



## CHARACTERISING USES AND ANCILLARY USES

The proper determination of a use of premises is fundamental to town planning – lawful uses are protected, unlawful uses are punishable and variously, a material change of use may require authorisation.

The characterisation of a use is not always a straightforward proposition and involves questions of fact, to be determined by evaluating the circumstances of the case, the applicable legislative regime and the planning context.<sup>1</sup> In other words, characterising a use requires analysis of the activities and premises in question, in the context of the applicable legislation and planning instruments. In this cheat sheet, we provide guidance about how to undertake that exercise.

Often, it is relatively simple to identify the premises, the purpose for which it is used, and to categorise that use in accordance with the *Planning Act 2016* (**the Act**) and applicable planning instruments. Difficulties tend to arise when considering whether multiple activities constitute a single primary purpose with an ancillary use, or a number of purposes forming independent uses or a composite use. In other instances, it may be difficult to define novel or hybrid activities which do not correspond neatly with a list of defined uses in a planning instrument, even though the premises and its use can be readily identified.

In defining the term 'use', the Act simply says: "*use, for premises, includes an ancillary use of the premises.*"<sup>2</sup> The term 'ancillary' is not defined in the Act. The Planning and Environment Court has confirmed that it is to be given its ordinary meaning, which has been found to be: '*incidental and subordinate*'.<sup>3</sup>

Therefore, it is necessary to consider the following matters when characterising a use:

- what physical area is being used, i.e. what are the 'premises'; and
- what is the purpose for which those premises are, or are proposed to be, used.

These questions are closely correlated, and require overlapping considerations.

### PREMISES

Under the Act, 'premises' can be land and/or all or part of a building or structure. In some cases, the concept of 'premises' is used interchangeably with the term 'planning unit'.

A 'planning unit' is the defined physical area (of land and/or building/s) used for a particular purpose, including any areas where a use is incidental or ancillary to that primary purpose.<sup>4</sup> Therefore, determining the premises necessarily involves overlapping considerations of the purpose for which the premises are to be used, but we will address each concept separately here.

The identification of the premises is a question of fact and degree, requiring an evaluative assessment of the circumstances of each case within the relevant legislative and planning framework.<sup>5</sup> The courts<sup>6</sup> have recognised three typical scenarios which might occur:

1. where an entire unit of occupation (e.g. a lot / building / tenancy) is used for a single main purpose, including any ancillary purpose – the entire unit of occupation is the premises;
2. where an entire unit of occupation is used for more than one purpose but it is not possible to identify an incidental and subordinate relationship between the activities, and those activities do not occur in physically distinct and separate areas – the entire unit of occupation is the premises;
3. where an entire unit of occupation is used for more than one different and unrelated purpose and those activities occur in physically distinct and separate areas – each distinct area should be considered separate premises.

## FOR WHAT PURPOSE/S IS THE PREMISES BEING USED?

The High Court<sup>7</sup> has said that the analysis of the purpose for which premises are being used is:

*not to be approached through a meticulous examination of the details of processes or activities, or through a precise cataloguing of individual items of goods dealt in, but by asking what, according to ordinary terminology, is the appropriate designation of the purpose being served by the use of the premises at the material date.*

Further, the Court said that the description of the purpose is intended to refer to:

*such ranges of activities as may be described in the ordinary use of language by expressions descriptive of trades, industries, manufactures, shops or places of public amusement, such as the expression 'retail butcher's shop', rather than to the details of the particular aggregation of activities.*

In O'Keefe, applying the approach quoted above, the Court found that pottery making was the protected existing use, rather than the most applicable use defined in the relevant planning instrument: 'light industry'.

The cases have given us the following further principles for identifying the purpose for which premises are to be used, although some care needs to be taken as these principles come from different legislative regimes:

- it is inappropriate to determine the relevant purpose by doing no more than identifying activities, processes or transactions and then fitting them to one or more uses as defined in a planning scheme;<sup>8</sup>
- the evaluation may identify more than one separate and distinct purpose. In that event, the question arises whether one purpose is dominant. The further question that may arise is whether the lesser purpose/s, are ancillary to the dominant purpose;<sup>9</sup>
- the dominant purpose for which land is used determines the character of the use, and not an ancillary use or uses;<sup>10</sup>
- where the whole of premises are used for two or more purposes, none of which subserves the others, it may be a composite or mixed use.<sup>11</sup>

## Considerations for Ancillary Uses

Under previous iterations of the planning legislation, an ancillary use had to be both incidental to, and necessarily associated with, the primary use. It was a high bar. Now, the Act contemplates an ancillary use as part of the primary use of premises and provides flexibility for both developers and regulators in achieving development outcomes.

To be an ancillary use requires;<sup>12</sup>

- a dominant and subservient relationship; and
- a use not to merely coexist with, but serve the purposes of, the primary use.

Determining any ancillary relationship is a question of fact in each case, and:

- involves planning considerations (e.g. physical attributes, occupation, custom, operations, traffic, ratio of space occupied in relation to the whole)<sup>13</sup> not, for example, the relative financial returns, and may include questions of size and scale;<sup>14</sup> and
- does not require ascertaining whether the nature of one use makes it necessarily an essential part of the other.<sup>15</sup>

## THE LEGISLATIVE AND PLANNING CONTEXT

Having identified the premises, and the purpose for which they are to be used, it is then necessary to characterise the use in the context of the Act and applicable planning instruments.

Planning schemes, and the definitions found in them, can sometimes lack clarity, contain ambiguities, appear contradictory, or do not neatly provide for a particular proposal. Planning schemes are statutory instruments and are to be interpreted according to the same principles that apply to interpreting legislation. Therefore, a planning scheme should be read as a whole and in a way that is practical and intended to achieve a balance between individual outcomes.<sup>16</sup>

It is not appropriate to characterise a use by the definition that 'best fits' the subject activities. Where a purpose very largely falls within a defined use it should be taken to fall within the defined use.<sup>17</sup>

On the other hand, where a use does not fall within a defined use, and where the applicable planning context provides for 'undefined uses' or similar, it may be appropriate to treat the use as such.<sup>18</sup> If two defined uses equally apply, the applicant can select the one it prefers.<sup>19</sup>

## CASELAW EXAMPLES

In the following cases, the Planning and Environment Court had to decide whether a use was ancillary to another use of premises.

- A KFC takeaway/restaurant was found to not be ancillary to the primary service station use of the premises.<sup>20</sup>
- In *Caravan Parks*, the Court held that recreational vehicle accommodation was not ancillary to the use of premises as a park.
- The use of parts of buildings for dwelling units was not ancillary to the existing industrial use of premises.<sup>21</sup>
- The Court confirmed that the subject approval authorised a retail warehouse with an ancillary restaurant.<sup>22</sup>
- Education and training activities provided at a dance school were ancillary to the main activities of the dance school (which was primarily for fitness and fun), and properly characterised as an indoor sport and recreation use.<sup>23</sup>

## CONSIDERATIONS FOR CHARACTERISING USES

If you are faced with a difficult scenario to categorise, it might assist to ask yourself the following questions, in light of the principles above.

- What area of land and/or buildings are occupied by the operator or proponent of the use?
- Within that area of occupation, what area is being used for the subject purpose, including any ancillary purpose?
  - Is it the entirety of a lot / building / tenancy?
  - If it is only part of an area, is that area separated and distinct from other areas or do the areas being used overlap?

- What are all the relevant features of the use? It is important to remember that this process does not involve a meticulous examination of the activities and processes, or cataloguing of individual goods dealt with, rather, it is the purpose to be served by the use of the premises (using ordinary terminology) which is important.<sup>24</sup>
- Is there more than one purpose? If so, what is the relationship between those different purposes, physically and operationally?
  - If the purposes are unrelated and occur in distinct areas, each may be its own planning unit, with each requiring its own assessment against the planning instruments.<sup>25</sup>
  - If the purposes are not distinct from each other (physically and operationally), it may be a single planning unit with a composite/mixed use, or a primary and ancillary use.<sup>26</sup>
- To determine whether there is a composite/mixed use, or a primary and ancillary use, consider the following indicators of a primary/ancillary relationship:
  - whether there is a dominant / subservient relationship between the two purposes?
  - whether any subservient use serves the purposes of the primary use?
- Does the use of the premises largely fall within a defined use in the applicable planning instrument? If so it can likely be categorized accordingly.
- Does the use of the premises not fall within a defined use in the applicable planning instrument? Where a planning scheme does not define every possible use and allows for "any other purpose" or innominate uses: it may be appropriate to treat the use as undefined rather than forcing it into a prescribed category.

- <sup>1</sup> *Kelly Consolidated Pty Ltd v Ipswich City Council & Anor* [2024] QPEC 12 (**Kelly**) at [30] and the cases cited therein.
- <sup>2</sup> Planning Act 2016 Sch 2.
- <sup>3</sup> *Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor* [2018] QPEC 52 (**Caravan Parks**) at [9].
- <sup>4</sup> *Woolworths Ltd v Maryborough City Council (No.2)* [2006] 1 Qd R 273, 290 [38] (**Woolworths**) citing *G Percy Trentham Ltd v Gloucestershire County Council* [1966] 1 WLR 506, 513 (Diplock LJ).
- <sup>5</sup> *Caravan Parks* at [14].
- <sup>6</sup> *Woolworths* at [38] citing *Burdle v Secretary of State* [1972] 1 WLR 1207 at p 1213; [1972] 3 All ER 240 at p 244.
- <sup>7</sup> *Shire of Perth v O'Keefe* [1964] 110 CLR 529 (**O'Keefe**).
- <sup>8</sup> *Cascone v Whittlesea Shire Council* (1993) 80 LGERA 367 (**Cascone**); *Kelly*.
- <sup>9</sup> *Cascone* at 382, cited with approval in *Hoe v Manningham City Council* (2011) 183 LGERA 441, 44.
- <sup>10</sup> *Brazil (Concrete) Ltd v Amersham RDC* (1967) 18 P&CR 396 at 399.
- <sup>11</sup> *Foodbarn Pty Ltd v Solicitor General* (1975) 32 LGRA 157, 161.
- <sup>12</sup> *Toner Design Pty Ltd v Newcastle City Council* [2013] NSWCA 410 (**Toner**) at [10].
- <sup>13</sup> *Witmack Industrial Pty Ltd v Toowoomba Regional Council* [2015] QPEC 7 at [30] – [36] (**Witmack**).
- <sup>14</sup> *Toner* at [11].
- <sup>15</sup> *Terra AG Services Ltd v Griffith City Council* [2017] NSWLEC 167 at [53].
- <sup>16</sup> *Zappala Family Co Pty Ltd v Brisbane City Council & Ors* [2014] QCA 147 at [56].
- <sup>17</sup> *Cascone* at 381.
- <sup>18</sup> *St Kilda City Council v Perplat Investments Pty Ltd* (1990) 72 LGRA 378, 392; *Cascone* at 381.
- <sup>19</sup> *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44 at [45].
- <sup>20</sup> *Witmack* at [38].
- <sup>21</sup> *Noosa Shire Council v 64 Gateway Drive Pty Ltd* [2021] QPEC 19.
- <sup>22</sup> *Mirvac Queensland Pty Ltd v Ipswich City Council & Anor* [2019] QPEC 62.
- <sup>23</sup> *Wormell Pty Ltd v Gold Coast City Council & Anor (No 2)* [2021] QPEC 22.
- <sup>24</sup> *O'Keefe* at [535].
- <sup>25</sup> *Woolworths* at [38].



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