect other businesses from competition, the quote cited with approval in this decision (In *Kentucky Fried Chicken Pty Ltd v Gantidis*⁵⁰) said that:

If the shopping facilities presently enjoyed by a community or planned for it 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 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 adverse 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.⁵¹

Therefore if the profitability of individual businesses are threatened and this does raise a prospect of existing facilities ceasing to be available to the community, then the impact on profitability of existing business can be an environmental and planning consideration under section 79C.

This conclusion – an interpretation of existing law - reinforces existing legislation and policies do not recognise that

- 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
- a shopping centre will not necessarily cease trading merely because a business or businesses experience financial difficulties due to competition.⁵²

In *Fabcot Pty Ltd v Hawkesbury Shire Council* this approach led to a refusal by the Land and Environment Court to overturn a council's refusal of a development approval for a new supermarket. In this matter the judge accepted the evidence of an expert witness that would be a 10 to 15 per cent

⁴⁹ (1997) 93 LGERA 373.

⁵⁰ (1979) 140 CLR 675.

⁵¹ *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675, 687 per Stephen J, with whom Mason and Aicken JJ agreed.

⁵² 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).

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.⁵³

The above discussion has explained how this provision 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 what the costs and benefits of increased competition will be on existing businesses, and that any attempt to do so is likely to result in inefficient economic outcomes and will disadvantage ordinary consumers. For this reason section 79C should be re-written so as to exclude consideration of this issue in the development assessment process.

Recommendation 4

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. The amended provision should make it clear that, when considering a development application, 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.

6. A planning system that encourages competition

The Urban Taskforce fundamentally believes that the planning system should actively encourage competition and consumer choice.

In effect this means planning authorities should

- not try and exactly align the supply of appropriately zoned land with the likely demand for such land, but instead ensure that there is significantly more rezoned land available to permit a given use (whether it be retail, residential, light industrial, office, etc) than is likely to be required within coming decades; and
- not consider the impact a development approvals on other businesses (including collections of businesses in a centre).

6.1 The objectives of the planning system

The objects of the *Environmental Planning and Assessment Act* includes the encouragement of the proper management, development and conservation ... towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment ...

⁵³ *Bongiorno Hawkins 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.

as well as

the promotion and co-ordination of the orderly and economic use and development of land, ... ecologically sustainable development ... [and] increased opportunity for public involvement and participation in environmental planning and assessment.⁵⁴

There should be an express provision in the objects of the Act to promote competition. Similar provisions already exist in a wide range of existing NSW acts of parliament.⁵⁵ The existing provision requiring the decisions under the Act to promote the "orderly" use and development of land should be deleted. By definition, markets are not "orderly" – they are fluid and responsive to changing consumer needs and changing costs.

The existing provisions requiring "ecologically sustainable development" should be retained. This expression is defined⁵⁶ by reference to section 6(2) of the *Protection of the Environment Administration Act 1991*:

[E]cologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes.

Recommendation 5

The object of the *Environmental Planning and Assessment Act* (NSW) should be amended so that the Act's existing objective of

the promotion and co-ordination of the orderly and economic use and development of land

be re-written to read

the promotion of competition and the economic use and development of land.

6.2 Improved description of the Minister for Planning's role

Section 7 of the Act gives the Minister for Planning responsibility for

... promoting and co-ordinating environmental planning and assessment for the purpose of carrying out the objects of this Act and, in discharging that responsibility, shall have and may exercise the following functions:
...

(c) to promote the co-ordination of the provision of public utility and community services and facilities within the State,

(d) to promote planning of the distribution of population and economic activity within the State,

(e) to investigate the social aspects of economic activity and population distribution in relation to the distribution of utility services and facilities ...

This role for the Minister does not recognise any role for market forces. It instead assumes that the Minister is solely responsible for the planning of economic activity within NSW. We believe this statutory definition of the Minister's role needs to be amended to reflect the important role that competitive markets play in the NSW economy.

⁵⁴ Environmental Planning and Assessment Act 1979 s 5.

⁵⁵ For example: *Air Transport Act 1964* s 4A; *Electricity Supply Act 1995* s 43EB; *Fair Trading Act 1987* s 60C; *Liquor Act 1982* s 54BA; *Motor Accidents Compensation Act 1999* s 5; and the *Water Industry Competition Act 2006* s7.

⁵⁶ *Environmental Planning and Assessment Act 1979* s 4.

Recommendation 6

The statutory summary of the NSW Minister for Planning's role set out in the *Environmental Planning and Assessment Act* (NSW) should be amended so that the existing provision giving the Minister responsibility

to promote planning of the distribution of population and economic activity within the State

be re-written to read

to promote planning of the distribution of population within the State;

to promote planning which facilitates the operation of competitive markets within the State's economy;

7. Further information

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

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