1. Background to deemed approvals

1.1 The commencement of the Sustainable Planning Act 2009 (SPA) on 18 December 2009, brought with it a significant change to the approval (or refusal) of certain types of development applications. This change was to introduce the concept of a deemed approval of certain development applications. It was a position that had been lobbied for by the property industry for some time, but until the SPA, had been resisted. This article gives a brief overview of the deemed approval provisions. It also incorporates feedback received by the authors from local governments and town planners and highlights some key points for those in the development industry to be aware of.

1.2 The Minister for Infrastructure and Planning said, in the second reading speech for the Sustainable Planning Bill 1999:

“The introduction of a deemed approval mechanism in relation to appropriate code assessable applications places clear responsibility with the decision makers and relevant agencies to allocate their resources appropriately and fulfil their roles within the expected time frames. The expectation is that, from this, social and economic benefits flow, with greater certainty for applicants as well as faster on-the-ground delivery, providing more choice to consumers and a more competitive marketplace for new homebuyers. …

Greater efficiencies in development assessment and therefore achieving on-the-ground faster delivery will be achieved through the abovementioned changes including … deemed approval of certain code assessable applications”.

1.3 The explanatory notes for the Sustainable Planning Bill 1999 said:

“Development assessment processes are enhanced by the clarity and certainty achieved by improved plan making through a potential reduction in the number of applications entering the system; more applications progressing through simpler processes (such as the new compliance assessment track); greater certainty in making applications; and more reliable and compliant applications being made. Time
and cost benefits with flow-on economic effects result in faster better integrated development on ground. This is achieved through...deemed approval for certain code assessable applications”

“The reform agenda responded with 24 specific recommendations for legislative improvements to IDAS, most of which are reflected in this Bill. Key among these are...introduction of deemed approvals for certain types of code assessable applications, if they are not decided within the IDAS timeframes.”

1.4 The authors spent some time trying to find the key recommendation for the introduction of deemed approvals in the reform agenda referred to in the extracts above. However, there was no recommendation. What appears to have happened is the deemed approval provisions were introduced at the instigation of a lobby group for the property industry.

2. The deemed approval provisions

2.1 The provisions in the SPA for deemed approvals take up only a few pages, but carry some significant weight. Section 331 allows a development applicant to issue a deemed approval notice to a Local government that has not made a decision on the development application within the normal decision making period (including any lawful extension of that period).

2.2 The right for an applicant to issue a deemed approval notice applies only to certain types of code assessable development applications and not to any impact assessable development applications. While not an exhaustive list, some of the instances in which the deemed approval provisions do not apply include:

(1) an application for a preliminary approval seeking to override the planning scheme (under section 242)\(^1\)

(2) any development application that a concurrence agency has required a refusal of or that only part of it be approved

(3) any development application on a Queensland heritage place (noting that this applies to heritage places listed on the State heritage register,)

(4) a vegetation clearing application under the *Vegetation Management Act 1999*

(5) a development application for building work.

2.3 While there are some exclusions, outlined above, the deemed approval provisions still apply to a broad range of code assessable applications.

2.4 A local government that receives a deemed approval notice from a development applicant has been deemed to have approved the development application on the day it receives the deemed approval notice. It then has 10 business days within which to issue a decision notice approving the development application with any conditions it wishes to impose.

2.5 There are some limits on the type of development approval that a local government can give in a deemed approval, including:

\(^1\) This type of development application was previously dealt with under section 3.1.6 of the *Integrated Planning Act 1997*. 
for applications where a concurrency agency has directed that an approval be just a preliminary approval, only a preliminary approval may be granted

(2) if the application was for a preliminary approval, a preliminary approval may only be granted

(3) if the application was for a development permit and no direction has been given by a concurrency agency about issuing a preliminary approval, a development permit must be issued

(4) a development application for a combined preliminary approval and development permit (where no direction from the concurrency agency about issuing a preliminary approval has been given) a combined preliminary approval and development permit must be issued.

2.6 If a local government fails to issue a decision notice within the 10 business days of receiving a deemed approval notice, the development application is taken to be approved subject to the standard conditions that are issued by the Minister for the Department of Infrastructure and Planning.²

2.7 The usual provisions about appealing the decision notice and making representations about a decision notice apply to a deemed approval. The appeal period for a deemed approval with standard conditions begins on the day that the local government was due to provide its conditions.

2.8 The development applicant is able to make written representations and request a negotiated decision whether the standard conditions were applied to the deemed approval or not.

2.9 The usual tests apply when challenging conditions (including standard conditions), that is, the conditions must meet the test for reasonableness and relevance set out in SPA.

3. Feedback

3.1 The authors sought feedback from Queensland local governments and consultant town planners about their experiences and thoughts about deemed approvals.

3.2 It is fair to say that, from the feedback received, there have been very few instances of the use of deemed approvals. In our view, the primary reason for this seems to be that the threat of the use of the deemed approval process was perceived to be more effective than its actual use.

3.3 The key issue for consultant town planners was the maintenance of a relationship with the Local government in question. The issue was described by consultants as a “balancing act”, “not wanting to annoy Council” and “we have to maintain reasonable relationships with councils and their officers and in any normal situation we would be willing to grant an extension to the decision making period where the application is likely to be supported”. One local government officer described it as “a confronting exercise” and said they would rather work through the issues, while another said that they had good relationships with consultants and so the process was used infrequently.

3.4 Examples given of use of the process are:

(1) A consultant town planner’s client had a right to issue a deemed approval notice. Rather than simply issue the notice, the planner suggested to the Local government officer concerned that they were considering issuing a deemed approval notice. A development approval was promptly issued.

(2) A local government advised that its experience was limited to only three deemed approval notices having been issued. These were issued by developers described as more aggressive and impatient.

(3) The client of another consultant town planner had the right to issue a deemed approval notice, but knew that an approval was days away so did not exercise its right.

(4) A local government had three instances of deemed approval notices being issued. In these instances the officer indicated that the full Council had been procrastinating on decisions and refusing to make a decision. The deemed approval notices were suggested by the local government officer to break that deadlock.

(5) The client of a consultant town planner issued a deemed approval notice so as to avoid a potential refusal of its development application.

3.5 In the instances where deemed approval notices were issued the following comments were given:

(1) deemed approvals arose where applications changed hands between officers, which can take time and blow out timeframes.

(2) for politically charged applications, the need to present to a committee or full Council can significantly blow out timeframes.

(3) the process had been used in the instance of a low standard of application material and information provided in response to an information request (particularly that plans were of poor quality, of incorrect scale and misleading). This meant further clarification was required and the timeframes taken to clarify this lack of information meant the right to a deemed approval arose.

(4) a development application was code assessable under the current planning scheme. However, it was inconsistent with the future planning for the site, the level of support for the application at the Local government was limited and there was a risk that it would be refused. A deemed approval notice was issued so as to avoid the refusal of the application.

(5) for one local government, information about stormwater has been a particularly challenging issue. Old technical reports had been provided for assessment and were not relevant or specific to the proposal. In the time taken to obtain the appropriate information from the applicant the right to a deemed approval arose.

(6) in one instance a site had quite generic preliminary approvals over it. These preliminary approvals changed the level of assessment to code assessment even though the application actually had a significant impact and, during the time required to assess that impact, the right to a deemed approval arose.
(7) A local government received a deemed approval notice for a development application for reconfiguring a lot. The engineering aspects of the development were difficult and the developer did not want to wait for them to be resolved.

(8) A development application for operational works (road and drainage works) was the subject of a deemed approval notice. The developer lost patience with the issues it was required to address. The local government indicated the development application was unlikely to have been refused.

(9) A local government had difficulties with swale and sewerage pipe relocation in a development application for operational works. The developer indicated that more information would be provided and it would work through the issues. However, instead it issued a deemed approval notice. The local government indicated the development application was unlikely to have been refused.

(10) Local governments tended to heavily condition development applications where a deemed approval was issued, in one instance to the extent that the conditions effectively meant a refusal of the development application (feedback received from both local government and consultant town planners).

3.6 General feedback about the deemed approval process was:

(1) This was a useful process where a local government was “dragging the chain” (comment from a local government officer).

(2) It was considered a path local governments will be fairly determined to avoid.

(3) One consultant indicated that he thought:

(a) the process was not being used so much at the moment because most activity in the property market was by larger developers who were less pushy with local government, stretched the boundaries less and spent more money on consultants to ensure applications were persuasive; and

(b) that the issue would be interesting in the next round of local government elections. It would be the first time elections had been conducted in circumstances where Councillors would be under threat of a deemed approval notice being issued. This was seen as the reverse of the situation in previous elections where the only real option for an applicant was to commence an appeal against a deemed refusal where it could not get a decision on its application.

(4) One local government wondered about the impact on the current use of the process when the property market improves and there are increased pressures on local governments from more development applications.

(5) Consultant town planners said:

(a) serious consideration would be given to issuing a deemed approval notice if the level of support for an application was limited and there was a risk of it being refused.

(b) there could be consideration given to extending the process to include impact assessable applications.
an applicant ought to be entitled to issue the standard conditions with
the deemed approval notice to avoid receiving a set of conditions that
equated to a refusal.

3.7 Matters that the relevant stakeholders in the development assessment process
should look out for are:

(1) timeframes for making decisions on a development application;

(2) when looking to issue a deemed approval notice, whether any earlier steps in
the integrated development assessment system have not been properly
complied with. This might cause a situation where a development application
is not actually in the decision stage and so a deemed approval notice could
not be properly given;

(3) when a deemed approval notice is given (local government and developer
ought to carefully note the 10 business days in which the local government
has to issue a decision notice and conditions);

(4) whether any notice extending a decision making period is issued within the
initial 20 business days for a decision.

4. What does the feedback tell us?

4.1 The use of the deemed approval process has been low. It has been used as a useful
tool to force a decision out of a local government. In those circumstances, the threat
of use of a deemed approval notice has produced an approval.

4.2 The property sector (including local government offices) are conscious of the impact a
deemed approval notice will have on relationships between applicants and local
governments.

4.3 Local governments will heavily condition any development approval issued under a
deemed approval notice.

4.4 No one we spoke to had encountered a situation where a local government failed to
issue a decision notice after receiving a deemed approval notice. So, no one has yet
received the standard conditions.

5. Looking forward

5.1 As the feedback demonstrated, often the use of the deemed approval process arose
from accidently missed timeframes. For that reason, we do not agree with the
comment that the deemed approval process should be extended to impact
assessable applications. Impact applications are generally more significant than
those undergoing code assessment. To give a right to a deemed approval in those
circumstances would weight the assessment process in favour of development.
While developers may well favour this course, it is not consistent with a proper
assessment process. It would undermine the purpose of impact assessment — to
fully assess the impact of development and to allow for public comment on significant
development. If an applicant is frustrated with the time taken to make a decision it
has sufficient protection in the IDAS process through the deemed refusal provisions.

5.2 We do agree with the comments in paragraphs 3.6(3) and 3.6(4). The true test of the
deemed approval provisions will come when the property sector is in better shape.
5.3 Even in the current, slower, climate, there have been instances of local governments missing time frames and giving deemed approval rights to applicants. As one local government officer said, when there is more pressure on local governments, the likelihood of missed timeframes will increase.

5.4 Similarly, the prospect of a deemed approval may force decisions from councillors during the March 2012 local government elections. Where previously those councillors may have been able to sit on the fence when considering development applications, safe in the knowledge that the only option was a deemed refusal appeal, now they face the prospect of a deemed approval. In the case of particularly contentious developments, this could have some significant impacts on local government elections.