

Submission on the Proposed Amendments to the Standard Instrument LEP – Better Planning for the NSW Retail Sector

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The NSW Young Lawyers Environment and Planning Law Committee (**Committee**) makes the following submission in response to the proposed amendments to the Standard Instrument (Local Environmental Plans) Order 2006 (**Standard Instrument LEP**) for better planning for the NSW retail sector.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committee comprises of a group of approximately 50 members interested in our environment. The Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

Summary of Recommendations

The Committee makes the following recommendations in relation to the proposed amendments to the Standard Instrument LEP:

1. That the definition of 'artisan premises' be adjusted to clarify the degree of automation of production and/or processes required for a product to cease being 'artisan'.
2. That the definition of 'artisan premises' be amended to include that the 'dominant purpose' of the building or place must be the production and/or processing of food or beverages.
3. That the definition of 'garden centres' be amended to clarify how the 'principal purpose' is determined, that 'principal purpose' be defined in the Standard Instrument LEP, or that the language of the indicative definition is amended to adopt the definition of 'retail shop' in section 3 of the Retail Leases Act 1994 (NSW).
4. That the definition of 'local distribution premises' be amended to clarify what is considered an 'item'.
5. That the definition of 'local distribution premises' be amended to clarify what is considered 'local delivery' on either a quantitative or qualitative (but preferably quantitative) basis.
6. That the definition of 'local distribution premises' specifies a maximum gross floor area smaller than that of a typical distribution centre.
7. That the definition of 'neighbourhood supermarket' be amended to clarify what is meant by 'self-service'.
8. That the definition of 'neighbourhood supermarket' specifies a maximum gross floor area smaller than that of a typical supermarket within the 'Shop' land use category.
9. That the definition of 'specialised retail premises' be refined to clarify whether items identified in paragraphs (a)-(m) fit into another land use category.

The Committee recommends a refinement of these definitions to ensure a higher degree of certainty, and submits that this will assist proponents, the community, primary decisions makers, and the Courts in interpreting and applying LEPs and the broader planning law framework.

1. General comments

The Committee supports the objectives of the proposed amendments to the Standard Instrument LEP. The broader reform to retail planning in NSW, which these proposed additional and amended definitions will support, is a welcome adjustment towards modern retail experiences and greater integration of land uses, particularly in urban centres. However, the Committee submits that where new definitions are introduced, it

is important to have recourse to existing definitions and land uses. The Committee also submits that the scope of the new or amended definitions requires careful consideration to ensure that they can be used effectively by consent authorities and development proponents to achieve the intended purposes of the reform.

Clarity of meaning in the new or amended definitions is vital to achieving regulatory certainty and the desired outcomes of the reform in practice. This submission considers the indicative definitions provided in the document 'Proposed amendments to the Standard Instrument LEP' published by the NSW Department of Planning & Environment (**Indicative Definitions**) and makes a number of recommendations in relation to the proposed new definitions.

The Committee agrees that an important step in amending the Standard Instrument LEP will be updating all State Environmental Planning Policies to ensure consistency across the State's planning framework.

2. Artisan Premises

The Committee welcomes the addition of the land use 'Artisan premises' to the Standard Instrument LEP. However, the Committee is of the view that the framing of this Indicative Definition requires further consideration.

The Indicative Definition gives effect to the term 'artisan' by use of the term 'without being fully automated'. The Committee queries whether the breadth of this definition overstretchers the intention to provide craft or locally produced goods that can be sold on site. 'Without being fully automated' encapsulates production processes that are entirely 'hand-made' all the way to processes that are almost entirely automated with only minor human intervention. While modern food and drink processing will inevitably involve some automation, the Committee submits that there is too much flexibility in the scope of this Indicative Definition.

Recommendation 1: That the definition of 'Artisan premises' be adjusted to clarify the degree of automation of production and/or processes required for a product to cease being 'artisan'.

Similarly, the use of the phrase 'produce and/or process foods and beverages' in relation to the Indicative Definition of 'Artisan premises' only marginally distinguished from the operation of the definition of 'food and drink premises' under the Standard Instrument LEP which uses the words 'preparation and retail sale of food or drink'. The difference between 'preparation' and 'produce and/or process' may cause some disagreement between consent authorities and proponents of development applications where the dominant purpose of the use of the premises is, for example, a restaurant. The Committee submits that this could be addressed by

amending the Indicative Definition to specify that the dominant purpose of the building or place must be the production and/or processing element.

Recommendation 2: *That the definition of ‘Artisan premises’ be amended to include that the ‘dominant purpose’ of the building or place must be the production and/or processing of food or beverages.*

The efficacy of this new definition in practice, particularly in achieving the aim of the proposed amendment, will depend heavily on careful consideration by Councils in strategic planning to allow for development consent to be granted for artisan premises in circumstances where minimal amenity issues will arise. Potential issues such as parking and congestion to traffic corridors in areas previously dominated by traffic patterns serving more conventional industrial or business zone uses will require the careful attention of consent authorities.

However, the degree to which such consumer related issues arise will be dependent on the circumstances of each development, with the definition stating that such premises ‘can also include’ restaurants, tastings, tours, sales and workshops, not that they must include one of the preceding uses. The Committee notes that this discretion means ‘Artisan premises’ are capable of being used purely for production and without a direct retail component.

3. Garden Centres

The Committee welcomes the amendment of the existing definition for ‘Garden centres’ in the Standard Instrument LEP. However, the Committee submits that the framing of this Indicative Definition requires further consideration.

The Committee supports the change to the wording ‘principal purpose’ away from ‘ancillary’ development because of the implications arising in the characterisation task inherent in the concept of ancillary development. However, the definition is unclear as to what a ‘principal purpose’ is. For example, is it not apparent whether the ‘principal purpose’ is to be determined by looking at a business’ profits from the sale of plants and/or landscaping supplies, the amount of floor space dedicated to plants/landscaping supplies, or some other factor. One option may be to adopt the language in section 3 of the *Retail Leases Act 1994* (NSW) in relation to the definition of ‘retail shop’, that is, ‘premises that are used, or proposed to be used, wholly or predominantly for the carrying on of one or more’ of the retail purposes prescribed in the indicative definition.

Recommendation 3: *That the definition of ‘Garden centres’ be amended to clarify how the ‘principal purpose’ is determined, that ‘principal purpose’ be defined in the Standard Instrument LEP, or that the language of the indicative definition be amended to adopt that of the definition of ‘retail shop’ in section 3 of the Retail Leases Act 1994 (NSW).*

4. Local Distribution Premises

The Committee welcomes the addition of the land use ‘local distribution premises’ in the Standard Instrument LEP because it provides a useful mid-way point in the delivery of goods that are purchased online or through similar means. However, the Committee is of the view that the framing of this indicative definition requires further consideration.

The Committee submits that it is unclear what may be an ‘item’ for the purposes of the indicative definition. This lack of clarity suggests that on the face of it, ‘local distribution premises’ may permit the storing or handling of items purchased or ordered for local delivery, regardless of the size and scale of an item. For example, a pair of shoes may be an ‘item’, however something like a television may also be an ‘item’ for the purposes of the definition, despite the significant difference in size between the two items. The Committee considers that the breadth of the term ‘item’ in the indicative definition would contradict the intention to provide a smaller-scale ‘last mile’ distribution centre.

Recommendation 4: *That the definition of ‘Local distribution premises be amended to clarify what is considered an ‘item’.*

The meaning of ‘local delivery’ in the Indicative Definition of ‘local distribution premises’ is also unclear. Although the Committee supports how the definition of ‘local distribution premises’ as a place where ‘no retail sales are initiated’, the Committee queries how far ‘local delivery’ extends and therefore how the new land use will be distinguished from other land use categories under the Standard Instrument LEP.

However, the Committee considers that the issue regarding the scope of what constitutes an ‘item’ is amplified by the lack of clarity in relation to what ‘local delivery’ means. Clarification in relation to the meaning of ‘local delivery’ may help to interpret what constitutes an ‘item’ and vice versa. This could be achieved by providing a quantitative or qualitative limit upon what is considered a ‘local delivery’. For example, ‘local delivery’ could be limited to any delivery within six kilometers of the local distribution premises, or apply only in respect of particular items, such as small goods.

Recommendation 5: *That the definition of ‘Local distribution premises’ be amended to clarify what is considered ‘local delivery’ on either a quantitative or qualitative (but preferably quantitative) basis.*

The Committee also considers that it is appropriate to place a limitation on the maximum gross floor area for a ‘local distribution premises’. The Committee is of the view that this is necessary to ensure the intended purpose of providing a smaller-scale ‘last mile’ category of distribution centre. Care should be taken to ensure the specified maximum gross floor area for ‘Local distribution premises’ is smaller than the floor area of a typical distribution centre.

Recommendation 6: *That the definition of “Local distribution premises” specifies a maximum gross floor area smaller than that of a typical distribution centre.*

In practice, the efficacy of the new definition in achieving the aim of the proposed amendment to provide a ‘last mile’ distribution centre will depend heavily on the conditions of consent imposed by individual Councils in permitting development that is a ‘Local distribution premises’. For example, Councils may impose a condition that only a vehicle of a certain size can enter a local distribution premises to deliver items. A condition such as this could have practical problems that will prevent some vehicles entering a local distribution premises, thus defeating the purpose of this new land use to provide a local distribution centre. Accordingly, when determining conditions of consent, Councils should consider the reasons why this new land use was introduced, namely to have a last mile distribution centre.

5. Neighbourhood supermarket

The Committee welcomes the introduction of the new definition for ‘neighbourhood supermarket’. However, the Committee is of the view that the framing of this Indicative Definition requires further consideration.

The Committee submits that the indicative Definition for ‘neighbourhood supermarket’ is not sufficiently distinct from the existing definitions of ‘neighbourhood shop’ and ‘Shop’. It appears that the sale of groceries (eg. food) and other household items (eg. personal care products) could occur at both a ‘neighbourhood supermarket’ and a ‘shop’ under the Standard Instrument LEP.

The Committee notes that the definition of ‘neighbourhood supermarket’ is distinguishable from the definitions of ‘shop’ and ‘neighbourhood shop’ where the sale of goods in a ‘neighbourhood supermarket’ is organised on a ‘self-service basis’. The Committee submits that the meaning of ‘self-service’ is unclear and should be defined in order to clarify how a ‘neighbourhood supermarket’ is to operate.

Recommendation 7: *That the definition of ‘neighbourhood supermarket’ be amended to clarify what is meant by ‘self-service’.*

The Committee notes that, whilst a neighbourhood supermarket is permissible with consent in zone ‘B1 neighbourhood centre’, a ‘Shop’ is not. In addition, groceries and other household items can be sold at a ‘neighbourhood shop’.

Under cl 5.4 of the Standard Instrument LEP, ‘neighbourhood shops’, must have a retail floor area not exceeding a figure to be determined by a local plan-making authority (the figure must be greater than 80 square metres). The Indicative Definition of ‘neighbourhood supermarket’ provides for a retail floor area up to 1500 square metres. This allows for considerable overlap between the definitions where, for instance, a local plan-making authority determines that the retail floor area for both premises is not to exceed 1000 square metres.

The Committee agrees that it is appropriate to place a limitation on the maximum gross floor area for a ‘neighbourhood supermarket’. However, the Committee submits that further consideration should be given to the appropriate maximum gross floor area. In particular, care should be taken to ensure the specified maximum gross floor area for a ‘neighbourhood supermarket’ (ie. 1500 square meters under the current indicative definition) is smaller than the floor area of a typical supermarket within the ‘shop’ land use category. The Committee is of the view that this is necessary to ensure the intended purpose of providing small-scale supermarkets for daily shopping is achieved. The Committee considers that this is compatible with surrounding land uses in the neighbourhood zone where consumers can walk rather than use a car.

Recommendation 8: *That the definition of ‘neighbourhood supermarket’ specifies a maximum gross floor area smaller than that of a typical supermarket within the ‘Shop’ land use category.*

6. Specialised retail premises (incorporating bulky good premises)

The Committee welcomes the amendment of the existing definition of ‘Bulky goods premises’ to become ‘specialised retail premises’. However, the Committee is of the view that the framing of this Indicative Definition requires further consideration.

The Committee supports the broadening of the definition of ‘specialised retail premises’ (from the definition of ‘Bulky goods premises’) by removing the requirement to have a large area and direct vehicular access. However, there is a risk that the broader definition of ‘specialised retail premises’ may capture some products (identified in paragraphs (a)-(m) of the Indicative Definition) which could fit into another land use

category. For example, whether baby and children's goods, such as baby clothing (refer paragraph (k)), fall under the Indicative Definition of 'specialised retail premises' or another land use category under the Standard Instrument LEP such as a 'Shop', is questionable.

Recommendation 9: *That the definition of 'specialised retail premises' be refined to clarify whether items identified in paragraphs (a)-(m) fit into another land use category.*

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

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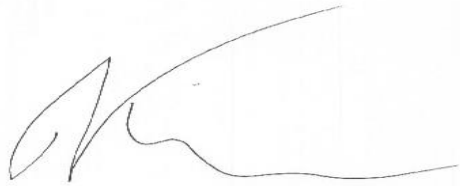
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