SUPREME COURT OF QUEENSLAND

CITATION:	*BWP Management Limited & Anor v Ipswich City Council* [2020] QCA 104
PARTIES:	**BWP MANAGEMENT LIMITED** ACN 082 856 424 (first applicant) **W & V NOMINEES PTY LTD AS TRUSTEE FOR THE ELTON FAMILY TRUST NO 3** ACN 606 755 239 (second applicant) **v** **IPSWICH CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 8250 of 2019 LAC No 3 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Land Court Act*
ORIGINATING COURT:	Land Appeal Court at Brisbane – [2019] QLAC 1
DELIVERED ON:	19 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2020
JUDGES:	Morrison and McMurdo JJA and Boddice J
ORDERS:	**1. Grant leave to appeal.** **2. Allow the appeal.** **3. Set aside the orders made by the Land Appeal Court made on 21 June 2019 and order instead that the appeal to the Land Appeal Court be dismissed.** **4. Set aside the orders made by the Land Appeal Court on 16 July 2019.** **5. The respondent to pay the appellants' costs of the proceeding in this Court, the proceeding in the Land Appeal Court and the proceeding at first instance.**
CATCHWORDS:	REAL PROPERTY – RATES AND CHARGES – RATING OF LAND – CATEGORIES OF LAND – OTHER TYPES OF PROPERTY – where there is a Bunnings Warehouse on each applicant's land – where each applicant's land is within the area governed by the Ipswich City Council – where the Council has categorised each property, under its 2015-2016 Budget, as a "Drive-In Shopping Centre" – where the

applicants say that the correct category is that of a "Shop – Single" – where the Land Court held that the correct category was "Shop – Single" – where the Land Appeal Court overturned that finding – whether the Land Appeal Court erred in law in its construction of the Budget

STATUTES – SUBORDINATE LEGISLATION – CONSTRUCTION – GENERALLY – where the meaning of the words of a statutory definition are not to be construed by reference to the term which is defined, for the reason that this would involve circularity – where the use of the lands fell within the text of each category of land – where the question of construction had to be resolved by the implication of a qualification to the words of one category or the other – whether the expression "Shop – Single" should be qualified by an implication – whether it is necessary to consider the terms of the instrument as a whole, including the term "Drive In Shopping Centre" – whether there is circularity in referring to the language of the defined term for that purpose

Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation (2011) 199 FCR 226; [2011] FCAFC 154, considered
Owners of Shin Kobe Maru v Empire Shipping Co Inc (1994) 181 CLR 404; [1994] HCA 54, distinguished
Tovir Investments Pty Ltd v Waverley Council [2014] NSWCA 379, considered
Wacal Developments Pty Ltd v Realty Developments Pty Ltd (1978) 140 CLR 503; [1978] HCA 30, distinguished

COUNSEL: C L Hughes QC, with H Stephanos, for the applicants
R N Traves QC, with M Wilkinson, for the respondent

SOLICITORS: Lander & Rogers Lawyers for the applicants
Colin Biggers & Paisley Lawyers for the respondent

[1] **MORRISON JA:** I have read the reasons of McMurdo JA and agree with those reasons and the orders his Honour proposes.

[2] **McMURDO JA:** On the first applicant's land at West Ipswich, and the second applicant's land at Springfield, there is a Bunnings Warehouse. These lands are within the area governed by the Ipswich City Council. The dispute in this case is how the lands are to be categorised for the purpose of the levying of rates. The Council has categorised each property, under the relevant instrument, as a "Drive-In Shopping Centre". The applicants say that the correct category is that of a "Shop – Single".

[3] The applicants appealed to the Land Court against the Council's categorisation decision. Initially they were successful.[1] However, that decision was overturned by the Land Appeal Court.[2] The applicants now seek leave to appeal against that

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1 *BWP Management Limited v Ipswich City Council*; *W & V Nominees Pty Ltd as trustee for the Elton Family Trust No 3 v Ipswich City Council* [2018] QLC 14.

2 *Ipswich City Council v BWP Management Limited & Anor* [2019] QLAC 1.

decision, pursuant to s 74 of the *Land Court Act* 2000 (Qld), arguing that the Land Appeal Court erred in law.

The facts

[4] There is no dispute as to any relevant fact. The evidence before the Land Court, by an agreed statement, was that a Bunnings Warehouse, such as the two premises in this case, sells goods to "the home improvement and outdoor living retail market", as well as to "project builders, commercial tradespeople and the housing industry." But it was agreed that the predominant use of a Bunnings Warehouse is the carrying out of a retail business.

[5] Premises such as these operate "as a single warehouse with various product categories". Each is a stand-alone premises, in that it shares no building, carparking or any part of the land with any other business. Bunnings occupies each property under a lease for the whole of the land, including carparking areas, for which the ingress and egress points are for the exclusive use of Bunnings' customers only.

The legislation

[6] Rates and charges are levied by a local government under the *Local Government Act* 2009 (Qld). By s 92, provision is made for various types of rates and charges, including, relevantly, "general rates (including differential rates)".[3] General rates are levied "for services, facilities and activities that are supplied or undertaken for the benefit of the community in general (rather than a particular person)".[4]

[7] That Act provides, by s 96, that a regulation may provide for, amongst other things, "the categorisation of land for rates and charges".[5]

[8] The *Local Government Regulation* 2012 (Qld), by s 80, empowers a local government to levy general rates that differ for different categories of rateable land, called "differential general rates." The categorisation is effected under s 81 of the Regulation as follows:

> "**81 Categorisation of land for differential general rates**
>
> (1) Before a local government levies differential general rates, it must decide the different categories (each a *rating category*) of rateable land in the local government area.
>
> (2) The local government must, by resolution, make the decision at the local government's budget meeting.
>
> (3) The resolution must state—
>
> (a) the rating categories of rateable land in the local government area; and
>
> (b) a description of each of the rating categories.
>
> …"

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3 s 92(1)(a).
4 s 92(2).
5 s 96(b).

[9] By s 88 of the Regulation, a local government which has decided to levy differential general rates must ensure that the relevant rate notice is accompanied by a document which states a rating category for the land which is the subject of the notice. By s 90(1) of the Regulation, a landowner who wishes to object to the categorisation may lodge an objection notice, on the ground that the land should belong to a different category. A right of appeal to the Land Court, against a dismissal of the objection, is provided by s 92 of the Regulation.

The Council's Budget

[10] The categorisation of these lands was by the Council's Budget 2015-2016 ("the Budget").

[11] The Budget contains a table which, in the first column, specifies some 55 categories of rateable land, and in the second column, a description of the necessary criteria for land to be within that category (Table 1).

[12] The applicants' case is that their lands should be within Category 44b, which is described in column one of Table 1 as follows:

> "Land used for a commercial purpose with a rateable value of $5,000,000 or greater."

The description of that Category is stated in column two of the table as follows:

> "Land which meets all of the following criteria:
>
> (a) has any of the Primary Council Land Use Codes for this rating category;
>
> (b) is primarily for a commercial use;
>
> (c) has a rateable value of $5,000,000 or greater."

[13] The Budget describes a "Primary Council Land Use Code" ("PCLUC") to be "a primary land use code approved by the Council which identifies the principal use of the land". Relevantly for rating Categories 41 to 50, the PCLUC is that contained in Table 3B of the Budget.

[14] Table 3B relevantly specifies, as item 11, one PCLUC as:

> "Shop – Single".

[15] The applicants' case is that the principal use of each of their lands is as a single shop, thereby satisfying the first of the criteria necessary for the land to be placed within Category 44b.

[16] The term "shop" is not defined by the Budget. However, by cl 2.2(2) the Budget provides that unless the context or subject matter otherwise indicates or requires, a term that is not defined has the meaning given to it in the Macquarie Dictionary.[6]

[17] The Macquarie Dictionary provides (relevantly) this meaning of a "shop":

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[6] There being no definition of the term in the *Local Government Act* 2009 (Qld) or any subordinate legislation made under that Act.

"a building where goods are sold retail."

[18] The Council placed the lands within the category numbered 52a, which Table 1 describes in column one as follows:

> "Land used for a drive-in shopping centre with a GLA of 10,000m^2 to less than 20,000m^2 and a land area of less than 200,000m^2."

[19] The description of Category 52a in column two of Table 1, is as follows:

> "Land which meets all of the following criteria:
>
> (a) has any of the Primary Council Land Use Codes for this rating category;
>
> (b) is primarily for a drive-in shopping centre with a GLA of 10,000m^2 to less than 20,000m^2;
>
> (c) has a land area of less than 200,000m^2."

[20] The PCLUC applicable to this Category is specified by Table 3C of the Budget as "Drive-In Shopping Centre".

[21] By cl 2.2(1), the Budget defines the term "drive-in shopping centre" to mean:

> "a premises or a cluster of premises that:
>
> (a) is used wholly or predominately for carrying out a retail business; and
>
> (b) is contained within one or more buildings or structures on one or more levels; and
>
> (c) provides off-street parking for customer vehicles."

[22] The term "retail business" is defined to have its meaning in the *Retail Shop Leases Regulation* 2006 (Qld). The term was defined in that regulation by s 9 and the schedule, to include the retailing of "domestic hardware and household goods".[7] As noted already, the parties agreed that the predominant use of the lands was for a retail business.

[23] The Council says that each of these properties constitutes a premises, used wholly for the carrying out of a retail business and which provides off-street parking for customer vehicles, so that it is a "drive-in shopping centre" as defined.

The decision of the Land Court

[24] The Land Court Member said that the facts which were relevant to each of these premises meant that they fell "squarely within all the elements of Category 44b, PCLUC 11 Shop – Single."[8]

[25] The Member was satisfied that a drive-in shopping centre, as defined, could be a single business.[9] He said that although a single business would not be a "shopping

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7 That Regulation was repealed on 2 December 2016 and replaced by the *Retail Shop Leases Regulation* 2016 (Qld), containing substantially identical provisions in s 8 and schedule 1.

8 [2018] QLC 14 at [52].

9 [2018] QLC 14 at [60].

centre" as that term is commonly used, common usage was irrelevant due to the specific definition of drive-in shopping centre which was contained in the Budget.[10]

[26] After considering the other criteria, the Member was satisfied that there was "no doubt that each Bunnings falls within Category 52a."[11]

[27] The Member then addressed the question of "[w]hat is the correct position when 2 categories can apply?" He referred to this Court's judgment in *AAD Design Pty Ltd v Brisbane City Council*,[12] saying that what was to be applied were orthodox legal principles of interpretation.[13] After referring also to s 14A of the *Acts Interpretation Act* 1954 (Qld) and *Project Blue Sky Inc v Australian Broadcasting Authority*,[14] the Member said that by the application of those principles, either category could apply, so that the "deadlock" was to be resolved by "an outcome that has the least impact on the taxpayer."[15] He therefore allowed the applicants' appeal, and held that the rating category should be changed from Category 52a to Category 44b.[16]

The decision of the Land Appeal Court

[28] The principal judgment was given by President Kingham, with whom Mullins J and Member Isdale agreed.

[29] President Kingham noted that it was common ground that only one rating category could apply, so that there was no "deadlock" which had to be resolved.[17] But her Honour endorsed the Land Court Member's observation that it was not a question of finding which category was the "best fit", for which her Honour referred to the observations of Chesterman JA in *AAD Design Pty Ltd v Brisbane City Council*,[18] that:

> "The result that several definitions may be satisfied by the one proposal with different or inconsistent consequences may be a powerful reason for construing the definitions to avoid the inconsistency or conflict. The construction must however occur in accordance with orthodox legal principles."

[30] President Kingham said that in *Blue Sky*, the High Court acknowledged that, in many cases, the only way in which to give effect to the purpose and language of apparently competing provisions, while maintaining the unity of all the provisions, is to determine a hierarchy of provisions, identifying the leading provision, and the subordinate which must give way to the other.[19] Her Honour was evidently referring to this passage from the judgment of McHugh, Gummow, Kirby and Hayne JJ in *Blue Sky*:[20]

> "A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.

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10 [2018] QLC 14 at [61].
11 [2018] QLC 14 at [67].
12 [2013] 1 Qd R 1; [2012] QCA 44 ("*AAD Design*").
13 [2018] QLC 14 at [69], referring to *AAD Design* [2013] 1 Qd R 1; [2012] QCA 44 at [49].
14 (1998) 194 CLR 355 ("*Blue Sky*"); [1998] HCA 28.
15 [2018] QLC 14 at [86].
16 [2018] QLC 14 at [89].
17 [2019] QLAC 1 at [5], [6] and [9].
18 [2013] 1 Qd R 1; [2012] QCA 44 at [49].
19 [2019] QLAC 1 at [13].
20 [1998] HCA 28; (1998) 194 CLR 355 at 381-382 [70].

> Where conflict appears to arise from the language of particular provisions, the conflict must 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 the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
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> (Footnotes omitted.)

[31] Her Honour accepted the Council's argument that those principles were not applied by the Land Court Member.[21]

[32] She observed that a single PCLUC may be a qualifying factor for more than one rating category, but that the only PCLUC for Category 52a was that of "Drive-In Shopping Centre".[22] In contrast, she said, PCLUC 11 "Shop – Single" was only one of 31 PCLUCs that may qualify land for rating under Category 44b.[23]

[33] Her Honour noted that Council accepted the Member's finding that the PCLUC of "Shop – Single" might be something which was "very small" or "very large", with which she agreed.[24] She also agreed with the Member's finding that a drive-in shopping centre, as defined, might involve a single shop or business.[25]

[34] In her view, there was a "potential conflict between the two categories, depending on how they are construed." Her Honour said that "there are other features of the Budget as a whole, and the definition of Drive-In Shopping Centre, that allow the Court to interpret the categories to avoid conflict and to give each category a field of operation within a consistent and harmonious differential rating scheme."[26] She noted that it was common ground that "a more general provision should give way to a more specific provision", and expressed her view that Category 44b was the former and Category 52a was the latter.[27]

[35] Her Honour then reasoned as follows:

> "[28] The Budget gives particular prominence to rating Drive-In Shopping Centres. There are ten rating categories for this single and discrete use. The only points of distinction between the ten categories are the gross lettable area and the land area. For category 52a, the land must have a gross lettable area of 10,000m^2 to 20,000m^2 and a land area of less than 200,000m^2.
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> [29] In contrast, the Council can rate land under category 44b if it falls within one of the 31 PCLUCs identified for that category,

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21 [2019] QLAC 1 at [15].
22 [2019] QLAC 1 at [20].
23 Ibid.
24 [2019] QLAC 1 at [24].
25 [2019] QLAC 1 at [25].
26 [2019] QLAC 1 at [26].
27 [2019] QLAC 1 at [27].

provided the use is primarily commercial and the land has a rateable value of $2,500,000 to less than $5,000,000.

[30] The Budget includes a definition of Drive-In Shopping Centre, but does not define a Shop – Single. That, in itself, indicates a special focus on this use in the scheme.

[31] The owners argue the definition of Drive-In Shopping Centre is more general than Shop – Single, because a Drive-In Shopping Centre could include more than one business, on more than one parcel of land, whereas a Shop – Single could only ever mean a single shop.

[32] That might be so, but that does not make category 44b more specific than category 52a. Nor does it make the definition of Drive-In Shopping Centre more general than Shop – Single. To the contrary, a use must meet a number of criteria before it falls within the definition of a Drive-In Shopping Centre. The obvious point of distinction between the two uses is the requirement for off-street car parking. A single shop can only be a Drive-In Shopping Centre as defined, if it provides off-street parking for customer vehicles.

[33] The ordinary meaning of the word shop invokes the building and the activity conducted within it, not the arrangements made for parking. For example, the primary meaning of shop in the Macquarie Dictionary is:

> "*noun* 1. A building where goods are sold retail."

[34] The requirement for off-street parking in the definition of Drive-In Shopping Centre is reflected in the name of the use and is an additional and specific requirement that makes the definition more particular than the meaning of Shop – Single.

[35] In summary, category 44b can apply to a number of different uses. The Budget gives emphasis to Drive-In Shopping Centres by specifically defining the use and establishing ten rating categories relating only to that use. The definition of Drive-In Shopping Centre includes a distinctive feature not invoked by the ordinary meaning of shop. Properly construed, category 44b is the more general and must give way to the more specific category 52a."

(Footnotes omitted.)

The applicants' submissions

[36] The effect of the applicants' argument is that the proper construction of the Budget requires a meaning to be given to "Drive-In Shopping Centre" which excludes a use of land which is within the description "Shop – Single". They submit that it is clear that the Bunnings Warehouses are single shops, each constituting the one business and with no other business being conducted on the land. From that, they submit that a drive-in shopping centre cannot include their lands, because land cannot be given more than one rating category. Therefore, they argue, the definition of "drive-in

shopping centre", considered in the context of the Budget as a whole, applies to a premises, or cluster of premises, comprising multiple businesses.

[37] The applicants further argue that their construction of the definition of "Drive-In Shopping Centre" accords with a land use which is akin to a traditional shopping centre, and that the Bunnings stores do not meet that description. Their argument acknowledges that in Australia, it is impermissible to resolve an ambiguity within a definition by reference to the term defined.[28] But they suggest that their argument does not offend that principle.

[38] The applicants further submit that the construction favoured by the Land Appeal Court would have absurd consequences. It would result in land being used for a single shop being placed in the category of a "Drive-In Shopping Centre" if it had even one or two car spaces for customers.

The respondent's submissions

[39] The respondent argues that the applicants' argument has a fundamental difficulty, in that the definition of "Drive-In Shopping Centre" expressly contemplates a single retail business. Therefore, it is contended, there is no possible construction of the definition of Drive-In Shopping Centre which would exclude a single retail business, or a single shop.

[40] The respondent rejects the contention that the Bunnings stores are not akin to a traditional shopping centre. Moreover, they submit that what constitutes a traditional shopping centre is irrelevant here, because the term "Drive-In Shopping Centre" is specifically defined.

[41] The respondent rejects the contention that the judgment would result in absurd consequences. It argues that a single shop with only one or two car spaces as off-street parking would not be a Drive-In Shopping Centre as defined.[29] It was submitted that there is a question of degree involved in judging whether the extent of the off-street parking would place the land in one category or the other. It was said that "[i]t's a question of which category best reflects the use of the land."[30]

Consideration

[42] In *Wacal Developments Pty Ltd v Realty Developments Pty Ltd*,[31] the question was whether the contract between the parties was an "instalment contract" as defined in s 71(2)(b) of the *Property Law Act* 1974 (Qld). Gibbs J rejected an argument that the word "instalment", in the expression "instalment contract", itself coloured the meaning to be given to the definition. Gibbs J said:[32]

> "With all respect it is impermissible to construe a definition by reference to the term defined. The expression is given by the statute

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28 *Owners of Shin Kobe Maru v Empire Shipping Co Inc* [1994] HCA 54; (1994) 181 CLR 404 at 419; *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* [1978] HCA 30; (1978) 140 CLR 503; *Minister for Immigration and Border Protection v WZAPN* [2015] HCA 22; (2015) 254 CLR 610 at 628 [48]; *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 256 CLR 1 at 21 [33].

29 Transcript of the hearing in this Court, T1-25.

30 Ibid.

31 (1978) 140 CLR 503; [1978] HCA 30 ("*Wacal Developments*").

32 *Wacal Developments* at 507.

> a special meaning which must be applied whether or not it accords with the ordinary meaning."

[43] In *Owners of Shin Kobe Maru v Empire Shipping Co Inc*, the High Court rejected a submission that the word "proprietary", in a defined term "proprietary maritime claim", could be used to colour the meaning to be given to the definition, saying that "[i]t would be quite circular to construe the words of a definition by reference to the term defined".[33]

[44] In 2011, these cases were analysed by the Full Federal Court in *Esso Australia Resources Pty Ltd v Federal Commissioner of Taxation*.[34] The Court (Keane CJ, Edmonds and Perram JJ) doubted that *Wacal Developments* was authority for the proposition that the term defined may not be used to resolve antecedent ambiguity in the definition.[35] Nevertheless, the Court said, *Shin Kobe Maru* did seem to establish that principle.[36] The Court suggested that there was a difficulty in reconciling this principle with "the general approach to interpreting statutes which requires that the meaning of a provision be determined 'by reference to the language of the instrument as a whole"', citing *Blue Sky*.[37] This was because the defined phrase or expression "is just as much a part of the statute as any other part."[38] Their Honours referred to the statement by Lord Hoffmann, in *MacDonald (Inspector of Taxes) v Dextra Accessories Ltd*,[39] that:

> "… a definition may give the words a different meaning from their ordinary meaning. But that does not mean that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean."

[45] In 2014, *Wacal Developments* and *Shin Kobe Maru* were analysed by the New South Wales Court of Appeal in *Tovir Investments Pty Ltd v Waverley Council*.[40] The case involved the interpretation of defined terms[41] in the *Waverley Local Environmental Plan* 1996. Basten JA there said:

> "[20] There are circumstances in which it is impermissible to use the defined term in giving meaning to a definition: *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* [1978] HCA 30; 140 CLR 503 at 507 (Gibbs J) and *The Owners of the Ship 'Shin Kobe Maru' v Empire Shipping Company Inc* [1994] HCA 54; 181 CLR 404 at 419 (the Court). However, in each of those cases the Court rejected use of an adjective in the defined term to read down a definition which otherwise widened the ordinary meaning (in *Wacal*) or the meaning which would derive from existing practice and principle (in '*Shin Kobe Maru*'). It seems unlikely that the approach

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33 [1994] HCA 54; (1994) 181 CLR 404 at 419 ("*Shin Kobe Maru*"), citing *Wacal Developments*.
34 [2011] FCAFC 154; (2011) 199 FCR 226 at [100]-[107] ("*Esso Australia Resources*").
35 *Esso Australia Resources* at [102].
36 *Esso Australia Resources* at [103].
37 *Esso Australia Resources* at [104], citing *Blue Sky* at [69].
38 *Esso Australia Resources* at [104].
39 [2005] 4 All ER 107 at [18].
40 [2014] NSWCA 379.
41 Namely "backpackers accommodation" and "temporary accommodation".

eschewed in those cases was intended to be universally rejected: *Barangaroo Delivery Authority v Lend Lease (Millers Point) Pty Ltd* [2014] NSWCA 279 at [11] (Leeming JA, Beazley P and Tobias AJA agreeing). As explained by Lord Hoffmann, dealing with the word "successor" in tenancy legislation, "[a]lthough successor is a defined expression, the ordinary meaning of the word is part of the material which can be used to construe the definition": *Birmingham City Council v Walker* [2007] 2 AC 262 at [11]. A similar approach has been adopted in construing contractual provisions: *Hardy Wine Company Ltd v Janevruss Pty Ltd* [2006] VSCA 28 at [5] (Callaway JA, Eames and Ashley JJA agreeing); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [17] (Lord Hoffmann); *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2014] NSWCA 323 at [47] (Macfarlan JA), [103] (Meagher JA); *Barangaroo* at [10]-[12].

[21] The present case involves a definition neither giving an expression a "special meaning" (in the language of *Wacal*) nor limiting what might otherwise constitute an expansive definition. Indeed, the Waverley LEP lacks the degree of precision and formality one expects in a statute. In such circumstances, reliance may appropriately be placed on the term being defined. As will be seen shortly, there was a volume of material in the present case which suggested that the premises in question were intended for use by travellers of a kind commonly described as backpackers."

In the same case, Leeming JA said:

"[54] Thirdly, it will be seen that the definitions used in the LEP are used less than precisely. As Basten JA's reasons amply demonstrate, it is not possible, in accordance with the process described by McHugh J in *Kelly v The Queen* [2004] HCA 12; 218 CLR 216 at [103], to transcribe the defined term into "backpackers accommodation"; some flexibility has to be given to the words used, in order to make sense of them. Where the drafter has been less than fastidiously precise in his or her choice of language, only limited weight may be given to relatively minor features such as those to which the appellants point. This consideration applies to contracts: see *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184; 310 ALR 113 at [98]. It applies to legislative instruments as well, for it derives from the care with which language is used. Indeed, it has been said that it has particular application to subordinate legislation. Lord Reid said in *Gill v Donald Humberstone & Co Ltd* [1963] 3 All ER 180 at 183 that the regulations in that appeal "ought to be construed in the light of practical considerations, rather than by a meticulous comparison of the language of their various provisions, such as might be appropriate in construing sections of an Act of Parliament". Decisions applying that reasoning may be found in *Marina*

> *Bay Developments Pty Ltd v Pittwater Council* [2007] NSWLEC 41."

[46] In 2015, in *Independent Commission Against Corruption v Cunneen*,[42] French CJ, Hayne, Kiefel and Nettle JJ referred to "circularity of the kind identified in *Shin Kobe Maru*;[43] which is to say the circularity which arises when the terms of a definition are interpreted by reference to the term defined."

[47] There have been several judgments of intermediate courts of appeal in Australia, in which it has been held that the ordinary meaning of a defined word or expression in a statute may properly influence, or colour, the interpretation of the definition, although doing so without reference to *Wacal Developments* or *Shin Kobe Maru*. Two recent examples from Victoria are *Greater Shepparton City Council v Clarke*[44] and *DLZ v Transport Accident Commission*.[45] In the former case, Santamaria, Beach and Kaye JJA said:

> "It is of course trite that the ordinary or dictionary meaning of a defined term in a statute is notionally displaced or altered by any statutory definition of that term.[46] Nevertheless, the ordinary or dictionary meaning of a particular term may influence, or colour, the court's view of the defined meaning of the term.[47]"

[48] Another example is the judgment of the New South Wales Court of Appeal in *Streller v Albury City Council*,[48] where Meagher JA explained the reason why, in his view, it was permissible for the ordinary meaning of a defined term to have some influence on the construction of the language of the definition. Meagher JA did so by adopting what was said by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd*,[49] albeit in the context of construing a definition in a commercial agreement:

> "The judge declined to regard the terms total land value and minimum guaranteed residential unit value as indicative of an intention that MGRUV was to be the minimum Chartbrook would receive as the land value of a flat because both terms were defined expressions. They might just as well have been algebraic symbols. Indeed they might, and I strongly suspect that if they had been, they would have made it clear that the parties were intending to give effect to Persimmon's construction. But the contract does not use algebraic symbols. It uses labels. The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition. In such cases the language of the defined expression

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42 [2015] HCA 14; (2015) 256 CLR 1 at 21 [33].

43 A passage to which I have referred above at [43].

44 (2017) 56 VR 229; [2017] VSCA 107 at [74].

45 [2017] VSCA 134.

46 Citing *Office of the Premier v Herald & Weekly Times Pty Ltd* (2013) 38 VR 684; [2013] VSCA 79 at [61]; *Gibb v Federal Commissioner of Taxation* [1966] HCA 74; (1966) 118 CLR 628, 635.

47 Citing *Manly Council v Malouf t/as Fusion Point* [2004] NSWCA 299; (2004) 61 NSWLR 394, 396-397 at [8]-[10]; *Hastings Co-operative Limited v Port Macquarie Hastings Council* [2009] NSWCA 400 at [17]; *Heffernan v Comcare* [2014] FCAFC 2; (2014) 218 FCR 1, 9 at [46]; *British Amusement Catering Trades Association v Westminster City Council* [1989] AC 147, 157.

48 [2013] NSWCA 348.

49 [2009] 1 AC 1101 at [17].

> may help to elucidate ambiguities in the definition or other parts of the agreement: compare *Birmingham City Council v Walker* [2007] 2 AC 262, 268."

[49] More recently, a Full Federal Court has considered some of those cases, against the authority of *Wacal Developments* and *Shin Kobe Maru*, but without finding it necessary to determine whether they were correct having regard to those two decisions of the High Court.[50]

[50] Most recently, in *Australian Securities and Investments Commission v King*,[51] Kiefel CJ, Gageler and Keane JJ referred to "the orthodox view that one should not attempt to 'construe the words of a definition by reference to the term defined'", citing *Shin Kobe Maru*.

[51] It must be accepted that the law in this country is that the meaning of the words of a statutory definition are not to be construed by reference to the term which is defined, for the reason that this would involve circularity. However, that is not what the applicants' argument invites this Court to do, as I will explain.

[52] Paragraph (a) of the definition of "drive-in shopping centre" requires that the premises (or cluster of premises) be used, wholly or predominantly, in any of the ways which constitute a "retail business" in the *Retail Shop Leases Regulation* 2006 (Qld). It is a criterion which requires the use, or predominant use, of the land to be of a certain kind. That criterion would be satisfied where there are several retailers carrying out their businesses on the land. If the words of the definition were construed alone, the criterion in paragraph (a) would also be satisfied in the case of a single retailer (although the respondent's submission, that the definition "expressly contemplates a single retail business", is an overstatement). Consequently, as both the Land Court and the Land Appeal Court found, the two Bunnings stores in this case were within the text of the definition.

[53] However, the Bunnings stores are also within the description of "Shop – Single", as the President of the Land Court accepted.[52] There is no apparent challenge to that finding.

[54] PCLUC 11 is a code which applies not only to rating Category 44b, but to five others, which are distinguished from each other according to the rateable value of the land in question. One of them[53] applies where land is used for a commercial purpose and has a rateable value of less than $200,000. Category 44b applies where the rateable value of the land is $5,000,000 or greater. As the respondent conceded in the Land Appeal Court, and that Court accepted,[54] the expression "Shop – Single" may describe a single shop ranging from the very small to the very large.

[55] President Kingham saw a significance in the primary meaning of "shop" in the Macquarie Dictionary being "a *building* where goods are sold retail." However, a PCLUC is defined to be a code which identifies the *principal* use of the *land*. Where there is land on which there is a building, used as a single shop, as well as carparking used only by customers of the shop, the principal use of the land would

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50 *SZTVU v Minister for Home Affairs* (2019) 268 FCR 297; [2019] FCAFC 30 at [66]-[71].
51 (2020) 94 ALJR 293; [2020] HCA 4 at [18].
52 [2019] QLAC 1 at [26].
53 Category 43a.
54 [2019] QLAC 1 at [24].

be as a single shop. The use of some of the land as a carpark would be merely an ancillary use.

[56] The use of the lands therefore fell within the text of each PCLUC. The question of construction in this case has to be resolved by the implication of a qualification to the words of one PCLUC or the other. The effect of the judgment of the Land Appeal Court is that, by necessary implication, the expression "Shop – Single" does not include a single shop with off-street parking for customers. The effect of the applicants' argument is that, by necessary implication, a drive-in shopping centre, *as defined*, does not include the case of a single shop. Whichever implication is to be made, it would not result from the construction only of the text of the affected PCLUC. Rather, as President Kingham said by reference to *Blue Sky*, it would be by a process of construction which identifies which provision must give way to the other.[55]

[57] It is in that task that, the applicants submit, it is legitimate to have some regard to the words "Drive-In Shopping Centre". In ordinary speech, a single shop, with carparking for its customers on the same land, would not be considered to be a shopping centre. If nothing else, a shopping centre involves a premises from which more than one business is conducted. In ordinary speech, the distinction between a shopping centre and a single shop is clear. In considering whether the expression "Shop – Single" should be qualified by an implication, it is legitimate, indeed necessary, to consider the terms of the instrument as a whole, including the "label", namely Drive-In Shopping Centre, which this Council chose to use. There is no circularity in referring to the language of the defined term for that purpose.

[58] The respondent's oral argument emphasised the scale of the carparking provided at these two stores. It was submitted that this made the stores more akin to a drive-in shopping centre than a single shop. This submission cannot be accepted. It appears to resemble the "best fit" approach which the Land Appeal Court rejected, on the authority of the judgment of Chesterman JA in *AAD Design*, who there said:[56]

> "This particular canon of construction appears unique to the Queensland P & E Court. While it may have practical attractions it offends the legal principle applicable to the statutory construction pronounced by courts of the highest authority, and facilitates planning appeals by reference to intuitive judgments by those who specialise in that jurisdiction rather than by an objective and logical examination of the words of the statutory instruments in question, according to established legal doctrine. All statutes in all jurisdictions should be construed according to the same established legal principles."

[59] The Land Appeal Court reasoned that the use of these lands was to be categorised as a Drive-In Shopping Centre, because that was the more specific of the two competing categories. In my respectful view, that was not the case. It may be accepted that in a category constituted by land used for single shops, there is a more specific category of those which have off-street parking. However it may also be said that within the category of premises described in the definition of Drive-In

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55 [2019] QLAC 1 at [13].
56 [2013] 1 Qd R 1 at [46].

Shopping Centre, there is a more specific category of premises where there is only one retail business.

[60] In my conclusion, the relevant intent of this instrument is to distinguish between land which is principally used for a single shop, and land which is principally used for purposes involving more than a single shop. The contrary interpretation, accepted by the Land Appeal Court, was erroneous, in my respectful view. A critical distinction between a single shop with no carparking, and a shop with even one or two car spaces, is unlikely to have been intended. The respondent's suggested answer to that consequence is one which does not accord with accepted principles of construction, and it would be conducive to uncertainty and debate in its application. Furthermore, the use of the expression "drive-in shopping centre" is of some relevance in identifying the intended distinction between the categories of use. On the proper construction of this instrument, each of these pieces of land is within Category 44b.

Orders

[61] I would order as follows:

1. Grant leave to appeal.
2. Allow the appeal.
3. Set aside the orders made by the Land Appeal Court made on 21 June 2019 and order instead that the appeal to the Land Appeal Court be dismissed.
4. Set aside the orders made by the Land Appeal Court on 16 July 2019.
5. The respondent to pay the appellants' costs of the proceeding in this Court, the proceeding in the Land Appeal Court and the proceeding at first instance.

[62] **BODDICE J:** I agree with McMurdo JA.