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Planning Law Update

The effect of the deemed provisions on the operation of local planning schemes

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On 19 October 2015, the deemed provisions contained in Schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* came into operation. The introduction of the deemed provisions was a significant reform, as they have effect and may be enforced as part of each local government's local planning scheme. Further, the deemed provisions prevail over inconsistent local planning scheme provisions. Consequently, scheme provisions will have no effect if they are inconsistent with the deemed provisions.

Since their introduction, there have been a number of cases in the State Administrative Tribunal in which the operation and effect of the deemed provisions has been considered. In particular, the Tribunal's approach to the issue of inconsistency between deemed and scheme provisions has been significant in shaping the effect of the deemed provisions. This article summarises the more significant implications of the Tribunal's approach to this issue.

Inconsistency between deemed and scheme provisions can arise in two ways. First, there may be incompatibility or incongruity between the substance of particular deemed and scheme provisions. Secondly, inconsistency can arise where the deemed provisions deal comprehensively and exhaustively with a particular subject. Examples of both forms of inconsistency can be found in the Tribunal's decisions.

The significant effect which inconsistency between particular deemed and scheme provisions may have can be seen in relation to the different approach which these provisions adopt with respect to planning instruments such as structure plans, outline development plans and detailed area plans. Commonly, scheme provisions relating to these planning instruments will:

- (1) require them to be prepared and approved before development within a particular area could proceed;
- (2) provide that these instruments (in whole or in part) have effect as if incorporated in the relevant Scheme;
- (3) specify the zoning of land which displaces the zoning under the scheme; and
- (4) require development to generally accord with the requirements of the planning instrument.

By contrast, the deemed provisions merely require that there be 'due regard' to planning instruments such as structure plans, activity centre plans and local development plans. They are not binding. Therefore, the legal status and effect which these planning instruments frequently had under many local planning schemes has been removed and replaced by the requirement that they merely be considered in determining development applications.

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Another significant consequence of this form of inconsistency concerns the well established principle that 'seriously entertained' draft planning instruments should be considered when determining development applications. This principle has now been given legislative expression in clause 67(b) of the deemed provisions which requires there to be 'due regard' to proposed schemes or scheme amendments that have been advertised and any other planning instrument that a local government is seriously considering adopting or approving. Therefore, it is no longer necessary or appropriate to consider whether draft schemes, amendments and other planning instruments are 'seriously entertained' where they are initiated by a local government. The deemed provisions simply require that they be given due regard.

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Examples of deemed provisions which deal comprehensively and exhaustively with particular subjects are those which exempt particular types of development from the need for approval and provisions which provide a list of matters which must be considered in determining development applications. The Tribunal has regarded such scheme provisions as inconsistent with the equivalent deemed provisions which comprehensively deal with these matters. As a consequence, the equivalent scheme provisions have been regarded as inconsistent and inoperative.

There are many matters which are the subject of comprehensive deemed provisions including the procedures for making local planning policies, structure plans, activity centre plans and local development plans. In addition, there are comprehensive deemed provisions concerning development applications and their advertising, consideration and determination and the subsequent amendment of approvals. Consequently, it is likely that significant parts of most local planning schemes are now inoperative and have been effectively replaced by the deemed provisions. Recognising this state of affairs, a number of local governments have amended their schemes to remove these inoperative scheme provisions. This is recommended as it results in schemes which only consist of operative provisions and avoids the confusion which can arise where schemes contain a significant number of redundant provisions.

For further information in regard to the above, contact Andrew Roberts on 9383 3133 or andrew.roberts@mcleods.com.au. The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.

