

# Have you got a heritage list

By Craig Slarke

The case of *Dain Pty Ltd v Shire of Peppermint Grove* [2019] WASC 264 (**Dain**) concerned a challenge to the inclusion of a property in the heritage list kept pursuant to the Shire's local planning scheme. The challenge succeeded, based on apprehended bias arising from a rather complicated factual background. This paper does not deal with the apprehended bias issue, but instead discusses the deemed provisions concerning heritage lists which were in many ways the foundational problem for the Shire in **Dain**. Those same deemed provisions could be problematic for many local governments.

## Background

Section 45 of the now repealed *Heritage of Western Australia Act 1990* required every local government to compile an inventory of buildings within its district which in its opinion are, or may become, of cultural heritage significance'. These inventories were commonly called municipal inventories. The 1990 legislation has now been replaced by the *Heritage Act 2018*. Section 103 of the *2018 Act* now similarly, requires the preparation of a survey of places, within each district that are, or may become, of cultural heritage significance. This document is now known as a local heritage survey.

Under the Shire of Peppermint Grove Town Planning Scheme 3 gazetted in 1996, the municipal inventory was deemed to be the heritage list established and maintained under the Shire's Town Planning Scheme No. 3 (**TPS3**). In March 2017 TPS3 was revoked and replaced by Local Planning Scheme No. 4 (**LPS4**). LPS4 follows the format of the model provisions and, significantly, did not deem the municipal inventory to be the Scheme heritage list. In order to address the lack of a heritage list under the new LPS4, the Council of the Shire initially resolved to adopt the municipal inventory as the heritage list for LPS4. This proved to be problematic, because the Council's decision to adopt the municipal inventory as the heritage list under LPS4 did not comply with the requirements of the deemed provisions concerning the adoption of heritage lists.

## Deemed provisions for heritage protection

The deemed provisions for heritage protection are contained in Part 3 of the deemed provisions contained in Schedule 2 of the *Planning and Development (Local Planning Schemes) Regulations 2015* (**LPS Regulations**).

The starting point is clause 8(1), which imposes an obligation on local governments to establish and maintain a heritage list to identify places within the Scheme area that are of cultural heritage significance and worthy of built heritage conservation. Note that is not the same thing as a local heritage survey. The local heritage survey is comprised by buildings which are, or may become, of cultural heritage significance.

Significantly, clause 8(3) provides that a local government must not enter a place in, or remove a place from, the heritage list or modify the entry of a place in the heritage list unless the local government —

- notifies in writing each owner and occupier of the place and provides each of them with a description of the place and the reasons for the proposed entry; and

- invites each owner and occupier to make submissions on the proposal within 21 days of the day on which the notice is served or within a longer period specified in the notice; and
- carries out any other consultation the local government considers appropriate; and
- following any consultation and consideration of the submissions made on the proposal, resolves that the place be entered in the heritage list with or without modification, or that the place be removed from the heritage list.'

The problem for the Shire was that although it advertised its intention to adopt the municipal inventory as the LPS4 heritage list, and invited submissions in that regard, it failed to comply with the obligation to notify each owner and occupier and provide them with written reasons for the proposed entry, as required by clause 8(3)(a). The owners and occupiers therefore could not make any submission in response to the reasons proposed for the heritage listing.

Further, by simply resolving to adopt the municipal inventory as the heritage list, the Court found that Council failed to positively consider and determine whether any of the properties actually met the relevant criteria established by the deemed provisions, namely whether each place was considered to be of cultural heritage significance and worthy of built heritage conservation. This was because the Council simply resolved to adopt the entire municipal inventory, without considering the individual merits of places in the inventory, and any submissions made with respect to those them.

### **Potential problems for built heritage conservation**

The problems encountered by the local government in **Dain** may well arise for other local governments which have adopted a new local planning scheme post the deemed provisions. Except in a case where the new local planning scheme itself contains a transitional provision which continues the heritage list adopted under the revoked scheme it will be necessary for the local government to strictly follow the requirements in Part 3 of the deemed provisions and adopt the heritage list afresh. Similar issues will arise with respect to the designation of heritage areas under a new scheme.<sup>[1]</sup>

Even if a local government has not adopted a new local planning scheme post the deemed provisions, the same or similar problems may still arise. That is because while the LPS Regulations contain transitional provisions with respect to various planning instruments (structure plans, activity centre plans, local development plans etc) which operated prior to the regulations and deemed provisions, they do not include any transitional provisions which continue an existing heritage list or heritage area.<sup>[2]</sup> There is therefore a real question as to whether any heritage area or heritage list adopted pursuant to a local planning scheme prior to the deemed provisions continues to operate and have effect in accordance with the deemed provisions.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information, please contact Craig Slarke by email to [cslarke@mcleods.com.au](mailto:cslarke@mcleods.com.au).

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### **Footnotes**

<sup>[1]</sup> The facts of **Dain** did not require the Court to deal with heritage areas.

<sup>[2]</sup> Nor indeed does it continue local planning policies which operated prior to the deemed provisions.