

# LOW RISK ARTS AND CULTURAL VENUES

A NSW Case Study of Exempt and Complying Development for Live Performance for National Application.



Prepared by:



**DESIGN COLLABORATIVE**

Pty Limited

ABN 36 002 126 954

ACN 002 126 954

Planning and Development Consultants

[www.designcollaborative.com.au](http://www.designcollaborative.com.au)

**Director**

J Lidis

BTP (UNSW) MPIA CPP

**Consultants**

G W Smith

BSurv(QLD) MCP(MIT) MIS FPIA

MRTPI FAPI

H M Sanders

MPhil(Lon) MSc(Rdg) FPIA MRTPI



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This report was commissioned by the Live Music Office and City of Sydney. It is not an official position of the City of Sydney and is not endorsed by the City of Sydney Council.

September 2015

## 1.0 EXECUTIVE SUMMARY

The purpose of this Paper is to respond to a Brief issued by the Live Music Office and The City of Sydney Council seeking a review of town planning controls surrounding the provision of live entertainment. Arising from that review, and through the benefit of two (2) case studies of live performance venues, the Paper makes recommendations that seek to simplify the process of obtaining planning and construction approval for the carrying out of entertainment in small low risk premises as a building block for the industry.

The key finding arising from the research is that the barriers to obtaining approval to provide entertainment are too high in order to encourage low key, live performances at the community and grass roots level. Presently, all purpose built entertainment premises and other commercial premises that provide entertainment require approval as an “entertainment facility” and to be built to the highest building standards under the Building Code of Australia in New South Wales.

The recommendations arising from this Paper advocate for changes to local Environmental Planning Instruments or *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* and the creation of a new definition for premises where the provision of entertainment could be considered low risk with respect to the potential for adverse noise or social impact and fire safety. These changes will provide clear pathways for development approval for low risk entertainment premises.

If the recommendations were adopted it is anticipated it would result in reduced timeframes for approval to provide entertainment, reduce costs, increase transparency and understanding of important town planning requirements and consequently increase the level of compliance in premises that provide entertainment and thereby encourage the provision of entertainment in a safe and cohesive manner.

## 2.0 INTRODUCTION

This Paper responds to a brief issued by the Live Music Office and The City of Sydney seeking a review of town planning controls surrounding the provision of entertainment in venues where entertainment is not ordinarily provided such as retail, rehearsal spaces or community facilities (*the Brief*).

This Paper will consider impediments within the planning system that prevent or discourage the provision of entertainment as an “ancillary use” in commercial premises such as retail or business premises and community facilities such as local halls, artist run initiatives and the like.

To assist in exploring these issues, Design Collaborative undertook two (2) case studies of premises that provide entertainment. One of those was a purpose built, entertainment/arts facility owned by the Council and staffed voluntarily by the local community to house arts such as spoken word, bands, theatre and provide art gallery space. The second case study was a mixed-use premises where one purpose was as a business premises providing music and singing tuition with a separate but related purpose as an entertainment space for hire.

Design Collaborative also attended the Creative Spaces and Built Environment Workshop held at the University of Sydney in conjunction with the City of Sydney, the Live Music Office and the University’s Faculty of Architecture, Design and Planning. This symposium provided a forum for discussion between venues that provide entertainment and statutory stakeholders of the building and planning system as one of a broad range of actions from the City of Sydney Live Music and Performance Action Plan endorsed by Council in 2014.

When considering the aim of reducing barriers to the provision of entertainment, it becomes apparent through the review of legislation and case studies that the planning and the building systems are inextricably linked. Applications for premises that provide entertainment or performance or a mix of other uses are often ambiguous or sit between existing available land use definitions. This complicates assessment and can lead to delays, increased costs, and higher costs in building compliance work, much of which may be unnecessary. High costs are a barrier to the provision of entertainment at the grass roots level.

This Paper will address the ways in which entertainment can be encouraged, impacts mitigated and how other building related risks can be mitigated through the planning system.

This Paper concludes with recommendations for change, that if made, will provide additional controls to protect occupants and the community, ensure consistent decision making within consent authorities, and help lower barriers to the provision of entertainment.

## 3.0 NSW TOWN PLANNING LEGISLATION FOR ENTERTAINMENT

The first step in exploring the NSW planning system is to understand the legislation and instruments that underpin it. The following section provides an overview of the relevant provisions of the *Environmental Planning and Assessment Act, 1979 (the EP&A Act)*, *Environmental Planning and Assessment Regulation, 2000 (the EP&A Regulation)* and Environmental Planning Instruments that might apply in the seeking of development consent for entertainment.

### 3.1 ENVIRONMENTAL PLANNING AND ASSESSMENT ACT, 1979

The EP&A Act prohibits development being carried out without consent. Development, relevantly, is defined to include the use of land and so includes the provision of entertainment.

There are three kinds of development consent available:

- (1) Exempt development – development of minimal environmental impact specified within an Environmental Planning Instrument as not requiring development consent;
- (2) Complying development – development that is permissible by addressing predetermined development standards specified within an Environmental Planning Instrument; and
- (3) Development consent – requires a development application and is assessed against all relevant criteria for potential adverse impact on the natural, built and human environment.

Development consent may be refused should it be considered approval would result in unreasonable adverse impacts. There are presently no provisions that permit entertainment on its own as a separate use to be undertaken as either exempt or complying development.

Section 79C 'Evaluation' of the EP&A Act provides the relevant considerations for the assessment of a development application; viz:

- (1) *Matters* *for* *consideration—general*  
*In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:*
  - (a) *the provisions of:*
    - (i) *any environmental planning instrument, and*
    - (ii) *any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and*
    - (iii) *any development control plan, and*
    - (iiia) *any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and*
    - (iv) *the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and*
    - (v) *any coastal zone management plan (within the meaning of the Coastal Protection Act 1979),*

*that apply to the land to which the development application relates,*
  - (b) *the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
  - (c) *the suitability of the site for the development,*
  - (d) *any submissions made in accordance with this Act or the regulations,*
  - (e) *the public interest.*

Section 80A 'Imposition of Conditions' of the EP&A Act permits conditions of consent to be imposed for any matter related to s. 79C(1) and specifically to impose reviewable conditions of consent for extended hours of operation or the number of persons permitted in an entertainment venue, function centre, pub, registered club or restaurant.

## 3.2 ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION, 2000

Section 79C(1)(a)(iv) of the EP&A Act requires consideration of certain provisions of the EP&A Regulation in the assessment of development applications. Those relevant to the assessment of entertainment are detailed below. These provisions provide the statutory link between the planning system and the building system.

Clause 93 'Fire safety and other considerations' of the EP&A Regulation requires the following considerations for applications that seek a change of building use and no building work.

- (1) *This clause applies to a development application for a change of building use for an existing building where the applicant does not seek the rebuilding, alteration, enlargement or extension of a building.*
- (2) *In determining the development application, the consent authority is to take into consideration whether the fire protection and structural capacity of the building will be appropriate to the building's proposed use.*
- (3) *Consent to the change of building use sought by a development application to which this clause applies must not be granted unless the consent authority is satisfied that the building complies (or will, when completed, comply) with such of the Category 1 fire safety provisions as are applicable to the building's proposed use.*

**Fire protection and structural capacity** of a building is defined in the EP&A Regulation to mean:

- (a) *the structural strength and load-bearing capacity of the building, and*
- (b) *the measures to protect persons using the building, and to facilitate their egress from the building, in the event of fire, and*
- (c) *the measures to restrict the spread of fire from the building to other buildings nearby.*

Clause 94 'Consent authority may require buildings to be upgraded' of the EP&A Regulation provides the following considerations when work is proposed.

- (1) *This clause applies to a development application for development involving the rebuilding, alteration, enlargement or extension of an existing building where:*
  - (a) *the proposed building work, together with any other building work completed or authorised within the previous 3 years, represents more than half the total volume of the building, as it was before any such work was commenced, measured over its roof and external walls, or*
  - (b) *the measures contained in the building are inadequate:*
    - (i) *to protect persons using the building, and to facilitate their egress from the building, in the event of fire, or*
    - (ii) *to restrict the spread of fire from the building to other buildings nearby.*
- (2) *In determining a development application to which this clause applies, a consent authority is to take into consideration whether it would be appropriate to require the existing building to be brought into total or partial conformity with the Building Code of Australia.*

Clause 98C 'Conditions relating to entertainment venues' of the EP&A Regulation imposes certain conditions on entertainment venues (through Schedule 3A), as follows.

### **Schedule 3A Entertainment venues**

*(Clause 98C)*

#### **1 Nitrate film**

*An entertainment venue must not screen a nitrate film.*

#### **2 Stage management**

*During a stage performance, there must be at least one suitably trained person in attendance in the stage area at all times for the purpose of operating, whenever necessary, any proscenium safety curtain, drencher system and smoke exhaust system.*

### 3 Proscenium safety curtains

*If a proscenium safety curtain is installed at an entertainment venue:*

- (a) *there must be no obstruction to the opening or closing of the safety curtain, and*
- (b) *the safety curtain must be operable at all times.*

### 4 Projection suites

- (2) *When a film is being screened at an entertainment venue, at least one person trained in the operation of the projectors being used and in the use of the fire fighting equipment provided in the room where the projectors are installed (the projection room) must be in attendance at the entertainment venue.*
- (3) *If the projection room is not fitted with automatic fire suppression equipment and a smoke detection system, in accordance with the Building Code of Australia, the person required by subclause (2) to be in attendance must be in the projection suite in which the projection room is located during the screening of a film.*
- (4) *No member of the public is to be present in the projection suite during the screening of a film.*

### 11 Emergency evacuation plans

- (1) *An **emergency evacuation plan** must be prepared, maintained and implemented for any building (other than a temporary structure) used as an entertainment venue.*
- (2) *An emergency evacuation plan is a plan that specifies the following:*
  - (a) *the location of all exits, and fire protection and safety equipment, for any part of the building used as an entertainment venue,*
  - (b) *the number of any fire safety officers that are to be present during performances,*
  - (c) *how the audience are to be evacuated from the building in the event of a fire or other emergency.*
- (3) *Any fire safety officers appointed to be present during performances must have appropriate training in evacuating persons from the building in the event of a fire or other emergency.*

Clause 98D 'Conditions relating to maximum capacity signage' of the EP&A Regulation requires signage related to the maximum capacity of certain premises to be erected at its entrance; viz:

- (1) *For the purposes of section 80A (11) of the Act, the requirement set out in subclause (2) is prescribed as a condition of development consent (including an existing development consent) for the following uses of a building, if the development consent for the use contains a condition specifying the maximum number of persons permitted in the building:*
  - (a) *entertainment venue,*
  - (b) *function centre,*
  - (c) *pub,*
  - (d) *registered club,*
  - (e) *restaurant.*
- (2) *From 26 January 2010, a sign must be displayed in a prominent position in the building stating the maximum number of persons, as specified in the development consent, that are permitted in the building.*
- (3) *Words and expressions used in this clause have the same meanings as they have in the standard instrument set out in the Standard Instrument (Local Environmental Plans) Order 2006.*

Clause 187 'Modification and Supplementation of Building Code of Australia Standards' of the EP&A Regulation permits variation to BCA compliance requirements in the construction of new work; viz:

- (2) *The applicant in relation to development to which this clause applies may lodge with the consent authority or*

certifying authority an objection:

- (f) *that compliance with any specified provision of the Building Code of Australia (as applied by or under clause 98 or 136A) is unreasonable or unnecessary in the particular circumstances of the case.*

Schedule 1 outlines documentation that is required to be submitted with a development application. Relevantly, subsection (1)(o) requires a statement of the maximum number of persons proposed to occupy the relevant part of the building for entertainment venues, function centres, pubs, registered clubs or restaurants.

### 3.3 THE STANDARD INSTRUMENT

The *Standard Instrument (Local Environmental Plans) Order 2006* prescribes the form and content of principal environmental planning instruments (*the Standard Instrument*). The Standard Instrument contains standard definitions and provisions that (generally) apply throughout NSW.

#### 3.3.1 Definitions

The following section looks to the definitions of premises that specifically permit entertainment, commercial premises which may or may not permit entertainment as part of the definition and for the types of premises to be explored in the Brief.

**Business premises** means a building or place at or on which:

- (a) *an occupation, profession or trade (other than an industry) is carried on for the provision of services directly to members of the public on a regular basis, or*
- (b) *a service is provided directly to members of the public on a regular basis,*

*and includes a funeral home and, without limitation, premises such as banks, post offices, hairdressers, dry cleaners, travel agencies, internet access facilities, betting agencies and the like, but does not include an entertainment facility, home business, home occupation, home occupation (sex services), medical centre, restricted premises, sex services premises or veterinary hospital.*

**Community facility** means a building or place:

- (a) *owned or controlled by a public authority or non-profit community organisation, and*
- (b) *used for the physical, social, cultural or intellectual development or welfare of the community,*

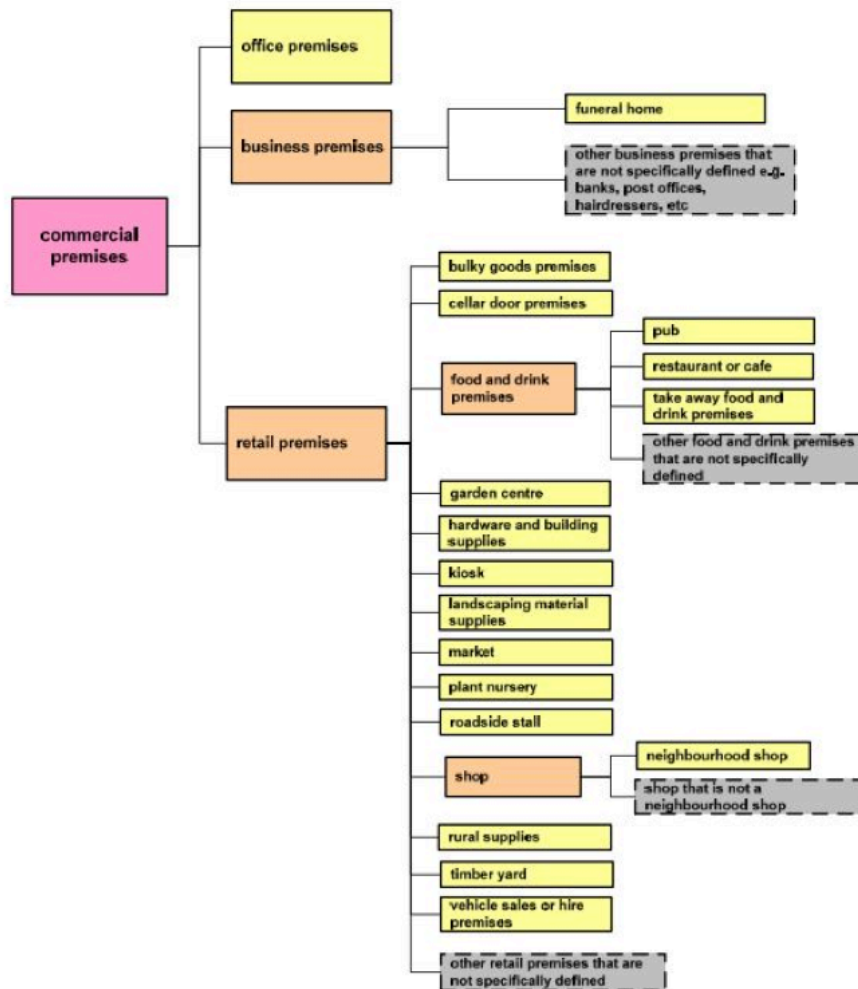
*but does not include an educational establishment, hospital, retail premises, place of public worship or residential accommodation.*

**Commercial premises** include **retail premises**, **business premises** and **office premises**. The defined terms **commercial premises** and **retail premises** are umbrella terms under the Standard Instrument, in that they include under them a range of other land uses. That is shown in the following diagram.



# COMMERCIAL PREMISES – RETAIL

LAND USE terms WITHIN commercial premises group term:



Source: LEP Practice Note PN 11003 dated 10 March 2013 issued by the Department of Planning.

**Entertainment facility** means a theatre, cinema, music hall, concert hall, dance hall and the like, but does not include a pub or registered club.

**Entertainment venue** (which is defined under the EP&A Regulation but not the standard instrument) means a building used as a cinema, theatre or concert hall or an indoor sports stadium.

**Function centre** means a building or place used for the holding of events, functions, conferences and the like, and includes convention centres, exhibition centres and reception centres, but does not include an entertainment facility.

**Office premises** means a building or place used for the purpose of administrative, clerical, technical, professional or similar activities that do not include dealing with members of the public at the building or place on a direct and regular basis, except where such dealing is a minor activity (by appointment) that is ancillary to the main purpose for which the building or place is used.

**Pub** means licensed premises under the Liquor Act 2007 the principal purpose of which is the retail sale of liquor for consumption on the premises, whether or not the premises include hotel or motel accommodation and whether or not food is sold or entertainment is provided on the premises.

**Restaurant or cafe** means a building or place the principal purpose of which is the preparation and serving, on a retail basis, of food and drink to people for consumption on the premises, whether or not liquor, take away meals and drinks or entertainment are also provided.

## 4.0 BRIEF QUESTIONS

The Brief asks five (5) questions that can readily be answered without the need to rely upon the case studies. The questions are based on entertainment being an ancillary land use. As will be shown, there are few impediments to the provision of “ancillary” entertainment. If, however, it is intended to encourage entertainment that is described in the Brief as operating “*separately to the primary use of the building*” that is no longer an ancillary use and the questions must be approached on the basis of entertainment being another, separate land use. This is an important distinction, as will be explained in answering the Brief questions which follow.

### 4.1 ANCILLARY DEVELOPMENT

#### 1. *Identifying the triggers that require an application for change of use;*

As detailed above, the EP&A Act requires development consent for the use of land. Any change of use, or first use of land, therefore requires development consent.

Another way of describing use is purpose. The use of land might be a restaurant, but more distinctly the purpose is the preparation and sale of food and drink for consumption on the premises for profit. When characterising development, and therefore in discerning whether there is a change in purpose of development, the test is a matter of fact and degree.<sup>1</sup> That is to say, all relevant factors need to be considered and the degree (or weight) to which they are relevant.

Using the restaurant example above, if the consumption was predominantly away from the restaurant it would be a takeaway food and drink premises. This is what is meant by fact and degree. The fact is that restaurants and take away food and drink premises both prepare food, but for the latter the degree in which food is consumed away from the premises fundamentally changes the character of the land use.

In addition to the above, there may be more than one purpose<sup>2,3</sup>. This is explored in greater detail below with respect to ancillary development.

#### 2. *The parameters within which a retail, community facility or other venue with non-entertainment development consent may host live performance activities as an ancillary use.*

A distinction needs to be drawn between what is an “*ancillary use*” of land and what is “*another use*” of land.

If there is more than one purpose to the use of the land, it is relevant to consider whether either one is a subordinate use and whether one is the primary land use. A subordinate land use is referred to as an “*ancillary land use.*” The relevant question to ask when determining whether a land use might be ancillary is whether it could operate independently of the other (primary) land use. That is to say, if the ancillary land use could not function without the primary land use it is appropriate to ignore that land use in characterising the purpose of development.<sup>4</sup>

If the land use can be considered to be independent, then it has its own purpose and must be categorised separately.<sup>5</sup> The use of land may have more than one purpose and each will require development consent. Consequently, if the entertainment to be provided is truly ancillary, then development consent would not specifically be required for that land use in addition to any other land use that already applies to the land. Any physical work that might be required to enable the provision of entertainment would of course be a separate matter.

Land and Environment Court (*the Court*) cases are provided below to illustrate the difference between ancillary and independent uses of land.

One of the most oft referred to cases in terms of ancillary development is *Foodbarn Pty Ltd v Solicitor General* (1975) 32 LGERA 157. In that case, a large supermarket sought development consent to provide an adjoining carpark for the benefit of its customers. Carparks were however prohibited in the zone and it was refused development consent. The Court found that the carpark would not operate for the purpose of a carpark per se and instead was a subordinate, ancillary use to the retail supermarket. Its purpose was not to provide a carpark but instead to support the retail land use which itself was permissible. Therefore, the carpark formed part of the permissible retail development.

<sup>1</sup> *Shire of Perth v O'Keefe* (1964) 110 CLR 529

<sup>2</sup> *Royal Agricultural Society of NSW v Sydney City Council* (1987) 61 LGRA 305 at 309-311

<sup>3</sup> *Grace v Thomas Street Café Pty Ltd* [2007] NSWCA 359, (2007) 159 LGERA 57

<sup>4</sup> *Foodbarn Pty Ltd v Solicitor General* (1975) 32 LGERA 157

<sup>5</sup> *Baulkham Hills V O'Donnell* (1990) 69 LGERA 404

In the case of *Baulkham Hills v O'Donnell* (1990) 69 LGERA 404 Meagher JA states that an independent use is not deprived of that quality merely because it is ancillary to, or related to, or interdependent with, another use. His Honour provides an example in *obiter dictum* (that is, discussion of an example not found in the facts of the case and so of lesser precedent value) of a book publisher that opens a sales room at its publishing house to sell books. The selling of books would still be an independent use although it is ancillary to publishing and so would require development consent. In support of the obiter statement he makes reference to *Warringah Council v Caltex Oil* (Australia) (1989) 68 LGRA 206 where it was found in the facts that a service station and convenience store were two *separate uses* (importantly, under the definitions that applied at the time).

As a further example, in the case of *Mollica v Marickville* (1969) 19 LGRA 24 a retail shop that sold liquor wished to import barrels of liquor and bottle them on site for retail sale. The Council refused the application as it considered the bottling to be a type of industry that was prohibited in the relevant zone. The Court disagreed. The bottling of liquor from barrels was a subordinate land use (i.e., not independent) to the retail sale and so did not change the purpose of the primary use or require specific consent for use.

The above cases illustrate how entertainment might be provided if it were to be considered to be ancillary. Any entertainment must not usurp the primary purpose of the land use by taking on the character of an independent land use. The provision of ancillary entertainment therefore, where no work is required, would not require additional development consent. Examples are provided below.

Example One: a retail shop decides to hire a band and a short cat-walk to promote a new line-up of clothing that they will be retailing. The purpose of the land use is still the retail sale of clothing and not any other purpose; the entertainment is subordinate and does not change or add to the retail purpose.

Example Two: An approved warehouse is empty. The land owner is approached by a promotional company that wishes to use it on a once off to hold a "rave party". The purpose of a warehouse for the storage of bulky goods for wholesale or transport is fundamentally different to an entertainment facility where the purpose is to provide a space for people to gather for entertainment. Development consent would be required for the change of use.

## 4.2 OTHER DEVELOPMENT

The following Brief questions ask what the relevant considerations might be for an application that proposes ancillary entertainment and what controls could be amended or interpreted differently to encourage ancillary entertainment.

As discussed above in Section 4.1 of this Paper, some ancillary uses will not require development consent if they are readily undertaken within the context of an existing development consent and where no work is required. That can readily be imagined in the provision of light entertainment where no work is required for a small band in the corner of a restaurant. Others will require development consent, for example, in Foodbarn where development consent was required for the construction of the carpark but not for the retail land use which already existed.

The interpretation of ancillary land use is governed by the common law. No assessment other than that above would assist in characterising a land use as ancillary. As previously discussed, it is a matter of fact and degree having regard to the purpose of the use of land. If an independent use of land were to be incorrectly characterised as ancillary development and consequently that development consent was not required, where it in fact would be required, the land use could not legally be carried out for lack of development consent.

The final three Brief questions are therefore more appropriately answered if it is assumed that the intention was to encourage the independent provision of entertainment where it cannot be characterised as ancillary development.

### 3. ***What are the common environmental land use considerations that would allow for the activity to occur as an ancillary use, i.e., zoning requirements, permitted uses within specified zoning, urban location, traffic volume, proximity to residential uses, noise amenity, etc.***

Under the Standard Instrument, the following zones list ***entertainment facilities*** as being permitted with consent: B2 Local Centre, B3 Commercial Core, B4 Mixed Use and B8 Metropolitan.

Under Sydney LEP 2012, ***entertainment facilities*** are prohibited in the R1 General Residential, R2 Low Density Residential, B1 Neighbourhood Centre, IN1 General Industrial and RE1 Public Recreation Zones. Entertainment facilities are permissible in B2 Local Centre, B3 Commercial Core, B4 Mixed Use, B5 Business Development, B7 Business Park and B8 Metropolitan Zone.

If entertainment is to be provided in any zone as an independent use, it can only be provided where entertainment facilities are permissible. Whether or not the above is acceptable or appropriate is a matter of statutory planning, and outside the scope of this Paper.

Other factors such as location, traffic impacts, noise and social impacts have to be considered separately to permissibility. That is addressed below under Section 5 of this Paper.

In addition to the above, some zones permit innominate land uses<sup>6</sup> and so could permit entertainment otherwise described as an “entertainment facility” for example, simply adding “entertainment” to a proposed land use. Zones that permit innominate land uses are those which specify that development not otherwise prohibited is permitted with consent.

**4. *What controls need to be considered by the consent authority in managing specific ancillary uses or developing interpretive frameworks to support an increase in performance ancillary uses generally.***

The control required correlates directly to the impact and nature of that impact that is sought to be mitigated. With licensed premises, entertainment premises, or any other class of operation, there is no one-size-fits-all solution. One must consider the potential impact, its nature or intensity and propose a reasonable solution. If no reasonable or likely solution can be designed to overcome potential impacts then it may be appropriate to refuse development consent.

What is a reasonable solution will require consideration of the premises and whether it can be reasonably incorporated, the nature of the impact and its context. For example, an appropriate solution for an entertainment venue with live bands might be additional acoustic absorption and a sound lock; an inappropriate solution would be to prohibit percussion instruments such as drums. For a venue that provides entertainment solely through electronic means, an appropriate solution might be to require utilisation of an in-house amplification limiter, rather than to require acoustic absorption and a sound lock. The solutions to similar problems will vary depending on the building, its operation and its context.

Planners must acknowledge they cannot understand all of the facets of all the various venues and their context in the same way as the operator. An appropriate solution for one venue could be prohibitively expensive or onerous for another.

Consultation with operators must be a fundamental part of the process and it is therefore suggested that additional controls or interpretive frameworks would not assist. General guidelines or fact sheets may assist, as has been recommended below under Section 7.2 of this Paper.

A separate section of this Paper has been dedicated to illustrating how the assessment of entertainment might best proceed and gives an overview of typical solutions to common problems.

**5. *How interpretation of planning controls can assist with permitting performance as ancillary use within non-entertainment venues, such as retail or community facilities without planning permission being necessary or with as low a level of intervention as possible with permission.***

It is addressed above that if entertainment is ancillary, no development consent is required in addition to a primary land use. If entertainment is not ancillary, then specific development consent is required.

The only avenue to loosen the requirements around entertainment is to amend the Planning System to include entertainment under certain conditions as either exempt or complying development or as a separately defined use for low impact facilities. This is considered further below in greater detail under Section 7 – ‘Recommendations’ of this Paper.

<sup>6</sup> An innominate land use is one that falls outside of the available definitions found in an Environmental Planning Instrument.

## 5.0 ASSESSING ENTERTAINMENT IMPACTS

This section of the Paper looks to assist in answering, in part, questions 3, 4 and 5 of the Brief in greater detail with respect to planning controls for assessing entertainment related land uses. Those questions are as follows.

*What are the common environmental land use considerations that would allow for the activity to occur as an ancillary use, i.e., zoning requirements, permitted uses within specified zoning, urban location, traffic volume, proximity to residential uses, noise amenity, etc.*

*What controls need to be considered by the consent authority in managing specific ancillary uses or developing interpretive frameworks to support an increase in performance ancillary uses generally.*

*How interpretation of planning controls can assist with permitting performance as ancillary use within non-entertainment venues, such as retail or community facilities without planning permission being necessary or with as low a level of intervention as possible with permission.*

In order to encourage entertainment, it is necessary to understand the premises, its context and likely impacts in order to ascertain those ways in which risk could be mitigated. Those considerations are as follows.

### 5.1 CHARACTERISE PURPOSE OF DEVELOPMENT

Once the provision of entertainment is elevated beyond simply being ancillary it becomes another purpose. The use of land may have more than one purpose and each use of land may require development consent. Once the provision of entertainment becomes a purpose of the use of land, the available definitions are restricted, as noted above, to **entertainment facility**. One could simply insert “entertainment” into the proposed land use or provide a description of the purpose of the use of land as an innominate land use, if innominate land uses are permissible (see page 16).

One reason from a planning perspective why characterisation is important is the significant difference in fire safety requirements between premises which have entertainment as a primary purpose (entertainment facility) and those that do not. An entertainment venue or entertainment facility is required to comply with the most rigid building and fire safety requirements, being Class 9b as they are considered to be a high fire risk.

### 5.2 CHARACTERISE NATURE OF DEVELOPMENT

The purpose and nature of the development are two separate, but related characteristics. Purpose explains the land use itself, nature explains the intensity and character of that use.

The purpose of a development may be entertainment, such as a theatre, but the nature of that purpose can vary significantly. At one end of the spectrum, the largest in the world, the Conference Centre Salt Lake City, Utah USA can hold up to 21,200 people in tiered, fixed seating. Under the BCA, that allows for one person every 425mm.



Conference Centre, Salt Lake City

At the other end, small unique venues such as 107 Projects in Redfern may hold up to 100 patrons who could be sitting on the floor, standing or in non-fixed seating at one person per 1sqm.



**Live Arts / Exhibition Space, 107 Projects**

It is necessary therefore to consider the nature of the proposed use and the inherent risk. Considering the nature of the use will also assist in understanding the risks of the proposed use. Self-evidently less intensive forms of entertainment and land use are associated with lower levels of risk to the surrounding area and occupants. It would be inappropriate to require a premises like 107 Projects to meet the same planning and building system requirements as one such as the Conference Centre Salt Lake City.

### **5.3 CONTEXT AND SETTING**

Surrounding context is relevant because the kinds of impacts associated with entertainment are more acceptable in certain areas. It requires consideration of the surrounding land zoning and predominant land use character. The more residential development and the less commercial development that is permissible in a zone, generally, the more sensitive it is considered.

Business zones such as B8 Metropolitan Zone (only found in Central Business District of the City of Sydney) or IN1 Industrial Zones are the least sensitive type of zone. They typically have less sensitive land uses. Other zones, such as the B4 Mixed Use Zone are more sensitive, but would be considered less sensitive than an R3 Residential or other type of residential zone. Context is important in making an assessment of reasonable impacts.

Whether an impact is reasonable in its context will require detailed assessment of the use. Those considerations for use are provided below.

### **5.4 ENTERTAINMENT RELATED IMPACTS AND CONSIDERATIONS**

The more intensive the nature of entertainment, the higher the potential for impact and that is particularly true for sensitive days and hours. For example, whilst acoustic music or spoken word on a Saturday evening might be acceptable even in the most sensitive contexts, such as a residential zone, that might not be true of a Monday evening. Conversely, a full-band with percussion instruments or DJ with amplified music that reverberates the building might be completely acceptable in the CBD at 3am in the morning where there are no residential land uses in the building or adjoining it.

Generally, longer operating hours are more appropriate for areas which are less sensitive to noise, where there is already a high background noise level or in instances where the potential for adverse impact can readily be managed. Trading hours are appropriately curtailed where unreasonable adverse impacts cannot be adequately managed during sensitive times.

## 5.4.1 Noise Impacts

There are generally three (3) acoustic criteria that are applied to commercial premises in NSW in seeking to control the potential for adverse impact. This can be confusing for applicants and practitioners, because fundamentally, there is no good reason to have different criteria. Noise impacts are noise impacts and their source, one would think, is irrelevant. Notwithstanding, they are as follows.

Noise can be scientifically verified and controlled. Subject to positive assessment, noise impacts emanating from within a premises can generally be mitigated.

- **Liquor Administration Board / Office of Liquor Gaming and Racing / Licensed Premises**

The following criteria was once a standard of the now defunct Liquor Administration Board under the *Liquor Act, 1982*. The acoustic criteria is not a published requirement under the *Liquor Act, 2007* but continues to form a standard condition on any new liquor licence. Because of its ubiquity under the former Liquor Act it has also been adopted as a standard condition of many local consent authorities.

*The LA10 noise level emitted from the Hotel shall not exceed the background noise level in any Octave Band Centre Frequency (31.5Hz - 8kHz inclusive) by more than 5dB between 7:00am and 12.00 midnight at the boundary of any affected residence.*

*The LA10 noise level emitted from the Hotel shall not exceed the background noise level in any Octave Band Centre Frequency (31.5Hz - 8kHz inclusive) between 12.00 midnight and 7:00am at the boundary of any affected residence.*

*Notwithstanding compliance with the above, noise from the Hotel shall not be audible within any habitable room in any residential premises between the hours of 12.00 midnight and 7:00am.*

In plain English, the above criteria requires complete inaudibility in any habitable room of a residential dwelling between midnight and 7am, which are deemed to be the most sensitive hours. Between 7am and midnight, the level of noise permitted within a residential dwelling is 5dB above background noise level. That would make any noise clearly audible, but not offensively so.

- **Protection of the Environment Operations Act, 1997**

A further criterion applies under the *Protection of the Environment Operations Act, 1997* (the PEOO Act). Because it is a statutory requirement it applies to all land uses at all times. It provides a subjective criterion that prohibits any land use from giving rise to “**offensive noise**”, which is defined under the PEOO Act, as follows.

- (a) *that, by reason of its level, nature, character or quality, or the time at which it is made, or any other circumstances:*
  - (i) *is harmful to (or is likely to be harmful to) a person who is outside the premises from which it is emitted, or*
  - (ii) *interferes unreasonably with (or is likely to interfere unreasonably with) the comfort or repose of a person who is outside the premises from which it is emitted, or*
- (b) *that is of a level, nature, character or quality prescribed by the regulations of the Protection of the Environment Operations Act 1997 or that is made at a time, or in other circumstances, prescribed by the regulations under that Act.*

- **Commercial Criteria**

A final criterion is one often applied on impacts to commercial premises or from mechanical ventilation to residential land uses.

- (a) *An LAeq, 15minute noise level emitted from the use must not exceed the LA90, 15minute noise level by more than 3dB in any Octave Band Centre Frequency (31.5 Hz to 8 kHz inclusive) when assessed inside any commercial premises provided that:*
  - (i) *The LAeq, 15minute noise level and the LA90,15minute noise level shall both be measured with all external doors and windows of the commercial premises closed.*

- (ii) *The LA90,15minute noise level shall be measured in the absence of noise emitted from the use but with the ventilation equipment (including air-conditioning equipment) normally servicing the commercial premises operating.*
- (iii) *In this clause, the term “noise level emitted from the use” means the contributing noise level from the use in isolation to any other ambient noise and account must therefore be taken of the LAeq,15minute when the use is not in operation.*
- (iv) *In circumstances where this development application refers to a modification or addition to an existing use, the background noise level referred to in this clause pertains to the LA90, 15minute noise level measured in the absence of all noise from the site.*

The above criteria restricts noise to being no greater than 3dB above background noise levels. Noise 3dB above background noise would be audible above background noise and to the human ear would sound approximately the same level as the background noise.

## 5.4.2 Capacity

Capacity is considered to give an indication of the likely potential for adverse impact. Higher patron capacities contribute to a sense of anonymity which may encourage poor behaviour (depending on the character and social cues within the premises) and, if licensed, for intoxication to go unnoticed, increasing the potential for adverse behaviour in the surrounding area.

Larger capacity venues can be more readily managed where the space is broken down into smaller, more manageable areas which can then be monitored by floor staff. It is more difficult to monitor large numbers of patrons in a single large room than it is to monitor large numbers of patrons across many smaller rooms. Increased security/staff numbers can be used where large numbers or a high density of patrons is proposed.

Overcrowding increases the chance of accidental physical contact as well as increasing temperature and noise levels which may lead to irritation and conflict. Overcrowding may also encourage anti-social behaviour through perceived anonymity and lowered perceptions about being apprehended. The adverse impacts of overcrowding are most evident around facilities such as bars, toilets, dance floors and thoroughfares. Fittings and furniture are appropriately spread so as to have minimal impact on patron movement.

People must also leave a premises. The greater the number of patrons leaving the premises at once, the higher the potential for adverse impact to the surrounding area. Whether those impacts are acceptable will depend on the context in which the premises is located. Staged shutdowns and pre-close procedures can assist to mitigate impact in potentially sensitive locations.

## 5.4.3 Parking and Traffic Generation

Parking requirements and traffic generation can be assessed by calculating the proportion of patrons likely to drive cars or with set rates per square metre of publicly accessible floor space.

The City of Sydney provides maximum car parking rates, rather than a minimum, and so a lack of parking is no impediment to the provision of entertainment.

## 5.4.4 Social Impact

Social impact on a surrounding neighbourhood arising from commercial use is related closely to capacity, management, design and fitout and whether liquor is sold or supplied on the premises.

Generally, the higher the capacity, the later trade is permitted and if alcohol is sold, the potential for impact on the surrounding area will be higher. Whether such impacts are acceptable is an assessment required to have regard to the context of the premises and anticipated level of impact.

The potential for social impact can be mitigated through the use of a robust Plan of Management which provides guidelines for staff in managing patrons and potential impacts and through positive social cues in the premises. Social cues such as a well maintained venue and staff provide non-verbal cues as to behaviour expectation. High amenity premises are generally associated with lower levels of adverse social impact.



## 5.5 FIRE RISK

A consent authority is required to give consideration to fire safety and the BCA under cl. 93 and 94 of the EP&A Regulation. It should be noted however that neither cls. 93 or 94 require compliance with the BCA.

Fire Safety in commercial buildings is related primarily to how the premises intends to function, with what fittings, fixtures, equipment, design and capacity. By requiring specification of lower risk fittings and function of the premises, Town Planning can lower the obvious risk of the use and so give certainty to building certifiers to permit a lower standard of building compliance work appropriate for the anticipated risk of the use.

The lower the risk to human safety and surrounding buildings means fewer active and passive fire safety measures will need to be installed in the building which in turn lowers the cost of development and providing entertainment.

This requires coordination between Planners and Building Officers to review a development application and consider whether any changes could be made to reduce fire risk and so lower the level of intervention required in order to provide entertainment.

Applicants may not be aware of these costs or the ability to mitigate them through operational changes. Applicants should be approached to discuss these issues if they arise.

## 5.6 EQUITABLE ACCESS

The *Disability Discrimination Act, 1992* (Cth) requires all buildings to provide equitable access for persons with a disability. That may include, for example, the provision of ramps, tactile markers, lifts, toilets or railings.

All new building work is required to comply with the BCA, which includes provisions for equitable access. The trigger for upgrading premises to comply with the these provisions varies, but is assessed fundamentally against similar provisions of the BCA which would trigger a requirement for a whole of building upgrade and where such additional work does not result in “undue financial hardship”.

For example, if one was to propose a change of use of a first floor premises and building work comprising \$50,000 it would be inequitable and cause undue financial hardship, to expect the Applicant to spend another \$50,000 to install a lift. That same applicant might however be reasonably required to provide an ambulant toilet or to install tactile indicators around stairs.

## 6.0 CASE STUDIES

The following section gives an overview of the case studies required by the Brief.

### 6.1 107 PROJECTS

#### 6.1.1 The Premises

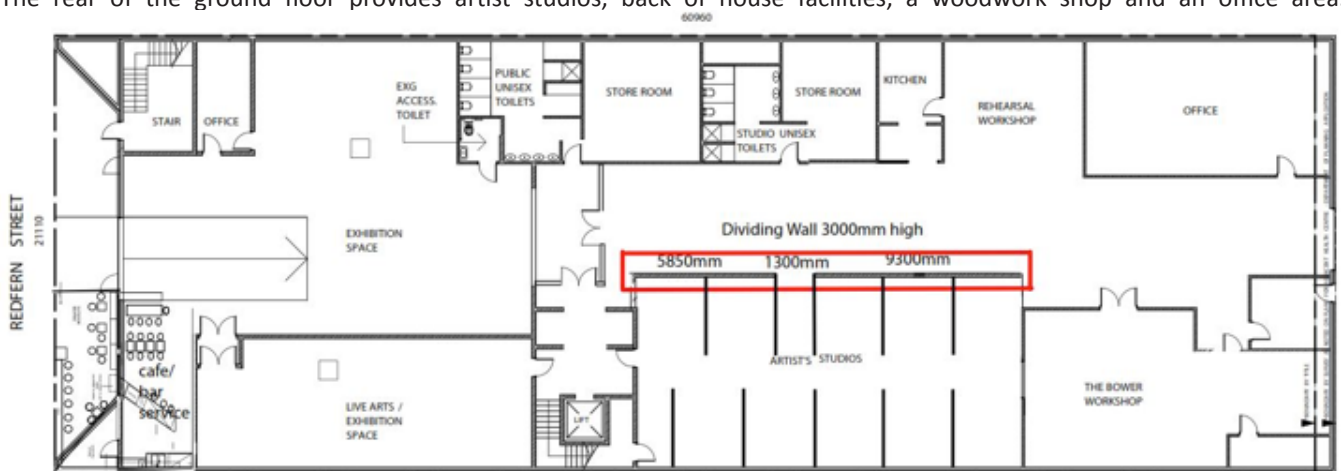
107 Projects is located at 107 Redfern Street, Redfern. It comprises a multi-use community facility. The building in which it is located was originally constructed as a warehouse and factory with approximately 1,700sqm in area. It has a total capacity of 200 persons, but each area of the premises has its own independent capacity restrictions.



Entry to 107 Projects on Redfern Street

The ground floor provides a 31 seat café to Redfern Street, which adjoins an open exhibition space and an adjoining live/arts exhibition area (including sound lock). The capacity of the ground floor is 100 persons for each entertainment space.

The rear of the ground floor provides artist studios, back of house facilities, a woodwork shop and an office area.



The first floor contains open plan offices and a smaller exhibition space which leads to an outdoor garden space. The rooftop garden is also utilised to provide occasional acoustic or spoken word entertainment. The first floor has a maximum capacity of 40 persons, inclusive of a 30 person limit within the garden and of the overall capacity of the premises of 200 persons.



The aim and purpose of 107 Projects, as detailed on their website is as follows:

*107 Projects is a multidisciplinary creative space located in the cultural melting pot of Redfern; cultivated by a team of artists, musicians, poets and passionate creatives to become a vanguard for public engagement and social enrichment through the arts... We believe in everyone's right to creative nourishment.*

*Through a mix of music, visual arts, performance, film and discourse; our year-long creative program aims to inspire, entertain and challenge people from all walks of life, while providing a fertile environment where emerging talent can flourish and more established creatives can fully realise their vision.*

*107 Projects is proud to be a non-profit, predominantly volunteer run organisation.*

### 6.1.2 The Surrounding Area and Zoning

107 Projects is located within a mixed use area that is zoned B2 Local Centre. Within the zone, **community facility, entertainment facility,** and **restaurant or café** are listed as permissible with development consent. The potential range of uses undertaken by 107 Projects is therefore permissible.

The site is located in close proximity to the intersection of Redfern and Pitt Streets. Land uses in the surrounding area are characterised by a mix of commercial premises and residential land uses. Commercial premises include public offices such as the Court House, Community Health Centres and retail and business premises typical of a suburban shopping street. There is also a pub and church in close proximity.

The nearest residential dwellings are in the form of shoptop housing over Redfern Street. The residential dwellings are far outnumbered by the commercial premises and the street is more readily defined as commercial in character.

### 6.1.3 Statutory Approvals

- **Development Consent**

107 Projects has development consent pursuant to D/2014/965/A to operate at the ground floor as an "artist and function space (licensed)." The approval also provides consent for a café.

It is permitted to operate with a maximum of 125 persons at the ground floor in addition to 16 external café seats and 55 persons on the first floor. The hours of operation are restricted to between 10am and midnight for internal areas and 8am and 10pm for external areas.

107 Projects is also required to adhere to a stringent Plan of Management.

It is subject to the standard conditions of consent for licensed premises including the acoustic criteria noted in Section 5.4.1 of this paper.

- **Liquor Licence**

107 Projects also benefits from an On-Premises Liquor Licence which authorises the sale and supply of liquor ancillary to another primary purpose. The nominated primary purpose under the Liquor Act (being distinct to primary purpose under the EP&A Act) is “social activity and support”.

The licensed trading hours are midday to midnight, Monday to Saturday and midday to 10pm Sunday for internal areas and midday to 10pm daily for outdoor areas.

Consistent with its nominated primary purpose, Condition 3010 restricts the sale and supply of liquor under certain circumstances as follows.

*The licensee must ensure that liquor is only served during the running of an exhibition and that the primary purpose of the premises is the showcasing of art. This does not include the playing of dance music or listening to a band or DJ.*

#### **6.1.4 Review of Case Study**

The first step as detailed above is to properly characterise the proposed development having regard to the available definitions. The use of the premises is non-profit and for the purpose of providing a community arts space. That puts the definition squarely within that of **community facility**. The approved use is *artists’ studios and exhibition space*.

As a community facility and entertainment venue, it is categorised as Class 9b.

It is located within a mixed use area in Redfern, which is presently developing a late night trading character. Whilst there are some residents in the immediate vicinity, the predominant land use is commercial. It is located within walking distance to Redfern Railway Station and so is accessible and relatively easy to depart the area by public transport. For these reasons, it is considered that there is scope for longer trading hours than that approved, perhaps to 1am or 2am in the morning, within which additional impacts would be reasonable.

Patron capacity is a matter for assessment under the BCA against provisions regarding floor area, sanitary facilities, exit paths and widths. Given the large footprint well in excess of 200sqm, subject to appropriate exit widths and sanitary facilities it could support an increase in capacity.

## **6.2 ANONYMOUS VENUE – MUSIC LESSONS AND ENTERTAINMENT SPACE FOR HIRE**

### **6.2.1 The Premises**

This Venue operates from within an approved retail premises to provide singing and music lessons to students in a one-on-one or small classroom setting. These are held daily. The Venue also provides entertainment either through students or by allowing others to hire the Venue. This occurs sporadically, depending on interest, but generally weekly. It has a self-imposed capacity of 40 persons. It does not provide drinks or foods, but does permit BYO liquor, and provides toilets.

The building in which the Venue is located is a single storey building that comprises the teaching and entertainment area to the street with bedrooms and kitchen to the rear.

### **6.2.2 The Surrounding Area and Zoning**

The Venue is located adjacent an inner Sydney industrial area, an IN1 Industrial Zone. Its location forms part of a buffer between the northern most portion of the industrial area and an adjoining R2 residential area. The buffer area comprises a mix of zones including IN2, B7, B4 and B5 land use zonings. The Venue itself is located within the B4 Mixed Uses Zone.

The nearest residential receiver is located directly adjacent to the Venue within an adjoining shoptop housing development. The next nearest residential receivers are located some 50-60 metres away.

The Venue also adjoins a classified road that faces high levels of vehicular traffic and associated noise. In addition, it is located within a 25 Australian Noise Exposure Forecast Zone for aircraft to Sydney Airport.

### 6.2.3 Statutory Approvals

We have reviewed the Development Consent that applies to the land. It is for a mixed retail/residential building. The operation does not comply with relevant conditions, such as hours of operation or the stated approved use of the premises.

There is no liquor licence for the Venue.

### 6.2.4 Review of Case Study - Permitting Entertainment

The first step is characterising the purpose of development and to ascertain whether a change of use would be required for the use of the building as a business premises or entertainment facility. That requires consideration of whether a change of use from retail to business premises would be required and whether the provision of entertainment would be an ancillary land use (and vice versa). This Paper advances on the assumption that the primary land use, based on frequency of use, is the music and singing lessons.

The purpose of the present approval, as a retail shop, is the sale of retail goods. The purpose of a business premises can be ascertained from the definition provided above “*to provide services directly to the public*”. It is considered that singing lessons would be within the definition of such a service to the public. It would not be an **educational establishment** because the definition for that use is restricted education provided for under legislation, e.g., TAFE. A change of use application would therefore be required due to the change in purpose from the sale of physical goods by retail to the provision of services.

Alternatively, if the entire building was a dwelling the provision of music lessons would come within the ambit of **home occupation** which is permitted in limited zones without consent. The provision of entertainment could not meet this requirement because persons not residing at the dwelling cannot be employed and hiring out a dwelling would not meet the common usage of the word “home occupation”.

The second consideration is whether the entertainment provided could be considered ancillary or an independent land use requiring separate development consent. The premises provides entertainment through its students who showcase their learning and improvements. It also hires the premises out separately to persons unrelated to the business premises. It is considered that the provision of entertainment by current students would come within the characterisation of ancillary development if there was approval for the premises for the primary purpose of providing singing and music lessons.

The provision of entertainment by persons who are not students would need separate consent as an individual land use. It would comprise an entertainment facility.

Under *State Environmental Planning Policy (Exempt and Complying Development) Codes 2008 (Codes SEPP)*, a change of use from a **shop** to a **business premises** is permitted as exempt development. The hours of operation however would be restricted to between 7am and 7pm, daily if there are no trading hours on the current development consent.

In preparing a development application for the above change of use to business premises and entertainment facility, the following supporting reports would be required:

- Proposed Plans – estimated cost of \$2,000 if prepared by Draftsperson;
- Statement of Environmental Effects – estimated cost of \$5,000 if professionally prepared;
- Acoustic Impact Assessment – estimated cost of \$4,000;
- Building Code of Australia Compliance Report – estimated cost of \$3,500; and
- Plan of Management – estimated cost of \$2,000 if professionally prepared.

The above illustrates that what is a relatively simple change of use application, before it is even determined, would cost the Applicant between \$7,500 and \$16,500 depending on the level of professional assistance.

Physical works may also be required and the cost of those will largely be dictated by the building system. If the premises were to be considered an “entertainment venue” then it would require compliance with the higher 9b building requirements of the BCA rather than the Class 6 Retail building requirements. Class 9b would require active fire suppression systems and high levels of treatment with fire resistant material which would be prohibitively expensive.

## 7.0 RECOMMENDATIONS

### 7.1 CHANGES TO TOWN PLANNING LEGISLATION

It is considered that the above exploration of the legislation and case studies has identified issues with:

- The need to appropriately define / characterise premises that wish to provide entertainment;
- Inflexibility of the planning system in permitting low risk entertainment as an independent land use;
- How to assess acoustic and social impact;
- How to gauge appropriate levels of intervention for risk based fire assessment; and
- Complexity and cost of the planning system for applicants.

### 7.2 EXEMPT AND COMPLYING DEVELOPMENT

It is considered that the provision of “entertainment” can readily be incorporated into State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (*the Codes SEPP*) or locally through the exempt and complying development provision found in the Standard Instrument. Doing so, would assist in ameliorating issues identified above.

The Codes SEPP and Standard Instrument permit development to comprise either exempt or complying development subject to meeting certain minimum requirements or development standards. We consider that there is no good reason why a land use of “entertainment”, could not be incorporated under certain circumstances as complying development.

#### 7.2.1 Ancillary Entertainment - Exempt Development Circumstances

This answers Question 4 of the Brief, “*What controls need to be considered by the consent authority in managing specific ancillary uses or developing interpretive frameworks to support an increase in performance ancillary use generally*”.

We suggest that no changes are made to incorporate ancillary entertainment to the exempt provisions of the Codes SEPP. However, it is recommended that guidelines be issued to assist with those considering opportunities for ancillary entertainment. Such entertainment may already be provided. To incorporate those provisions, having regard to that proposed for complying development, would also be confusing.

We note that there are existing guidelines issued by the Department of Planning in October 2009 that focus on the provision of entertainment in restaurants, pubs, clubs and cafes. These should be expanded to cover other uses where ancillary entertainment would not trigger a requirement to obtain development consent.

#### 7.2.2 Independent Entertainment - Complying Development Circumstances

This answers Question 5 of the Brief, “*How interpretation of planning controls can assist with permitting performance as ancillary use within non-entertainment venues – such as retail or community facilities – without planning permission being necessary or with as low a level of intervention as possible with permission.*”

For development which may otherwise require development consent and is considered to be of low to moderate risk, Complying Development criteria can be created to permit that use. The development standards created would need to ensure that the risk associated with the provision of entertainment is mitigated.

This would assist in encouraging the provision of entertainment by lowering the bar and provide a pathway to moderate levels of entertainment and clearly outline building requirements.

Relevant considerations or prohibitions that could be incorporated into the Codes SEPP or Standard Instrument (under cl. 3.3 and Schedule 3) could be as follows:

- (1) The provision of entertainment may be provided in premises which has development consent for another purpose, subject to adherence to the following requirements or stricter requirements if they apply elsewhere.

- (a) All conditions of development consent continue to apply and the provision of entertainment must comply with all

requirements of the development consent.

- (b) Entertainment may only be provided between 10am and 10pm any day of the week or lesser if trading hours are imposed under any development consent condition.
- (c) All entertainment must comply with the Protection of the Environment Operations Act, 1997 for “offensive noise”, unless stricter requirements apply separately.
- (d) Large percussion instruments such as drums, gongs and cymbals must not be utilised.
- (e) Pyrotechnics must not be utilised.
- (f) A 5kg, Class C Fire Extinguisher must be located within 20 metres of electrical fire risk such as in-house amplification equipment, electronic equipment or the like and must be certified annually. A copy of the annual fire safety certificate must be kept on premises.
- (g) Any maximum capacity of the premises shall be shown at the entrance to the premises.
- (h) If a maximum capacity is not nominated on the development consent the maximum capacity shall not exceed the following:
  - (i) One person per square metre of publicly accessible floor space; and
  - (ii) 100 persons or part thereof per 750mm of exit width and one metre of egress paths; and
  - (iii) If food and drink is provided, toilet facilities in accordance with **Table F2.3** of the BCA [which should be inserted into the SEPP for convenience]; and
  - (iv) 120 persons inclusive of staff, security and entertainers.
- (i) Maximum distance permitted to exits for ground floor premises is 30 metres and upper floor premises is 20 metres.

It is considered that the above adequately restricts the use of the building and the provision of entertainment to what would be considered low to moderate risk operations. Consequently, the considerations appropriately protect the surrounding area from adverse impact and the users of the building with respect to fire safety during the provision of entertainment.

We note further that under the Codes SEPP, cl. 1.17A ‘Requirements for Complying Development for All Environmental Planning Instrument’s, sub-clause (d) prohibits the carrying out of any complying development on so much of any land that is subject to an interim or heritage order under the Heritage Act, 1977 or heritage item under an Environmental Planning Instrument. Clause 1.18 ‘General Requirements for Complying Development for this Policy’ prohibits complying development for draft heritage items under an Environmental Planning Instrument.

With respect to State Heritage Items under the Heritage Act, 1977, an exemption is available. However, no such exemption is available for local heritage items and the above prohibition applies even in the case where there is no work proposed.

It is considered that the Codes SEPP should be amended to permit complying development to be approved for all heritage items where no work is proposed, such as in the case of a change of use, or to provide entertainment as proposed above. Furthermore, exemptions should be available, such as those under cl. 5.10(3) of the Standard Instrument for minor works to heritage items with the approval of the local consent authority, for work permitted under the Codes SEPP to be carried out on heritage items.

### 7.2.3 Independent Entertainment – Development Application

The key barrier under the current planning system that prevents the provision of purpose built, low risk entertainment premises is the current definitions available under the Standard Instrument.

The only definition available for such a premises is an **entertainment facility**. Due to the interaction between the EP&A Act and the BCA, approval for such a premises is automatically categorised as an **entertainment venue**, which must be built to Class 9b standards in accordance with the NSW Variations. For the vast majority of small venues, this high building standard is prohibitively expensive and not in line at a national level.

Under the current planning system, other venues such as restaurants and pubs are permitted to provide entertainment in conjunction with other retail services, such as the sale and supply of food, without affecting the definition for that use nor without affecting the building class required to be met. For those restaurants and pubs, they are required to meet Class 6 building standards under the BCA.

We therefore see no reason under the current planning system why entertainment in one venue should be built to one class whilst entertainment in another venue, where there is a similar low scope for risk, must be built to a higher building class. We therefore propose a new definition for low risk entertainment premises that would permit them to be dealt with as Classes 5, 6 or 8 under the BCA in NSW, as follows.

**Low-Risk Arts and Cultural Venue** means a basement, ground or first floor of a building or part of such a building which provides entertainment in the form of live performance, or, stationary art such as images, sculpture or cinema whether or not the premises provides food and drink, but does not include:

- (a) any premises where the density of patrons is greater than one person per square metre of publicly accessible floor space; or
- (b) any premises with a capacity greater than 140 persons inclusive of staff, security and entertainers and a maximum of 120 patrons.

The above definition reflects recent changes in Victoria which aim to permit entertainment in Class 6 buildings. However, it is noted that the provisions in Victoria apply only to premises that are already retail premises, such as pubs and restaurants. That is already permissible in NSW and the above definition seeks to go beyond that restriction to permit entertainment as a primary purpose in Class 5, 6 or 8 buildings under low risk circumstances.

The above proposed definition needs to be considered in conjunction with potential changes to the Building Code of Australia to ensure that the requirements of the building system reflect the intention above to reduce building costs for low-risk entertainment premises.

This report recognises that for the purposes of the City of Sydney's Development Control Plan 2012, Category B Low Impact Premises are generally described as premises with a capacity for 120 patrons or less. We have proposed to utilise the same maximum patron number of 120 but propose to incorporate an overall figure of 140 persons so as to include staff in the maximum capacity for the purpose of fire safety calculations.