

Inconsistency and the deemed provisions in Western Australia

By Craig Slarke

A key element of the reforms to the planning system commenced in WA more than a decade and a half ago was to 'streamline and clarify existing provisions and processes to improve the efficiency of the approvals process'.^[1] The introduction of the model provisions and deemed provisions contained in Schedules 1 and 2 respectively of the *Planning and Development (Local Planning Schemes) Regulations 2015* (**LPS Regulations**) was one of the principal mechanisms of the reform.

A local planning scheme is required to include the model provisions, subject to the power of the Minister to approve the exclusion from, or variation in, the scheme of a model provision.^[2]

Pursuant to section 257B(2) of the *Planning and Development Act 2005* (**PD Act**) the deemed provisions are deemed to be part of each local planning scheme. By section 257B(3) of the PD Act if a deemed provision is inconsistent with another provision of a local planning scheme, the deemed provision prevails and the other provision is to the extent of the inconsistency of no effect.

Puma Energy Australia and City of Cockburn

The State Administrative Tribunal first considered the question of inconsistency between the deemed provisions and other scheme provisions in ***Puma Energy Australia and City of Cockburn*** (2016) 89 SR (WA) 1. The Tribunal found that the word 'inconsistent' in section 257B of the PD Act has its ordinary meaning and, applying that ordinary meaning, the Tribunal concluded that there was an incompatibility, incongruity and lack of harmony between the substance of clause 67 of the deemed provisions (which provides a set of considerations to which the local government is required to have due regard in so far as they are relevant to the merits of an application for development approval), and another scheme provision which performed the same function. The inconsistency arose because the deemed provisions indicated an appearance of exhaustiveness on the subject which was incompatible with the other scheme provision dealing with the same subject. Subsequent SAT decisions have applied the same approach as ***Puma Energy***^[3].

Shire of Peppermint Grove v McComish

More recently, the Supreme Court has provided further guidance on the question of inconsistency.

In ***Shire of Peppermint Grove v McComish*** [2025] WASCA 155 the Court of Appeal considered a matter in which a landowner wished to build a single residential house. The proposed house complied with all of the 'deemed-to-comply' requirements of the Residential Design Codes (R-Codes), but it did not comply with a local planning scheme requirement with respect to plot ratio. The owner argued that development approval was not required to erect the house because clause

61(1) of the deemed provisions provides, in effect, that no development approval is required to erect a single house on a lot where the R-Codes apply, the works are not on a heritage protected place, and the works comply with the 'deemed-to-comply' requirements of the R-Codes. The owner said that the deemed provision overrode the additional scheme requirement because of the operation of section 257B(3).

The additional plot ratio requirement imposed by the local planning scheme was set by clause 32, which is based on a 'model provision' prescribed by the LPS Regulations.

The Court of Appeal found that there was no inconsistency between the two provisions.

The Court noted that it was open to a local planning scheme to supplement the model provisions pursuant to section 73(2A) of the PD Act. It was significant that model provision clause 32(1) provides that the provision:

'Sets out requirements relating to development that are additional to those set out in the R-Codes, activity centre plans, local development plans or State or local planning policies'.

(underlining added).

Similarly, clause 26 of the local planning scheme was based on a model provision which expressly contemplates the insertion of 'exclusions or variations to the R-Codes'. The R-Codes indicate in clause 2.2.1 that:

'A proposal for a single house that meets the deemed-to-comply provisions of the R-Codes Volume 1 does not require development approval, unless otherwise required by the scheme or clause 2.3.'

(underlining added).

This shows that the R-Codes themselves contemplate that it may not be sufficient to comply with the deemed-to-comply provisions if the relevant local government scheme imposes an additional requirement.

The Court listed eight considerations which they said together meant that clause 61 of the deemed provisions is not intended to prevent modification of the R-Codes pursuant to clause 26 of the model provisions, or to negate any supplementary provision made pursuant to clause 32 of the model provisions. Rather, item 6 of the table in clause 61 of the deemed provisions should be construed as referring to 'the R-Codes *as validly modified or supplemented by the provisions of the scheme*'.

There was, therefore, no inconsistency with the deemed provision in prescribing an additional requirement within the power to add a requirement to a local scheme contained in section 73(2A).

Fabcot Pty Ltd v City of Stirling

In the recent decision of ***Fabcot Pty Ltd v City of Stirling*** [2025] WASC 29, the Supreme Court dealt with a matter in which the applicant had received approval from the Metropolitan Redevelopment Authority (**MRA**) to develop land within the Scarborough Redevelopment Area pursuant to the *Metropolitan Redevelopment Authority Act* and Scarborough Redevelopment Scheme (**SRS**). The development approval included a condition which was to the effect that substantial

commencement of the development was to occur by 1 July 2025.

By that time, the Scarborough Redevelopment Area had ceased to exist, the SRS had been repealed and the land was within the Scheme Area of the City of Stirling Local Planning Scheme No. 3 (**LPS 3**).

Fabcot initially applied to the MRA to amend the development approval by extending the substantial commencement period, but that was refused on the basis that the MRA did not have any power to deal with the application. In March 2025, Fabcot applied to the local government for approval to extend the substantial commencement period pursuant to clause 8.3.1 of LPS 3. That clause provided:

‘The Council may, on written application from the owner of land in respect of which planning approval has been granted, revoke or amend the planning approval, prior to the commencement of the use or development subject of the planning approval.’

The local government’s view was that clause 8.3.1 was inconsistent with clause 77 of the deemed provisions and was therefore of no effect. Clause 77 of the deemed provisions provides a power to amend or delete any condition of an approval granted by the local government, and to amend the approval so as to extend the period within which any development approved must be substantially commenced.

In addition, the City was of the view that the phrase ‘planning approval’ in clause 8.3.1 meant planning approval granted by the local government, and not by another entity such as the MRA.

With respect to the question of inconsistency, his Honour Justice Howard considered that the term has its ordinary and natural meaning which involves ‘incongruity as well as incompatibility ... or lack of harmony’.

In resolving the question of construction, his Honour considered it appropriate to apply the presumption that two provisions within the one legislative instrument are intended to work together, and found that there is no inconsistency between clause 77 of the deemed provisions and clause 8.3.1 of LPS3 – at least in so far as clause 8.3.1 applies to a planning approval granted *other than* by the local government. That was because the two provisions can operate harmoniously where a planning approval had been granted by an authority other than the City.

These two recent decisions indicate that close attention needs to be given to the question of inconsistency between local planning scheme provisions and the deemed provisions. As it is a principle of statutory construction that statutory texts enacted by the same legislature are to be construed so far as possible to operate in harmony and not in conflict, an apparent conflict should be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining their unity.^[4]

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For any comments or questions on this article please contact Craig Slarke (cslarke@mcleods.com.au).

^[1] Second Reading of the Approvals and Related Reforms (No 4) (Planning) Bill 2009.

[2] Planning and Development Act section 257A.

[3] See, for example, Amherst Developments Pty Ltd and City of Gosnells [2018] WASAT 16 [12]; Kaizen Property Developments Pty Ltd and City of Armadale [2017] WASAT 123 [10]. C/F Ursula Frayne Catholic College and Town of Victoria Park (2020) 99SR (WA) 76 [50] – [55].

[4] See Commissioner of Police (NSW) v Eaton [2013] HCA (2013) 252 CLR 1 [98].

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