

Submissions summary for outdoor dining and live music venue incentives

Background

The NSW Government made election commitments to:

- permanently relax the rules for outdoor dining to allow food and drink premises to take advantage of private space outside their venues
- encourage new live music venues by offering floor space and density bonuses for new developments that include music venues.

This report summarises feedback on proposed changes to deliver these commitments.

Exhibition of the explanation of intended effect (EIE)

The NSW Department of Planning, Housing and Infrastructure developed an explanation of intended effect (EIE) which was exhibited from 19 October to 16 November 2023. The EIE set out proposed changes to deliver the two commitments by:

- establishing a complying development pathway for outdoor dining on private land and registered clubs in the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (Codes SEPP)
- inserting a new optional clause into the Standard Instrument Principal Local Environmental Plan (2006) (Standard Instrument) to allow councils to set a floor space and/or height bonus that can be used in developments that contain music venues.

The exhibition was publicised using various channels including the department's website, council forums, emails to stakeholders from the department and the Office of the 24-Hour Commissioner. On 9 November 2023, an additional follow-up email was sent from the department to stakeholders seeking feedback. The department and the Government also used social media including Facebook, Instagram and LinkedIn posts.

The department received 54 submissions. Industry stakeholders included hospitality, property and professional organisations. Submissions were generally supportive of outdoor dining and live music venues but raised questions about the details of the proposals.

Stakeholder group	Number of submissions
Council / Local Government NSW	23
Individual / community group	24
Industry	7
Total	54

Outdoor dining

During the COVID-19 pandemic, the Codes SEPP was amended to temporarily allow outdoor dining on private land and at registered clubs as exempt development. These exemptions were due to end on 31 December 2023.

The exemptions allowed businesses to swiftly set up outdoor dining areas and keep trading when COVID-19 safety measures limited patron numbers permitted inside venues.

In preparation of exemptions expiring, the Minister for Planning and Public Spaces proposed to establish a permanent complying development approval pathway for outdoor dining on private land and at registered clubs.

The EIE sought feedback on the proposal to amend the Codes SEPP to establish a new complying development pathway for outdoor dining:

- on private land, where it is associated with food and drink premises or artisan food and drink industries, or at registered clubs which contain an existing food and drink premises
- with outdoor areas available calculated as a percentage of the venue's internal gross floor area and the land use zone it is located in
- which allows for an increase in the number of patrons as well as the additional space if the venue is compliant with the Building Code of Australia's requirements for sanitary facilities
- would no longer operate on car parks or be permitted in the E5 Heavy Industrial Zone
- could operate according to the venue's hours of operation.

Instead of a full development application (DA) or modification to their current approval, businesses would submit a simpler application to their local council or a private certifier for outdoor dining.

Overview of outdoor dining submissions

What we heard from individuals and community groups

The department heard that there was general support for measures to encourage outdoor dining which would support local vibrancy. It was thought the proposal would make it easier for businesses to use outdoor spaces.

Some individuals raised concerns that the proposal may impact local amenity by increasing noise and anti-social behaviour. One submission suggested that the proposal should only allow outdoor dining in non-residential areas.

What we heard from councils

Three submissions supported the proposal, with one noting that it would support businesses and enhance local vibrancy. Another submission noted that the proposal was supported if amenity could be protected. It was suggested that the proposal should be expanded to apply to rural zones.

Most councils which commented were also concerned that the proposal may result in adverse amenity impacts for surrounding residents. Several submissions noted that the proposed development standards did not provide adequate controls to manage amenity impacts with standards only relating to vehicular and pedestrian access.

Several submissions raised concerns that outdoor dining would result in increased noise. It was suggested that the proposal should include additional provisions to ensure that noise impacts are minimised. Several submissions also noted that an acoustic assessment prepared by a qualified acoustic consultant should be a requirement of the pathway.

It was also noted that the proposal did not have adequate development standards to manage noise impacts. Instead, several councils raised concerns that managing noise through the *Protection of the Environment Operations Act 1997* created a burden on council compliance officers, particularly for regional council areas with fewer resources. There were concerns with certifiers assessing noise impacts.

There were also concerns that increases in patron capacity without corresponding parking requirements would displace parking to surrounding streets. This would create additional pressures on pre-existing parking issues and create traffic issues. It was suggested that additional parking provisions should be introduced to reduce pressure and maintain amenity.

Councils also noted that:

- the Building Code of Australia is only applicable to new building works
- further controls are required as some DAs do not specify hours of operation
- outdoor dining hours of operation should not be based on the venue's internal hours of operation

- the zone-based gross floor area calculations are too generous and would generate significant parking demand which may not be able to be accommodated on site
- restrictions should be placed in the outdoor dining area on permanent structures, lighting, music, easements and service utilities, trading hours and food handling, and that the proposal should not be applicable in Heritage Conservation Areas
- there should be no reduction of approved loading/services areas
- they will be responsible for managing complaints, even though in most instances private certifiers will be authorising the use through the issue of a complying development certificate.

Concerns about hours of operation being too generous for a venue's normal trading hours have been addressed. Outdoor areas using the exempt pathway will be required to be consistent with the development consent and, where relevant, the conditions in their liquor licence.

What we heard from industry

We heard from peak bodies representing hospitality, development and acoustic industries. There was general support for streamlining planning approvals and removing 'red tape' for businesses to support outdoor dining. It was also thought that the proposal would encourage local vibrancy.

The management of noise was again raised with comments including that:

- the proposed management of noise emissions is out of practice with industry standards
- some certifiers may not have experience in acoustic assessment to adequately assess acoustic reports and requirements.

New permanent exempt pathway

Following the exhibition, the Minister asked the department to make the temporary exempt provisions for outdoor dining permanent. This was to ensure minimal disruption to venues over the busy summer holiday period and included some modifications to allow outdoor dining:

- at *artisan food and drink industries* (eg. craft brewery)
- on areas used for car parking, other than disabled parking spaces, subject to pedestrian and public safety.

To address safety and amenity concerns, new standards were introduced. The standards provide that the outdoor dining area must:

- if located at ground level - have a direct exit to open space or a road in case of a fire (to address concerns in enclosed rear courtyards),
- not reduce the existing access to the premises for people with a disability, and
- not be located on rooftops. Rooftop dining must continue to be assessed by councils for safety, structural matters and neighbour amenity (such as noise and privacy).

Outdoor dining venues must continue to meet the existing exempt development standards set out in the Codes SEPP. These manage environmental impacts such as hours of operation, patron capacity, waste management, food safety and pollution control.

There will be no increase in patron capacity of premises allowed under the exempt provisions. The exempt changes commenced on 1 January 2024.

What we're still working on

Some venues may be operating with consent conditions that limit the number of patrons allowed in the venue. An expansion of outdoor dining may allow a venue to expand its patronage if this is done safely and with health and amenity in mind. The department will use the feedback it has received and undertake further investigation to see if a complying development pathway might be used to expand patron capacities.

Live music venues

The NSW Government made a range of election commitments to support live music. These, together with other commitments delivered via the Vibrancy Reforms, aim to provide communities and creatives across the state with more vibrant dining, performance and leisure destinations and experiences.

As a result of several factors, including the former lockout laws in the Sydney CBD and the COVID-19 pandemic, many music venues in NSW have closed or experienced significant economic losses. To assist in reinvigorating the night-time economy, the government made an election commitment to encourage new music venues by offering floor space and density bonuses for new developments that include music venues.

The department proposed an optional model clause to be included in the Standard Instrument LEP that councils could use to implement the floor space and density bonus initiative. If councils adopt the model clause in their LEP, it gives them a mechanism to encourage venues and implement their strategic planning in suitable locations, land uses, by establishing a floor space and/or height bonuses.

Floor space and density bonuses are a feature of the NSW planning system and are already used by some councils to incentivise particular planning outcomes. For example, they can be used to deliver design excellence, social housing, heritage conservation, community facilities and other public benefits connected to a private development.

Councils would develop and set the specific numerical standards suitable to their own local circumstances and demand, rather than a blanket state-wide number.

The EIE sought feedback on the proposed Standard Instrument clause that:

- A building may exceed the maximum permissible floor space ratio and/or height [*standards to be developed by councils*] that is otherwise allowed under the provisions of this LEP if the development includes any of the following land uses:
 - i. creative industry

- ii. entertainment facility
- iii. information and education facility
- The consent authority must be satisfied that the part of the building that is used for one of the purposes above for a minimum period of – [*council to insert specific provisions*].

Overview of submissions

Fewer submissions commented on the live music proposals as the measures are more targeted to councils and industry. The issues raised were similar across stakeholder groups and so are presented together.

What we heard from stakeholders

There was general in-principle support for measures to encourage and support live music venues. However, there were several concerns about the proposed incentives and a consensus that more detail and guidance is required for councils to effectively determine an appropriate bonus and implement this policy. We heard that:

- councils need additional guidance and a methodology to determine and apply a bonus
- there is no mechanism to guarantee that new floor space would be used as a venue, for a specific length of time, or in a suitable development type or location, with concern this may result in vacant spaces if tenants cannot be found
- the relationship with / cumulative impact of existing bonuses eg affordable housing and building controls and impact on established planning controls (eg building height (incl aerospace operations and solar access) and contributions levy)
- long lead times for strategic planning of suitable locations and for industry to deliver new developments, which may not match current venue demand or location preferences
- the optional clause may have limited council take-up and other mechanisms were suggested eg site-specific planning agreements or fee waivers offer a more nuanced approach for both councils and developers
- the proposal is likely to be more relevant to metropolitan areas rather than regional areas where development is of a lower density
- complex acoustic issues (sound transmission through walls) of locating a live music venue with adjacent residential/commercial uses
- major impediment to successful live music venues is land use conflict and risk of complaints from residents in close proximity to venues
- the definitions do not reflect that much live music occurs in pubs, function centres and events, and the proposed uses do not always include live music eg information and education facilities
- amenity impacts for surrounding residents, compliance issues for councils and sound mitigation costs for developers

- bonus may impact land value and feasibility, and increase construction costs to mitigate against noise and vibration, which may disincentivise development.

What we're still working on

The department will use the feedback to investigate options to improve the proposals, for example how to ensure that the additional floorspace is used as venues.