**SLEP Amendment Proposal – Tourist Accommodation**

**Background - The LEP**

The statewide Standard Instrument LEP (SILEP), maintained by the Department of Planning (DoP), contains a Land Use Table that identifies for each land zone (Residential, Business, Rural and Environmental) which uses must be shown as permitted or prohibited.

Each council, in its own local LEP, may include additional land uses in the ‘*Permitted*’ or ‘*Prohibited*’ lists for each zone, and to assist councils with this process, the DoP provides Practice Note PN09-006 ‘*Providing for Tourism in Standard Instrument LEPs’*.

The SILEP also contains definitions of each land use in its Dictionary, and a list of scaling controls, such as maximum number of bedrooms, in Clause 5.4. Unique individual council local requirements can be included in Part 7 ‘*Additional Local Provisions’*.

To obtain consent, a development application must identify a specific Permitted land use and demonstrate compliance with the Dictionary definition and Clause 5.4 Controls.

For example, an application for Farm Stay accommodation must comply with the following–

* Definition - *a building or place that provides short-term accommodation to paying guests on a working farm as a secondary business to primary production.*
* Clause 5.4 Controls *- the accommodation that is provided to guests must consist of no more than 7 bedrooms*
* Within the Shoalhaven, Farm stay is permitted in zones – RU1, RU2, RU4, E3

**The Group Term – ‘Tourist and Visitor Accommodation’ (TVA)**

The use of group term in the SILEP has proved to be a source of confusion. In the case of tourist-related uses, PN09-006 states –

*The* ***group term*** *‘tourist and visitor accommodation’ includes -*

* *Backpackers’ accommodation*
* *Bed and breakfast accommodation*
* *Hotel or motel accommodation*
* *Serviced apartments*

*Other* ***(*individual**) *forms of accommodation for tourists include –*

* *Farm stay accommodation*
* *Caravan park & camping ground*

**Issues with the SLEP relating to Tourist Accommodation**

Tourist accommodation development applications that have been the subject of appeals at the LEC have highlighted significant loopholes and inconsistencies in the SILEP.

1. A change made to the group term TVA in the SILEP in 2011, making it inconsistent with PN09-006.
2. The omission of tourist cabins from the SILEP and their subsequent classification as an innominate use.
3. The potential for hotel and ‘ancillary’ function centre developments to be characterised as eco-tourist facilities to obtain permissibility.
4. Within the Shoalhaven LEP, the ability to obtain a subdivision of land in RU1, RU2 and E3 zones by applying for the development of five tourist cabins.

**1. Change made to the SILEP in 2011**

PN 09-006 recommends the group term only for Residential & Business zones. For Rural & Environmental zones, it recommends Farm Stay, Bed & Breakfast and Eco-tourist facilities.

In 2011, the SILEP was amended and Farm Stay was added to the group term list, causing the SILEP and PN 09-006 to become misaligned. Councils continued using the group term in Residential and Business zones, but had to list Farm Stay as a Prohibited Use.

Coastal councils from Bega to Newcastle continued to restrict use of the group term only to Residential and Business zones, but SCC was one of very few councils that chose to also deploy the group term in RU1, RU2 and E3 zones; this meant hotels, motels and serviced apartments had to be listed as Prohibited Uses, a source of continuing confusion.

As explained above, a development application must identify a specific Permitted land use category and demonstrate compliance with its definition and Clause 5.4 Controls.

However, in the case of the Mount Hay DA, although the landowner had described the development as “high end farm stay accommodation” in his covering letter to the General Manager, in the application the development was characterized using the group term ‘tourist & visitor accommodation’. This was because it would not have met the Farm stay definition of being a secondary business to primary production.

In February 2016, when the Mount Hay DA use of the group term was challenged by residents, the following advice was provided by the DoP Southern Region GM –

*“tourist and visitor accommodation (and anything characterised as this) will be permissible. In other words you don't have to meet the 5 categories to be permissible provided you are characterised as broadly meeting the tourist and visitor accommodation definition.”*

On 17 October 2018, DoP executive Steve Murray stated this advice was not DoP policy. However, it is clear that use of the group term will remain open to legal interpretation and will therefore be a continuing source of contention and appeals at the LEC.

**2. Omission of Tourist Cabins from SILEP**

Tourist cabins/units were omitted from the original SILEP and have subsequently been classified as an innominate use, but there is no Dictionary definition to limit size, or Clause 5.4 scaling controls to restrict the maximum number of bedrooms.

Councils have attempted to address the problem by introducing DCP performance criteria on maximum size and number of tourist cabins, but the LEC views DCP criteria as only ‘discretionary guidelines’. The SDCP specifies a maximum floor area of 120m2, but Council’s refusal of the Mt. Hay cabin floor area of 195m2 was overturned by the LEC (see attached photo of ‘cabin’ described by Minister Roberts as “taking the p\*\*s”.

The siting and number of tourist cabins on the Cambewarra Escarpment prompted the proposed expansion of scenic protection. However, in the case of tourist cabins that are part of an eco-tourist facility, scenic protection is provided by Clause 5.13(3g) that states “*development will be located to avoid visibility above ridgelines and against escarpments.”*

In December 2016, Mayoral Minute MM 16.20 recommended –

*“Council also consider the policy approach in respect to density of tourist cabins in rural and environmentally sensitive locations.”*

The main concern cited was that the proliferation of cabins for tourism purposes could run counterproductive to the environmental values of particular landscapes.

**3. Eco-tourist facilities in RU1, RU2 and E3 zones.**

There is growing demand for function centres with attached accommodation in attractive rural settings, for mid-week business meetings and conferences and weddings and guest accommodation on weekends.

However, with hotels and function centres prohibited in Rural and Environmental zones, there is an incentive to explore permissibility for developments by characterising them as eco-tourist facilities. LEP Clause 5.13.3 requirements are meant to assist councils in restricting approvals to applications with genuine eco-tourist credentials, but they have proved to be inadequate.

Unlike Farm stay and Bed & Breakfast accommodation, there are no Clause 5.4 scaling controls restricting the number of bedrooms in an eco-tourist facility. Kiama Council has included a maximum of 10 bedrooms per lot in its DCP, but this restriction would be considered only as a guideline by the LEC.

The need for more effective LEP controls for eco-tourist facilities has been amply proven by the Department’s own experience in a case of *Raphael Shin Enterprises v Minister for Planning* currently before the LEC.

Although the SILEP definition refers to eco-tourist facilities being “sensitively designed to minimise bulk, scale, and overall physical footprint and visual impact”, the DoP is currently opposing a proposal to construct a -

“five star international eco-hotel incorporating 150 hotel rooms, restaurant and café, retail space, multipurpose theatre and undercover parking, and three buildings incorporating 219 2/3 bedroom units”,

having failed to convince the Judge that the DA failed to meet the Dictionary definition.

**4. Subdivision of land in zones RU1, RU2 and E3**

In the SILEP, the current minimum lot size following subdivision in rural and environmental zones is 40ha, but Clause 4.2 allows for a reduction in the minimum lot size for the purpose of primary production in zones RU1, RU2, RU4 and RU6.

The Shoalhaven LEP includes an additional Clause 4.2A that allows for subdivision of land under the *Community Land Development Act 1989* in zones RU1, RU2 and E3 that will create lots of less than 40ha for the purpose of tourist & visitor accommodation.

Section 5.6 of the SDCP - Community Title Subdivision of Tourist & Visitor Accommodation supplements Clause 4.2A and states the proposed subdivision must include a minimum of 5 tourist cabins. Unfortunately, Clause 4.2A has created an unintended incentive to obtain a subdivision by stealth.

**Example of How the Loopholes can be Leveraged**

The need for action was demonstrated by an application lodged in March 2016 for five tourist cabins on a working farm in Strongs Rd.. The accommodation would not have met the secondary business definition condition. The DA boldly stated -

*“Tourist cabins are not specifically separately defined by the SLEP and it is considered unnecessary to define the development beyond the broad group term. On this basis, given that Tourist and Visitor Accommodation is permissible within the RU1 zone, it is considered that tourist cabin accommodation is permissible within the RU1 zone.”*

The characterization was accepted and consent was provided for the DA. This means the Lot is now eligible for a sub-division.

**Impacts of the Loopholes in the SILEP**

The Rockfield Park and Mount Hay development applications generated considerable levels of community action and hundreds of objections. Both were refused by Council (Mt Hay twice), but the decisions were overturned on appeal at the LEC. These applications were the source of great angst for many members of the community and a drain on council staff and finances. The Rockfield Park process took 3 years and Mt Hay almost 2 years.

The Nerringillah Rd, Bendalong application for an eco-tourist facility also generated many objections and much community opposition. It was controversially approved by Council, but was withdrawn by the applicant after residents mounted a robust appeal at the LEC.

**Recommendation**

1. Council to comply with the DoP Practice Note on ‘Providing for Tourism’, by removing the group term ‘tourist and visitor accommodation’ from the list of SLEP Permissible Uses for RU1/RU2/E3 zones, and replacing it with ‘Farm Stay’ and ‘Bed & Breakfast’ accommodation. This would bring SCC into line with other NSW coastal councils.
2. Insert a local clause into SLEP Part 7: ‘Development of tourist cabin accommodation’ –

* Consistent with Clause 5.4 controls, the accommodation that is provided to guests must consist of no more than 7 bedrooms and the gross floor area of each cabin/unit must not exceed 80 square metres.
* Consistent with Clause 5.13 (3g), the development will be located to avoid visibility above ridgelines and against escarpments.

1. Insert a local clause into SLEP Part 7: ‘Development of eco-tourist facilities’ -

* Consistent with Clause 5.4 controls, the accommodation that is provided to guests must consist of no more than 10 bedrooms. The first 2 bedrooms will require a minimum Lot area of 10 hectares, and each additional bedroom will require an area of 5 hectares. The gross floor area of any cabin/unit must not exceed 60 square metres.

1. Remove SLEP Clause 4.2A ‘Subdivision of land in zones RU1, RU2 and E3’

NB. The first three recommendations are interdependent ie. If only the loopholes covered by recommendations (1), or (1) & (2) are removed, then all activity will move to loophole (3)

**Next Steps**

The Strategic Planning Works Program identifies the review of tourist accommodation provisions in SLEP rural and environmental zones as a ‘priority project’. The recommendations proposed in this paper would address the issues raised in both the tourist accommodation project and the Scenic Preservation Overlay for the Cambewarra Escarpment, discussed at the November Development Committee meeting.

Over the last two years, SILEP tourist accommodation planning loopholes in rural and environmental protection zones have been the subject of several discussions between the Berry Forum, Gareth Ward, DoP Executive Directors and two Planning Ministers. Following a meeting of the parties on 17 October, the Minister asked the DoP to proceed with preparatory work to amend the SILEP group term ‘Tourist & Visitor Accommodation’

Prior to commencing the work, the DoP is seeking feedback from councils via a survey to help inform whether the issues are state-wide, regionally focused or isolated to particular LGAs. Given the uncertainty over changes to the SILEP and over what timeframe, it is considered prudent to proceed with the necessary changes to the Shoalhaven LEP on a timely basis.