

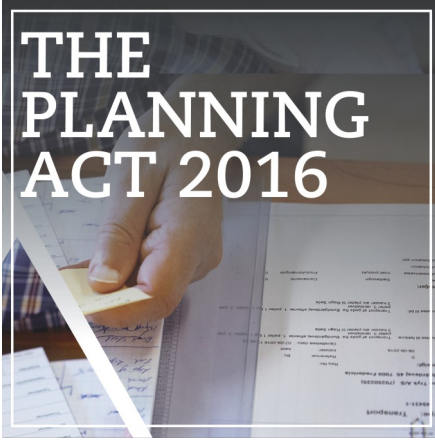
# Planning & Environment Update

May 2018

p&e Law

planning, environment & native title law

## APPEALS FILED AFTER THE COMMENCEMENT OF THE PLANNING ACT 2016



On 30 April 2018, Her Honour Judge Kefford DCJ delivered her Judgment in *Jakel Pty Ltd & Ors v Brisbane City Council & Anor* [2018] QPEC 21.

### The Issue

One of the primary issues in this case was whether the decision making regime under the *Sustainable Planning Act 2009 (SPA)* or the *Planning Act 2016 (PA)* applies, in respect of a development application that was:

1. lodged while the SPA was in force;
2. decided after commencement of the PA; and
3. the subject of an appeal filed after commencement of the PA (on 3 July 2016).

Both parties accepted that pursuant to section 311(4) of the PA, the administrative steps/process applicable to the appeal are those prescribed under the PA.

The dispute related to the applicable assessment and decision frameworks.

### The Decision

Her Honour held that pursuant to section 311(1)(c) and (4) of the PA, the appeal was to be heard and determined under the new legislative regime, ie under the PA.

Section 311(1) and (4) state:

*“311 Proceedings generally*

- (1) *Subject to section 312, this section applies to a matter under the old Act, if a person—*
  - (a) *had started proceedings before the commencement but the proceedings had not ended before the commencement; or*



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- (b) *had, immediately before the commencement, a right to start proceedings; or*
- (c) *has a right to start proceedings that arises after the commencement in relation to—*
  - (i) *a statutory instrument mentioned in section 287; or*
  - (ii) *an application mentioned in section 288.*
- (4) *For proceedings mentioned in subsection (1)(b) or (c), proceedings may be brought only under this Act”.*

Subsection 311(1)(c) is relevant in this case. However, the same outcome would apply under (b) where Council decided the application prior to commencement of the PA and the appeal was filed after commencement of the PA.

### Changes in the Assessment and Decision-making Framework under the PA

Council submitted that the SPA assessment regime applied, and that *“to construe the legislation in a manner that requires the Court on appeal to make the decision on a different basis to that on which the assessment manager made the decision is an absurd result “.*

Her Honour did not accept that the result is absurd and stated in her Reasons for Judgment: *“It is the consequence of the appeal being by way of hearing anew ... Further, to the extent that the Planning Act 2016 requires the Court to make a decision on a different basis than that which applied during the assessment of the development application, this situation only applies to appeals instituted after the commencement of the Planning Act 2016 ... It is the basis on which the decision is to be made (ie the assessment process and decision rule) that has changed, not the nature of the decision ...<sup>1</sup>”.*

Accordingly, Her Honour, acknowledged that there have been changes in the assessment and decision making regime under the PA. These changes include the removal of the conflict/sufficient grounds test that applied under section 326(1) of the SPA. .

On pages 29 and 30 of the Judgment, Her Honour noted that the Court reached a different conclusion in *Guerin v Scenic Rim Regional Council & Anor* QPEC 016. However, Her Honour notes that in that case:

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<sup>1</sup>Paragraphs 83 – 86 of *Jakel Pty Ltd & Ors v Brisbane City Council & Anor* [2018] QPEC 21

<sup>2</sup>See section 60 of the Planning Act 2016, and related provisions

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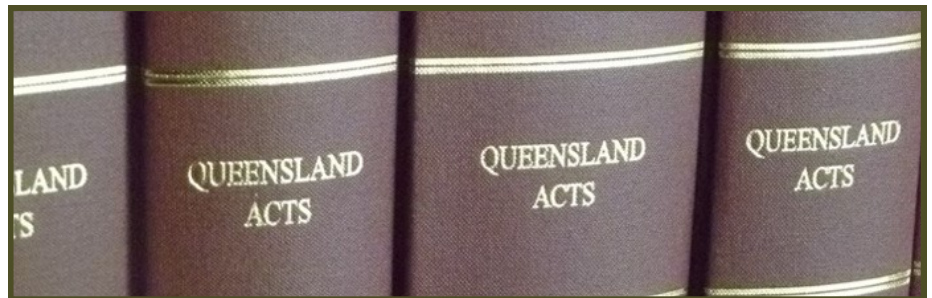
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- both the Appellant and Respondent submitted that the appeal was to be heard and determined under the SPA regime; and
- the parties did not draw the Court's attention to contextual matters that Her Honour considered relevant, as outlined in Her Judgment.

### Implications

The *Jake* decision will have implications for the assessment of some development applications decided on appeal. As submitted by Council in this case, the assessment and decision making regime in an appeal will differ from the regime applicable to Council's assessment of a development application, in the circumstances described above.

Her Honour's finding means that the decision rules under the PA will be applied in the determination of appeals started under the PA about development applications made under the SPA. It is important to note that in those appeals, the court will assess the application against the planning instruments that were in force when the development application was first made, but will be entitled to have regard to later instruments or amendments which come into force before the appeal is decided.



If you would like more information on the above topic or advice generally,

**Freecall 1300 303 866**

please do not hesitate to contact

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This information provides advice of a general nature only and should not be relied upon as legal advice.