

Submission to the NSW Small Business Commissioner on the outdoor dining fees position paper

November 2018

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Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW welcomes the opportunity to provide feedback on the proposals put forward in the NSW Small Business Commissioner's position paper, 'Bringing the Indoor Out: The future of outdoor dining fees in NSW'.

This submission was endorsed by the LGNSW Board on 7 December 2018.

Introduction

LGNSW recognises that ease of doing business is vital to attracting and retaining the businesses that contribute to the social and economic vibrancy of our communities. LGNSW also appreciates the natural tension between appropriate oversight, minimising regulatory burden and appropriate cost recovery, and welcomes the OSBC's engagement with stakeholders to ensure an appropriate balance in this regard.

The OSBC is proposing that councils could choose to opt-in to the OSBC's model policy for outdoor dining and would then receive 'decision ready' outdoor dining applications via Service NSW's Easy to do Business online platform, reducing the administrative burden for councils. In return, councils that opt-in to the policy would be expected to offer businesses outdoor dining on a free-free basis. This would mean waiving all council fees for outdoor dining, including:

- Outdoor dining application fees
- Administration fees
- Ongoing rental or usage charges for the public (footpath) space occupied by outdoor dining.¹

Outlining this proposal, the OSBC has published an overview paper and technical paper on the future of outdoor dining fees in NSW, seeking feedback by 23 November 2018.

The OSBC's proposal is informed by an OSBC and Service NSW outdoor dining trial which commenced in September 2017 in seven councils² and is due to conclude on 31 December 2018.

The OSBC has signalled its intention to review submissions made in response to its outdoor dining proposal before developing a NSW Outdoor Dining Policy for release in early 2019. This would be a model outdoor dining policy that councils could choose to adopt. The OSBC's proposal states that:

¹ Fees that are separate to outdoor dining approval and usage fees, such as for food safety compliance, are not affected by this proposal.

² Canterbury Bankstown, Parramatta, Liverpool Plains, Maitland, Queanbeyan-Palerang, Port Stephens and Snowy Valleys councils are involved in the trial. The trial aims to provide councils with 'decision-ready' applications, in an effort to ensure businesses receive outdoor dining approvals within two days, rather than up to six months. Councils and the NSW Government agencies involved agreed to offer the trial on a fee-free basis.

[The Outdoor Dining Policy] will set standardised requirements for businesses in the food and beverage sector that offer outdoor dining – including the location, safety, and amenity of outdoor dining areas – and a central online platform for operational efficiency. Under these arrangements, councils will retain control over compliance and approval...

Cost recovery for council regulation of and support for outdoor dining

While the OSBC proposal aims to simplify the outdoor dining application process, it does not relieve councils of the ongoing infrastructure, maintenance and regulatory costs involved in providing for outdoor dining.

Councils across NSW invest significant resources in ensuring public spaces used by restaurants and cafes for outdoor dining are clean, vibrant, well-maintained and effectively regulated. This investment helps to create an environment that benefits community and business alike. Capital upgrades, maintenance and regulatory services provided by councils can include:

- Infrastructure upgrades and streetscape improvements, including footpath widening, dedicated outdoor dining furniture, planter boxes and street trees, street lighting, bollards and paving;
- Regular street cleaning, which is often more intensive in outdoor dining precincts;
- Food safety inspections by environmental health specialists to ensure the health of the community and public confidence in local food businesses (outdoor dining increases the size of the premises and number of fixtures and fittings to be inspected); and
- Compliance inspections and interventions to ensure the footpath remains accessible to all members of the community, including those with disability, older people and those using prams.

For many councils the costs involved in providing an environment conducive to outdoor dining can be substantial. Recognising that businesses with outdoor dining derive financial benefit from their use of well-regulated and maintained public land, many councils choose to charge these businesses modest usage fees which may partially cover the costs borne by councils.

When the OSBC does publish its NSW Outdoor Dining Policy in 2019, LGNSW would welcome an acknowledgment in the policy of the substantial costs councils bear to create environments conducive to outdoor dining. The policy should acknowledge that outdoor dining fees are levied not only in recognition of the fact that public land is being used for commercial purposes, but that the fees are also a reasonable contribution to the significant infrastructure, maintenance and regulatory costs borne by council and which benefit restaurants and cafes.

Recommendation 1: That the outdoor dining policy acknowledge that where councils charge fees for outdoor dining, this reflects a reasonable contribution to the significant infrastructure, regulatory and maintenance costs borne by council and which benefit restaurants and cafes.

Application fees and ‘decision ready’ applications

Application processes for outdoor dining vary among councils, but can include consideration of footpath access, type of outdoor furniture and its placement, neighbourhood amenity, appropriate clearances for road safety, lighting, music, hours of operation, public liability insurance and protection of council infrastructure.

The OSBC proposal aims to relieve councils of some of the administrative burden associated with receiving and assessing applications against these criteria (as councils would receive ‘decision ready’ applications). However, the OSBC proposal does not reduce ongoing council infrastructure, maintenance and regulatory costs for outdoor dining.

Additionally, feedback from some councils is that a no-fee environment can result in a perception that no approval is required, and potentially a culture of limited respect for the public land and its council provided infrastructure.

To better reflect the costs and benefits of opting into the OSBC’s proposed outdoor dining policy, the OSBC should consider amending its policy so that councils opting-in would waive outdoor dining application and administration fees only (while still having the option to charge usage fees for outdoor dining on public land).

Recommendation 2: That the policy require councils opting-in to waive application and administration fees only (while still having the option to charge usage fees).

Impact of rate pegging

The OSBC’s proposal notes that councils in Perth and Adelaide have significantly reduced fees for outdoor dining in recent years. However, unlike in NSW, councils in the South Australian and Western Australian jurisdictions are not constrained by rate pegging and have the ability to independently and flexibly set rates to meet the costs of infrastructure and service delivery for their communities.

The NSW local government sector and LGNSW have long called on the NSW Government to remove rate pegging and reform the NSW local government rating system. If the NSW Government were to do so, councils would have more scope and flexibility to reduce the fees and charges they are required to impose in other areas to meet costs – including potentially reducing fees charged to their small business communities.

Recommendation 3: That the outdoor dining policy explicitly recognise that rate pegging limits councils’ ability to reduce fees and charges, and that the NSW Small Business Commissioner recommend the removal of rate pegging.

Opt-in basis

LGNSW appreciates that councils across NSW have differing outdoor dining policies and that this may create confusion for cafes and restaurants. In this respect, LGNSW welcomes the preparation of a model outdoor dining policy councils could choose to adopt, and which may harmonise and promote more consistent regulation of outdoor dining – particularly in adjoining council areas or in council areas that do not have clear outdoor dining policies.

However, LGNSW also recognises that councils have different priorities and vastly different requirements when it comes to outdoor dining. While the model policy – and the decision to charge no fees – may suit some councils' needs, other councils will need more complicated and nuanced outdoor dining policies to account for their diverse local government areas (LGAs).

Indeed, the seven councils involved in the OSBC's outdoor dining trial have been able to choose whether to adopt the outdoor dining policy trial in their entire LGA, or only in select precincts or areas. For its proposed policy however, the OSBC will require councils that opt-in to do so for their entire LGA. This approach would remove the ability of councils with diverse LGAs to have a nuanced outdoor dining policy that reflects the different needs of its communities.

A key role of a council is to determine what kinds and scale of development are appropriate in each part of an LGA. While under the proposed policy councils would retain the power to refuse an application for outdoor dining, a one-size-fits-all approach to outdoor dining requirements may mean that councils cannot easily adjust outdoor dining approvals to fit the circumstances of specific communities in an LGA.

Recommendation 4: That the OSBC allow councils to adopt the policy for only certain parts of their local government area.

Similarly, while some councils may (and already do) choose to offer outdoor dining free of charge to restaurants and cafes, other councils may be unable to do so, or may determine that modest fees reflect an appropriate recovery of council costs.

Ultimately, this decision must remain a matter for each individual council, and LGNSW thus welcomes the OSBC's proposal for this to be an opt-in policy.

To provide further clarity however, the OSBC should make clear how a council can 'opt-out' of the policy, if it finds that a fee-free approach is unsustainable or does not meet the council's needs.

Recommendation 5: That the OSBC make clear how councils can opt-out of the outdoor dining policy.

Publication of evaluation of outdoor dining trial

It is the intention of the OSBC to release its NSW Outdoor Dining Policy shortly after the conclusion of the outdoor dining trial (which ends 31 December 2018). However, LGNSW recommends that the OSBC instead publish a full evaluation of the trial to allow councils to consider the necessary information and the time to make a more considered response to the fee-free proposal. Some councils have provided feedback to LGNSW that modest outdoor dining fees do not function as a significant deterrent to restaurants and cafes applying for outdoor dining.

Further, some of the councils involved in the outdoor dining trial have reported to LGNSW that applications they have received as part of the trial have not been 'decision ready', but have instead required substantial rework by council officers and liaison with business owners to ensure the applications are in compliance.

LGNSW appreciates that the quality of applications handled through Service NSW's advisors may improve as the advisors become more proficient (and as the number of outdoor dining applications rises). However, to bolster the evidence base for an outdoor dining policy, justify the benefits of a fee-free model and ensure that councils are provided with all relevant information prior to making a decision on whether to opt-in to the policy, the OSBC should make public a full evaluation of the outdoor dining trial following the trial's conclusion. The findings of the evaluation should be used to refine the Service NSW processes to improve the 'decision-readiness' of any applications.

Recommendation 6: That the OSBC make public a full evaluation of the outdoor dining trial prior to finalising its outdoor dining policy.

Conclusion and summary of recommendations

LGNSW recognises the value to communities of vibrant and sustainable restaurants and cafes and welcomes efforts to promote ease of doing business, including through streamlined and harmonised outdoor dining application processes.

Council infrastructure, maintenance and regulatory investment for outdoor dining also help to create an environment that benefits restaurants and cafes and the communities they serve. However, many councils operate in a constrained financial environment, and modest outdoor dining fees from businesses represent a reasonable contribution to the cost councils bear in providing the conditions in which these businesses operate.

While some councils are in a position to waive fees for outdoor dining, they are nonetheless still required to fund ongoing council costs for infrastructure, maintenance and compliance.

A decision to waive fees for outdoor dining must ultimately remain a matter for each individual council and LGNSW welcomes the commitment from the OSBC that councils will individually remain able to determine whether to opt-in to the fee-free model.

LGNSW also encourages the NSW Small Business Commissioner to ensure councils have all relevant information to determine whether the fee-free model is suitable for their individual circumstances. Further refinement of Service NSW advice to businesses should be done in consultation with the local government sector.

In summary, LGNSW recommends:

- **Recommendation 1:** That the outdoor dining policy acknowledge that where councils charge fees for outdoor dining, this reflects a reasonable contribution to the significant infrastructure, maintenance and regulatory costs borne by council and which benefit restaurants and cafes.
- **Recommendation 2:** That the policy require councils opting-in to waive application and administration fees only (while still having the option to charge usage fees).
- **Recommendation 3:** That the outdoor dining policy explicitly recognise that rate pegging limits councils' ability to reduce fees and charges, and that the NSW Small Business Commissioner recommend the removal of rate pegging.
- **Recommendation 4:** That the OSBC allow councils to adopt the policy for only certain parts of their local government area.
- **Recommendation 5:** That the OSBC make clear how councils can opt-out of the outdoor dining policy.
- **Recommendation 6:** That the OSBC make public a full evaluation of the outdoor dining trial prior to finalising its outdoor dining policy.

For further information on this submission, please contact LGNSW's Social and Community Policy team on 02 9242 4063 or at lgnsw@lgnsw.org.au.