

***Atkinson v Minister for Lands for NSW (No 2)* [2010] FCA 1477**

Jagot J, 16 December 2010

Issue

The issue before the Federal Court was whether to vary self executing orders made on 1 October 2010 requiring compliance by 29 October 2010. The applicant, by notice of motion, sought an exercise of the court's discretion to extend time which would have effectively reinstated the proceedings. The court refused to vary the orders.

Background

The applicant did not comply with an order to file and serve an amended claimant application and all material on which the applicant sought to rely by 29 October 2010, failing which the proceedings would stand dismissed. Therefore, the proceedings were dismissed. However, the applicant had filed and served six folders of primary material on 29 October 2010 and sought to file at least two more folders of material and an amended native title application. The court was told this was all the material upon which the applicant would rely. However, the two additional folders and the amended application had not been served on the other parties and so they had not had a chance to consider their position. Further, there was 'at least some doubt that the material is all of the material on which the applicants seek to rely' because there was an affidavit that indicated the applicant intended to file a further folder of evidence and at least 10 witness statements—at [5] to [6].

Fairness

Justice Jagot held that the applicant must:

- explain why the 1 October 2010 orders were not complied with;
- give the other parties 'an adequate opportunity to consider all of the material said to respond to the ... orders';
- advise the court as to whether or not the material was now complete and, if it was not, 'provide a clear explanation of what further material might be required'—at [9].

Her Honour found that: 'None of those requirements have been met today'—at [9]. Further, the evidence was that there was no funding to bring these proceedings to completion. Therefore, the applicant could instead:

Focus ... resources on the collation of the material in substance on which they wish to rely and the commencement of fresh proceedings when that material is ready. That, however, is a matter for the applicants—[10].

Decision

Jagot J decided it was not appropriate to adjourn these proceedings 'because there is no indication as to when the notices of motion might be ready for determination'. Therefore, both notices of motion were dismissed—at [11].