The Planning Institute of Australia (PIA) is the peak body representing professionals involved in planning Australian cities, towns and regions. The Institute has around 4,500 members nationally and around 1,300 members in New South Wales. PIA NSW plays key roles in promoting and supporting the planning profession within NSW and advocating key planning and public policy issues. This submission has been prepared on behalf of PIA NSW by Members of the Institute.

**Introduction**

The Planning Institute of Australia (NSW Division) welcomes the opportunity to comment on the Draft State Environmental Planning Policy (Competition) 2010, as released by the Department of Planning for public exhibition between Tuesday 27 July and Thursday 26 August 2010.

**Issues for Consideration**

The Institute would like to raise the following matters for the Department of Planning’s consideration:

1. **The Need for the SEPP**

   The Institute questions the need for the SEPP given that it appears only to codify the current case law. It is the Institute’s view that another regulation in the planning system will further complicate an already over complex system and this may be a counter productive step. The Institute believes that a Practice Note reflecting the principles of the SEPP based on the relevant case law would equally serve the intent of the SEPP without burdening the system with another head of consideration for development assessments.

2. **Definitions**

   The draft SEPP raises a series of new definitional problems:
   - ‘commercial development’
   - ‘overall adverse impact’
   - ‘extent and adequacy’
   - ‘loss of trade’

   These terms may keep the Courts and the legal profession occupied for a great many cases at considerable expense. A Practice Note with examples and simple explanations is a preferable
approach. The Practice Note could specify when an Impact Statement is required so that proponents do not waste money on carrying out expensive economic impact statements or economic viability reports. It should also clarify what should be contained in an economic impact statement if one is required, so that the important issues are addressed.

The draft SEPP provides no guidance as to what constitutes ‘overall adverse impact on the extent and adequacy of local community services and facilities’ under Clause 9 (2) of the draft SEPP. It also provides no guidance about when a planner should consider economic viability and about the processes / methods for assessing adverse impact. Without guidance, there may be some confusion and questions asked, about how planners should assess overall adverse impact on facilities and services in the local community. More guidance on this matter should be provided within the SEPP.

In particular, the Institute considers that there is potential for considerable confusion around the interpretation of the new definition of ‘commercial development’ in Clause 7 of the draft SEPP, as only constituting ‘business premises’, ‘commercial premises’ and ‘retail premises’. This exposes it to significant misinterpretation which will make the current issues around the consideration of competition in development consent much harder for planners working in councils, government and industry.

Whilst the Department’s LEP Practice Note of 2006 - PN 06-003 gives some direction about what constitutes ‘business premises’, ‘commercial premises’ and ‘retail premises’, some uses are not explicit. For instance, on page 9 of the LEP Practice Note it is noted that ‘Depending on the nature of the development, landscape and garden supplies, vehicle showrooms, bulky goods premises, and timber and building supplies may be a form of retail premises’. This leaves the very real issue of what is considered to be a ‘retail premises’ open to interpretation by the consent authority, and this means that the application of the draft SEPP (Competition) to a specific type of retail premises could be ignored by the consent authority, depending on its interpretation of the nature of the development. This uncertainty has caused some considerable issues for development.

There is however, a very useful precedent for explicitly referencing additional standard definition development types in new draft SEPPs so the application is quite clear. In 2010, the Department amended the General Commercial and Industrial Code within State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 to include a new definition of ‘commercial premises’ which meant ‘business premises, office premises or retail premises’, and also explicitly referenced ‘warehouse and distribution centre’ and ‘bulky goods premises’. The Codes SEPP further outlines which standard definition uses (which are often considered ‘office premises’ ‘commercial premises’ or ‘retail premises’) could not be included as complying development within the Codes SEPP. These included a funeral chapel, a funeral home, retail premises where firearms within the meaning of the Firearms Act 1996 are sold, landscape and garden supplies, a market, a pub, restricted premises, a roadside stall, sex services premises, timber and building supplies, vehicle sales or hire premises.

The Institute would suggest amendments to the draft SEPP (Competition) to clarify which standard definition uses are included as ‘commercial development’ under this draft SEPP, and which are excluded (with relevant reasons). The definition of ‘commercial development’ should be consistent with the SEPP (Exempt and Complying Development Codes) 2008, rather than include a new definition of ‘commercial development’ which has the same meaning. The Institute also recommends that the Department updates the LEP Practice Note of 2006 - PN 06-003, so that definitions are consistent across Department policy.

The draft SEPP, if it is adopted (contrary to the Institute’s submission), will need accompanying guidelines to explain what is meant by each clause and how the SEPP is to be applied in various
circumstances. This could easily be incorporated in a Practice Note rather than a SEPP with accompanying Guidelines. The Institute’s view is that the SEPP would not reflect good policy if it requires another document to explain its purpose and operation.

3. Centres Policy

It is unclear how the draft SEPP relates to or becomes part of the overall package of planning policies under the Centres Policy. The draft SEPP issue is just one aspect of the recommendations and issues raised in the review report ‘Promoting Economic Growth and Competition through the Planning System’, prepared by the NSW Government’s Department of Planning and Better Regulation Office in April 2010. The Institute does not believe that it is appropriate for the draft SEPP to proceed in isolation of the Centres Policy (or Activity Centres Policy) or other recommended actions from the previously mentioned review report. Competition policy is an integral aspect of the realisation of and promotion of economic development in centres. Accordingly, the Institute submits that the draft SEPP should be contained within the Activity Centres Policy, not as a stand alone instrument, but as a key principle of a broader Policy with a Practice Note to assist its implementation through the Local Environmental Plans and development application assessment processes.

4. Application of draft SEPP Policy

The Institute considers that the draft SEPP must apply to Part 3A as well as consents under Part 4 (Councils and JRPP) of the NSW Environmental Planning Act (the Act).

The Institute’s interpretation of clause 10 of the draft SEPP is that Local Environmental Plans and Development Control Plans are still able to prescribe the scale of a commercial development by reference to the maximum gross floor area for retail, offices and business premises in a zone or area (so long as it can be demonstrated when the Plan is prepared that there is a planning purpose for the restriction). This should be clarified in a Practice Note or explanatory note so that there is no confusion. An example where such a control may be used is to limit the amount of retail floor area in a centre where there are traffic constraints or to avoid large floor area retail premises in areas that are planned for commercial office uses.

The Institute is concerned that the draft SEPP, if adopted, would be used by some proponents to advocate the rezoning of residential or industrial areas for retail, office or business uses on the basis that there is an unmet demand in the area and refusing the proposal would be anti-competitive. The power of Part 3A to override local planning instruments and existing zones means that such a proposal might be considered by the Minister on the basis of competition. This issue must be clarified in any Guidelines or Practice Note to avoid any misperception that the draft SEPP gives a presumption in favour of rezoning to support more competition, especially in out of centre locations.

Clause 11 of the draft SEPP needs to clarify the criteria for distance separation requirements for certain premises that might be warranted on planning grounds. These might include the capacity of the local road network for additional traffic and servicing and to avoid a proliferation of permissible service shops for example in an industrial area that reduces industrial employment potential. The draft SEPP should also make it clear that the policy does not apply to restricted premises or brothels.

The draft SEPP may also make it difficult for councils to develop areas within centres as precincts with a certain character, for example restaurant precincts or antique precincts. This is because Council’s ability to promote precincts for a specialist type of use could be affected by the policy intent of the draft SEPP.
5. Suspension of Covenants, Agreements and Instruments

Clause 12 of the draft SEPP is unacceptable in that the phrase, “... or with a development consent granted under the Act...” will be broadly interpreted beyond the bounds of the draft SEPP to suspend all covenants, agreements and instruments whether relating to competition or not. The proper place for such a mechanism is through a Local Environmental Plan, not a SEPP, as is contemplated by s28 of the Act.

6. Review of SEPP

If the draft SEPP proceeds then the Institute, having regard to the resources of the Department of Planning and the value of allowing additional time to see if any issues arise from the SEPP, would recommend a review period of 2 years rather than 12 months under clause 14.

The Institute welcomes the opportunity to make this submission and would be pleased discuss any aspect of the points raised in the Submission with the relevant Officers of the Department.

Tony McNamara
NSW President