October 2021

Outdoor Dining and Fun Experiences

Explanation of Intended Effect

This document answers frequently asked questions about the proposed amendments to State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP) to support outdoor dining, small live music and arts venues, artisan food and drink premises, temporary events and filming.

The Outdoor Dining and Fun Experiences Explanation of Intended Effect (proposed changes) bring together changes to planning rules to support hospitality, events and arts industries to recover and emerge from lockdown.

The proposed changes will help to deliver a 24-hour economy that is vibrant, diverse, inclusive and safe. They will help the hospitality and arts industries to recover from the pandemic by providing flexibility and a simpler, faster planning process. It will make it easier to hold outdoor events, film, set up artisan food and drink premises or convert shops to arts or live music venues.

NSW outdoor dining

What are the outdoor dining trials?

The trials allowed small bars and pubs to quickly provide safe outdoor dining spaces when their internal capacity was reduced due to COVID-19 restrictions. We temporarily lifted the Codes SEPP's restriction from pubs and small bars providing outdoor dining on the footpath or public open space as exempt development. Without this, venues would need to lodge a development application for the outdoor dining area.

At the same time, councils were able to accept outdoor dining applications online and send their approvals to Liquor and Gaming NSW who would approve the new liquor licence boundary.

The trials ran in:

- The Rocks from 16 October 2020
- City of Sydney (except for The Rocks) from 30 October 2020
- State-wide from 1 December 2020

The trial measures lapse on 31 October 2021.

Why are the provisions for outdoor dining being made permanent?

The trials successfully reduced approvals from a couple of months to a couple of weeks. They reduced costs for business owners and saved assessment time for councils. No compliance issues were reported during the trial and councils can manage impacts under other legislation.

The trial provisions lapse on 31 October 2021. A permanent change will allow pubs and small bars to continue to access the exempt provisions.

Outdoor Dining and Fun Experiences Explanation of Intended Effect

Frequently asked questions

What venues are eligible for these changes?

All lawful pubs and small bars can use the outdoor dining measures.

The provisions apply state-wide, on Crown land, and areas managed by Place Management NSW such as The Rocks and Darling Harbour.

How will outdoor dining for pubs and small bars be approved?

Pubs and small bars will now follow the same approval process as other food and drink premises, such as restaurants or cafes.

The changes do not automatically mean that venues can trade outside or on the footpath. Venues must obtain council's approval in line with the council's outdoor dining policies and guidelines. Approval to use the space is issued under the *Roads Act 1993* and the *Local Government Act 1993*. Venues must operate consistently with approvals granted.

Please contact your local council for details on their outdoor dining requirements and how to apply.

How long does approval for the liquor licence boundary change take?

Once a council approves the outdoor dining application, Liquor & Gaming NSW can approve the liquor licence boundary change (if applicable) issued under the *Liquor Act 2007* in three days. More information on liquor licences can be accessed here.

How will the changes be implemented?

The clause in the Codes SEPP that restricts bars and pubs from using exempt development for outdoor dining will be removed (Part 2, Subdivision 20A cl2. 40B (1) aa). The change will apply state-wide and separate measures for The Rocks and the City of Sydney will no longer be required.

What happens to outdoor dining on Crown land?

Outdoor dining on Crown land must comply with the arrangements of the land's Plan of Management, whether managed by a council, or under a lease or licence issued under the *Crown Land Management Act 2016*.

What is Place Management NSW?

Place Management NSW is a government agency that owns and manages the states most significant assets including heritage and cultural precincts such as The Rocks and Darling Harbour. Place Management NSW issue outdoor dining approvals for venues in these areas, rather than the council.

What support is there for councils?

The Office of Local Government has published guidance and information to support councils to make the outdoor dining approval process simple and easy for business owners.

The Small Business Commissioner's Outdoor Dining Policy also contains useful information to assist councils with the considerations surrounding outdoor dining.

If your council is interested in joining the online application process, please contact the Office of Local Government.

Small live music and arts venues

Why are the provisions needed for small live music and arts venues?

The arts sector has raised the lack of affordable and suitable small to medium-sized performance spaces as a critical issue.

Arts and performance venues are classed in the Building Code of Australia (BCA) as 'public assembly buildings', such as a night club or sporting facility. These have higher fire and building standards than shops to assist public safety.

As a result, the cost and time to gain approval and upgrade a small venue to the higher building class standards means converting retail premises is often not financially viable for the arts sector.

We are proposing to make changes so that shops can be converted through a complying development pathway without triggering the change of building class and associated upgrades.

What will this change mean?

We are proposing to make changes so that small live music and arts venues These venues are treated as a Class 6 building such as a shop, cafe or restaurant instead of a Class 9b public assembly building.

Pubs, restaurants and shops commonly hold performances, exhibitions and events as part of their regular business without needing to upgrade their premises. The building standards applied to shops and food and drink premises are suitable for the ongoing use for small scale arts use without requiring building upgrades. These venues will also need to meet criteria such as not using pyrotechnics or theatrical smoke (smoke machines, hazers or the like).

How are the changes going to be implemented?

Under the current legislation, business owners who wish to change their premises to a small, live music and arts venue must submit a development application. We are proposing to establish a complying development approval pathway. This will require:

- a state variation to the NSW BCA implemented through the *Environmental Planning and Assessment Regulation 2000,* and
- a change of use provision and development standards through the Codes SEPP.

The complying development pathway for small live music and arts venues will include building, fire safety and amenity development standards.

The changes have been developed with accredited fire and building certifiers and the Department of Customer Services' Building Policy Unit. South Australia and Victoria have already made equivalent changes to the Building Code of Australia for their states.

How do the changes occur through the BCA?

The BCA provides the minimum requirements for safety, fire safety, health, amenity and sustainability for the design and construction of buildings. All buildings are required to comply with the BCA.

We will amend the BCA to clarify that in NSW a Class 6 building, being 'a shop or other building for the sale of goods by retail or the supply of services direct to the public' includes a small live music and arts venue. To be defined as one of these venues, the premises must meet the following criteria:

- have a maximum floor area of 300m²
- not be located above the second storey of a building
- not occupy more than two storeys in a building including the ground floor
- provide cultural activities to the public such as live music, visual arts displays, dancing, poetry and spoken word performances
- not use pyrotechnics or theatrical smoke (smoke machines, hazers or the like)
- have a maximum occupancy limit of 300 people (including staff and performers) or 50 people if food and drink are provided
- provide sanitary facilities based on employee and patron numbers as per the BCA
- may operate from 7.00 am to 10.00 pm Monday to Saturday and 7.00 am to 8.00 pm on a Sunday or a public holiday.

These measures aim to reduce the risk of fire and limit a venue's capacity to be consistent with the Class 6 category and standards. The NSW definition of Class 6 buildings will allow multiple small live music and arts venues in one building.

Artisan Food and Drink Industry

Why are we proposing these changes?

The land use term 'artisan food and drink industry' was introduced in July 2018, following feedback from local councils and industry that the previous industrial land use definitions did not adequately categorise the growing artisan manufacturing industry.

Since this was introduced, we have heard that some producers would like to convert their light industry development consents to artisan food and drink without needing to submit a new development application to assess the ongoing operations. We have also heard that the restriction on industrial retail outlets that only allow for the sale of products made on site is impractical and overly restrictive.

What is an artisan food and drink industry?

An artisan food and drink industry is a place where the main purpose of the business is to manufacture boutique, artisan or craft food and/or drink items. These businesses would also include a retail space, or a café or an area to host tastings, workshops or tours. Examples include a cheese factory, a coffee roaster or a brewery.

Will an artisan food and drink industry be permitted under the complying development pathway?

There is currently no exempt or complying development pathway for a change of use to an artisan food and drink premises in the Codes SEPP.

We are proposing to create a new complying development pathway for a change of use of premises from an existing light industry or industrial retail outlet to an artisan food and drink industry.

The department has also been working on other reforms which we propose to extend to artisan food and drink premises. These development standards include:

- a maximum retail floor area 30% of gross floor area, or 500m2, or any limit in council's Local Environmental Plan, whichever is lesser
- maximum of 100 patrons at any restaurant or café

- trading hours for food and drink premises and retail sales from 6 am to 10 pm while allowing 24-hour operations (for baking, brewing, fermenting and so on). This does not over-ride other laws, for example, liquor licence conditions
- premises must comply with Australian Standard 4674-2004 Design, construction and fit-out of food premises and the requirements contained in the Noise Policy for Industry 2017.

Will the change of use of premises to an artisan food and drink industry be restricted to certain areas only?

'Artisan food and drink industry' is a subset of the 'light industry' land use term and is permissible whenever 'light industry' is permissible in local environmental plans (LEPs) and certain other environmental planning instruments. The change of use of premises to an artisan food and drink industry will only be allowed where a council already permits this type of use.

These uses are permissible with consent in the Enterprise Corridor (B6) and Business Park (B7), General Industrial (IN1), Light Industrial (IN2) and Working Waterfront (IN4) zones and artisan food and drink is consistent with their objectives. We would also like to include the Business Development (B5) zone, which the Department's Employment Zone Reform propose to incorporate into a new E3 Productivity Support zone with B6 and 7.

Making some temporary COVID-19 measures permanent

Why were these temporary measures implemented?

In response to the COVID-19 pandemic, the NSW planning system has been used to keep the community safe, support community wellbeing, keep the economy moving and respond to challenges which have arisen because of the pandemic.

How were these temporary measures implemented?

On 25 March 2020, the NSW Government introduced the *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020* which made changes to the *Environmental Planning and Assessment Act 1979*.

The changes allow the Minister for Planning and Public Spaces to make an order for development to be carried out without the normal planning approval to protect the health, safety and welfare of the public during the COVID-19 pandemic.

On 2 April 2020, the Environmental Planning and Assessment (COVID-19 Development – Takeaway Food and Beverages) Order 2020 (the order) was gazetted.

Why are these measures proposed to be continued?

As NSW moves towards a COVID normal environment, it is proposed to maintain these measures to support the State's economic recovery, protect the health and safety of the community and ensure businesses can adapt and respond to changing needs.

Is it possible that these temporary measures may not become permanent?

If these temporary COVID-19 measures are not made permanent, the measures will come to an end on the 31 April 2022 as originally planned.

Food Trucks

Were food trucks allowed before the implementation of the temporary measure?

In 2013, Codes SEPP was amended to enable mobile food and drink outlets (food trucks) to operate as exempt development, if the proposal met the specified standards.

What does the temporary measure currently allow?

The order allows mobile food and drink outlets (food trucks) to operate on any land at any time if certain requirements are met.

These include:

- Food trucks must have the consent of the owner of the land on which they are located. If a council or other public authority has control and management of the land, such as a public road, public reserve or other public place, consent in writing from the council or relevant public authority must be obtained
- If the food truck is located on private land
    - It is limited to one food truck per lot
    - It must not contravene any conditions of development consent for any other use of the land.
- There must be enough space to allow customers to stand at least 1.5 metres from each other, and seating for customers cannot be provided.
- Other requirements from the Codes SEPP also applied, including not obstructing vehicle or pedestrian access.

What is proposed to be continued?

We propose to maintain the existing measure and provide some additional flexibility on land adjoining a residential zone, by increasing the hours a food truck can operate there.

Dark Kitchens

What is a ‘dark kitchen’?

A dark kitchen is using commercial kitchen facilities within an existing premise to prepare, sell and deliver takeaway food and beverages to be consumed off the premises.

What does the temporary measure allow?

The order allows ‘dark kitchens’ to be established in an existing commercial kitchen, in a:

- community facility
- educational establishment, business premise or office premise which operated as a cooking school before April 2020
- food and drink premise
- function centres.

The ‘dark kitchens’ could be used at any time to prepare, sell and deliver food and beverages to be consumed off the premises.

The orders require that the existing premises must have development approval for one of the land uses and will need to comply with existing conditions, other than those relating to:

- operating hours
- the use of the premises for food or beverage preparation or delivery purposes'
- the use of premises for the sale of prepared or packaged food or beverages for consumption off the premises
- location of retail sales and food preparation within the premises.

What is proposed to be continued?

It is proposed to continue to allow dark kitchens' to be established in an existing commercial kitchen, as exempt development.

The existing commercial kitchen must be located in a:

- community facility
- educational establishment, business premise or office premise which operated as a cooking school before April 2020
- food and drink premise
- function centre

It is proposed that the existing premises must have development approval for the use and will need to comply with existing conditions, other than those relating to:

- the use of the premises for food or beverage preparation or delivery purposes.
- the use of premises for the sale of prepared or packaged food or beverages for consumption off the premises.
- location of retail sales and food preparation within the premises.

The hours of operation for a 'dark kitchen' will need to comply with any condition of consent that restricts or specifies the hours of trading or operation.

The 'dark kitchen' will need to comply with other legislation and requirements, including for the sale of liquor and any requirements under the *Food Act 2003.*

Temporary events

Why are the provisions for community events and private functions changing?

Currently, the Codes SEPP describes events as either a community event or a private function. We know that both community events and private functions can happen on both council land and private land.

We want to make it easier to hold a temporary event on council owned and managed land by removing any approval duplications. This means that a temporary event, whether a community event or a private function, can be held on council owned and managed land without the need for a separate planning approval.

How will temporary events on council owned and managed land be assessed?

To hold an event on council owned and managed land a council must assess the impacts and give an approval under section 68 of the *Local Government Act 1993*. An event must also be consistent with a plan of management for the land. This means that a separate planning approval for the use of the land is not required.

From 21 December 2020 to 18 April 2021 the Codes SEPP provided an exempt development clause for council events on council land. The changes proposed will reinforce events on council owned land is exempt development.

What if I want to hold a temporary event on private land?

A temporary event on private land may not need a separate planning approval. It will depend on the size of the event, the number of days it is to be held and the start and finish times.

There will be provisions for small and low impact temporary events on private land, such as limiting the number of people attending the event, limiting the number of days in a year that the event can be held and limiting the zones in which it can occur. We are seeking feedback from stakeholders about the appropriate limits that denote a small temporary event.

This doesn't mean that we're controlling family gatherings, picnics and birthday parties. It means that large events or events with a commercial element need to have an approval pathway that is commensurate with the impacts of the event. This means that a merit assessment by a council is necessary.

How are the changes going to be implemented?

Codes SEPP clauses under Part 2 Division 3 Temporary Uses and Structures Exempt Development Code currently separate community events and private functions controls.

A new definition for Temporary Event will be added to the Codes SEPP. This will provide a way for temporary events on council owned and managed land and temporary events on private land.

The three current clauses for filming will be combined into a single clause for use and associated structures for clarity. We are seeking feedback from councils, industry and the community on whether the number of days should be unlimited and if any of the current controls need updating to meet changes in technology and practices.

Combining the use and the structures associated with temporary events on council owned and managed land under a single clause.

Adding a clause to combine existing clause for tents, marquees with existing clause for stages and platforms for private events.

Our council LEP already contains exempt development standards for temporary events. How will these controls be affected by the changes?

Some councils already have bespoke controls for temporary events in Schedule 2 of their Local Environmental Plans (LEPs). Where there is an inconsistency between the Codes SEPP and the LEP, the Codes SEPP will prevail.

If I intend to have a party on my private property, will I need to lodge a development application with council?

Private parties may be held without obtaining approval from council if all the private function controls are met. The changes will make it clear where the Codes SEPP applies and where a development application is required. We want to make sure that there are no unnecessary barriers for holding temporary events, particularly when the impacts are minor.

Will the proposed changes for temporary events impact the planning amendments for 'farm events'?

No. It is proposed to introduce 'farm events' as a form of agritourism under a separate division within the Codes SEPP. More information on 'farm events' can be found here.

Why are there separate changes for major event sites?

Increasing the number of consequential days that a temporary event can be held on at The Rocks, Darling Harbour, Barangaroo and Sydney Olympic Park allows longer events to be held such as plays and festivals.

Filming

Why are the provisions for filming changing?

The government wants NSW to be the most attractive destination in Australia for screen productions and works proactively with filmmakers, agencies and councils to be film-friendly and help the industry grow.

Currently, the Codes SEPP includes exempt measures that support filming, temporary structures and building alterations, and tents and marquees for up to 30 days a year on private property.

The department and councils are frequently approached to enable longer filming. For example, a TV mini-series or reality show which films for longer in a fixed location. Some councils have changed their LEPs to allow for longer filming, but this requires a planning proposal. We would like to hear if an unlimited period is appropriate or not.

We also propose to make the Code SEPP's existing measures for filming clearer by consolidating the three current clauses into a single clause for filming use and associated structures.

When is a film management plan required?

A development application is not required for filming, but other approvals may be needed depending on the location used or length of filming. If filming is to be carried out for more than 2 consecutive days—a film management plan must be prepared and lodged with the consent authority (typically the council) at least five days before filming starts.

Councils will review the film management plan to determine if public safety, environmental protection and matters such as traffic management and hours of operation are properly managed.

What matters are required in a film management plan?

For details of what is required in a film management plan please refer to the Code SEPP.

What can prevent filming as exempt development?

Filming may occur, unless there are exceptional circumstances or reasons which prevents this, such as the presence of an item of Aboriginal significance or the presence of threatened species. Specific development standards that relate to environmentally and heritage significant land are identified in the Codes SEPP.