

Submission on the *Proposed Infrastructure SEPP Amendments: Renewable Energy and Regional Cities*

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The NSW Young Lawyers Environment and Planning Committee (**Committee**) make the following submission in response to the *‘Proposed Infrastructure SEPP Amendments: Renewable Energy and Regional Cities’*.

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.

NSW Young Lawyers accepts the science and wide-ranging effects of climate change, including as outlined by the United Nations Intergovernmental Panel on Climate Change in its leading expert reports. NSW Young Lawyers considers that Australia has the ability and a responsibility to rapidly reduce emissions and actively help to keep the world’s emissions within its remaining ‘carbon budget’.

NSW Young Lawyers recognises that there is a climate emergency, posing an unprecedented challenge for human rights and the rule of law. In order for there to be intergenerational equity and climate justice, as well as interspecies equity and ecological sustainability, the law needs to enable and require Australia to rapidly decrease CO₂ (and other greenhouse gas) emissions and to be legally accountable for their adverse contributions to the impacts of climate change.

The NSW Young Lawyers Environment and Planning Committee comprises of a group of approximately 250 members interested in our natural and built 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.

Introduction

The Committee welcomes the opportunity to comment on the State Environmental Planning Policy (Infrastructure) 2007 (**Infrastructure SEPP**) of the proposed amendments 1 and 2 of the *Proposed Infrastructure SEPP Amendments: Renewable Energy and Regional Cities - Explanation of Intended Effects* dated September 2021 (**EIE**).

Summary of Recommendations

1. That the Renewable Energy Zones and proposals as set out in the EIE should not create disproportionate 'red tape' for utility scale renewable projects.
2. That the proponent should not be required to address utility scale renewable projects considerations in two separate instruments, as well as during the consultation process.
3. That consideration for utility-scale solar and wind energy proponents are better addressed under Local Environmental Plans (**LEPs**).
4. That amendments should be informed by local knowledge.
5. That the NSW Right to Farm Policy be taken into account in this review and agriculture land use conflicts be taken into account as part of the proposed amendments to the Infrastructure SEPP.
6. That that the two standalone definitions in the Proposal be expressly stated as nominate permissible uses rather than merely included as part of a group term.
7. That the two standalone definitions in the Proposal be rephrased as follows:
 - a. *Utility-scale Solar Energy System* – means a photovoltaic electricity system used for the purpose of generating electricity **primarily** for export to the electricity grid.
 - b. *Utility-scale Wind Turbine System* - means a system comprising wind turbines used for the purpose of generating electricity **primarily** for export to the electricity grid.

Amendment 1 – Matters of Consideration for Utility-Scale Solar and Wind

Whether the role of concurrence should be retained

1. The Committee welcomes the shift towards renewables from fossil fuels, especially coal, as part of the NSW Net Zero Plan. However, the Committee is concerned that the proposed amendments to the Infrastructure SEPP in the EIE may be superfluous and represent disproportionate "red tape" for utility scale renewable projects that are already forced to take into account planning controls under the specific LEPs when seeking development consent.
2. The Committee sees a potential conflict between the development of the Renewable Energy Zones (**REZs**) and the proposals as set out in the EIE.

Recommendation 1: That the Renewable Energy Zones and proposals as set out in the EIE should not create disproportionate 'red tape' for utility scale renewable projects.

Are the additional considerations put forward by the proposed amendment already protected in other instruments?

3. While it may be important for planning purposes to ensure that utility-scale solar and wind energy developments are not situated so closely to regional cities that it does not provide those cities with any room to expand, the additional considerations proposed by amendment 1 of the EIE appear to be unnecessary.
4. Firstly, the proposed amendments appear to duplicate the considerations contained in the provisions of LEPs, that proponents are required to address and consent authorities are required to take into consideration under Section 4.15 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**).
5. LEPs set out a number of aims and objectives which are desirable of developments within a specified area. These aims and objectives will differ depending on the area for which the LEP applies, which take into account the uniqueness of each area the subject of an LEP.
6. Proponents are expected to address the aims of the applicable LEP and the objectives of the zone in the application process, including how a proposal promotes or preserves these aims and objectives. Similarly, consent authorities are required to take into consideration the provisions of such instruments when determining a development application.

7. For example, in the RU1 – Primary Production zone of the *Mid-Western Regional Local Environmental Plan 2012 (MWLEP)*, a zone within which electricity generating works is permitted, the objectives include:
- (a) *To minimise the fragmentation and alienation of resource lands.*
 - (b) *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
 - (c) *To maintain the visual amenity and landscape quality of Mid-Western Regional by preserving the area’s open rural landscapes and environmental and cultural heritage values.*
 - (d) *To promote the unique rural character of Mid-Western Regional and facilitate a variety of tourist land uses.*
8. These objectives are in addition to the aims of the MWLEP. The aims of the MWLEP are broad and apply to the land regardless of the zoning, for example, protecting expansive areas by ‘conserving the significant visual elements that contribute to the character of the towns, such as elevated land and the rural character of the main entry corridors into the towns’.
9. It is not unusual for proposed solar and wind developments to be determined by way of refusal where the reasons for refusal include that the proposed development was contrary to the aims or objectives of the relevant LEP.
10. LEPs are therefore uniquely positioned to capture the necessary considerations to reflect the values of a zone within a particular area. In relation to land which contains an important scenic quality or landscape character, some LEPs contain maps which identify certain land as ‘Visually Sensitive Land’. In areas mapped as ‘visually sensitive’, consent authorities must be satisfied that the proposal will complement the visual setting before they may grant consent.
11. If the proposed amendment is implemented, then proponents will be required to address such considerations in two separate instruments, including during the consultation process. This is simply unnecessary.

Recommendation 2: That the proponent should not be required to address utility scale renewable projects considerations in two separate instruments, as well as during the consultation process.

Land use conflicts

12. Amendment 1 in the EIE is focused towards avoiding land use conflicts as regional cities sprawl and expand.

13. The Committee welcomes a forward planning approach to land use planning in order to reduce land use conflicts, but requests that the Department consider whether this should be incorporated into LEPs rather than using an amendment to the Infrastructure SEPP.
14. In the Committee's view, the amendments should be informed by local knowledge as the EIE is focused on considerations of local character, scenic quality, and people's enjoyment of the landscape. The Committee recommends that local knowledge and consultation should include engagement with local Indigenous communities.
15. Additionally, the Committee understands that the NSW Agriculture Commissioner will lead a review of the NSW Right to Farm Policy in the last 12 months. The Committee would welcome the consideration of this review and agricultural land use conflicts as part of the proposed amendments to the Infrastructure SEPP.
16. In summary, the Committee submits that the proposed amendment 1 of the EIE creates unnecessary hurdles for utility-scale solar and wind energy proponents. LEPs are better placed to address land use conflicts, future growth areas, and the impact a proposed development will have on the scenic quality and landscape character of a regional city.

Recommendation 4: That the NSW Right to Farm Policy be taken into consideration in this review and agriculture land use conflicts be taken into account as part of the proposed amendments to the Infrastructure SEPP.

Recommendation 5: That consideration for utility-scale solar and wind energy proponents are better addressed under LEPs.

Amendment 2 - Standalone Definitions for Utility-Scale Solar and Wind

17. The Committee welcomes and agrees with the proposal to add stand-alone definitions for utility-scale solar and wind energy development (**Proposal**) to encourage the orderly and economic use of land for renewable energy generation outside of the nominated REZs throughout NSW.
18. The Committee appreciates that the Proposal is intended to work alongside proposed Amendment 2 comprising part of the "Proposed Infrastructure SEPP amendments: Electricity generating works or solar energy systems" released by the Department for exhibition last month, specifically to amend the definition of 'solar energy systems' in the Infrastructure SEPP (**Prior Amendment**). It is entirely

reasonable and sensible for a household energy system to be treated differently to a commercial solar farm.

19. However, the Committee recommends that the wording of the amendment set out in the Proposal be rephrased. For instance, [Planning Circular PN 11-003](#) contains a 'group term definition' concept that the EIE appears to contemplate being adopted in the Proposal, such that the group term 'electricity generating works' includes both 'Utility-scale Solar Energy Systems' and 'Utility-scale Wind Turbine Systems' as innominate permitted uses.
20. Therefore, to ensure there can be no ambiguity that 'electricity generating works' are permissible on certain land pursuant to the Infrastructure SEPP, the Committee believes that both 'Utility-scale Solar Energy Systems' and 'Utility-scale Wind Turbine Systems' should be clearly expressed as being nominate permitted uses (rather than as innominate permitted uses if 'electricity generating works' is a nominate permitted use).
21. This ambiguity has, in the context of other SEPPs, led to considerable uncertainty and unnecessary litigation (for example, the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* which contains Precinct Plans that adopt the 'group terms' concept in an ambiguous way and have led to a spate of current Court proceedings).

Recommendation 6: That the two standalone definitions in the Proposal be expressly stated as nominate permissible uses rather than merely included as part of a group term.

22. The Committee recommends that the definitions in the Proposal be amended to reflect the fact that many medium-scale PV arrays (to use the example in the Prior Amendment, 'large warehouses or industries with a significant number of solar panels used to generate electricity for their own use') do not have sufficient space for (or are unable to feasibly purchase sufficient numbers of) batteries to store excess electricity.
23. Many of these medium scale systems have been installed primarily on the basis that all of their running costs, and eventually the entirety of their installation costs, will be paid back over a number of years by way of directly selling surplus electricity back to the grid. It is important, therefore, to ensure that such medium scale systems are not caught by the limitations inherent in the definitions set out in the Proposal (specifically in relation to solar energy systems).
24. Although similar medium-scale wind turbine systems are incredibly rare, the Committee recommends that the wind turbine system definition be similarly amended to ensure consistency between the two definitions and to establish an element of 'future-proofing' to the wind turbine system definition in the event of future technologies generating an increased demand for medium-scale systems.

25. The Committee therefore recommends that the Proposal be amended such that the standalone definitions are worded as follows:

- **Utility-scale Solar Energy System** – means a photovoltaic electricity system used for the purpose of generating electricity **primarily** for export to the electricity grid.
- **Utility-scale Wind Turbine System** - means a system comprising wind turbines used for the purpose of generating electricity **primarily** for export to the electricity grid.

26. This is an important distinction to the wording proposed in the Prior Amendment, in which the meaning of ‘electricity generating works’ has been refined to mean development where ‘the primary purpose of the solar farm is exporting electricity to the grid’. The Proposal needs to ensure that medium scale systems which have the ancillary purpose of exporting energy to the grid are not captured within either of the two standalone definitions in the Proposal (and thereby preventing such medium scale systems from being installed across the Regional Cities).

Recommendation 7: That the two standalone definitions in the Proposal be rephrased as follows:

- **Utility-scale Solar Energy System** – means a photovoltaic electricity system used for the purpose of generating electricity **primarily** for export to the electricity grid.
- **Utility-scale Wind Turbine System** - means a system comprising wind turbines used for the purpose of generating electricity **primarily** for export to the electricity grid.

Concluding Comments

NSW Young Lawyers and the Committees 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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