

## ***Gale v NSW Minister for Land and Water Conservation* [2011] FCA 77**

Jagot J, 2 February 2011

### **Issue**

The issues before the Federal Court were whether to grant leave to discontinue a claimant application with conditions imposed on the making of another application by the same group and whether to make an order in relation to costs.

### **Background**

A claimant application was lodged on behalf of the Darug Tribunal Aboriginal Corporation in May 1997. It was amended in May 2000 and accepted for registration in December 2000.

On 31 March 2004, Justice Madgwick found in *Gale v Minister for Land and Water Conservation* (NSW) [2004] FCA 374 (the Gale proceeding) that native title did not exist because there was no evidence of a body of traditional laws and customs acknowledged or observed as required by s 223(1) of the *Native Title Act 1993* (Cwlth) (NTA). It was accepted that the claim dealt with in that matter and the claim dealt with in this matter were connected. The applicant sought leave to discontinue under O 22 r 2(2) of the *Federal Court Rules*. This was not opposed.

### **Decision – leave granted, conditions imposed**

Justice Jagot was persuaded by the submission of Deerubbin Local Aboriginal Land Council (DLALC) that conditions should be imposed upon the commencement of any new proceeding by the same claim group because the maintenance of this proceeding had prevented DLALC from fully exercising rights which would otherwise be vested in it by the *Aboriginal Land Rights Act 1983* (NSW). Therefore, her Honour made orders preventing the filing of a further claimant application on behalf of the same claim group (however described) without the leave of the court unless that claim was filed in response to either a notice given under s. 29 of the NTA or a non-claimant application—at [27], [28] and [30].

### **Costs**

DLALC sought an order for its costs from 31 March 2004 on the basis that:

- from the date of the Madgwick J's judgment (31 March 2004), it was or should have been apparent to the applicant that this claim could not proceed;
- this proceeding was kept on foot as leverage to induce the state government to enter into an Indigenous Land Use Agreement.

However, Jagot J was not persuaded that the circumstances warranted departure from the usual starting-point identified in s. 85A(1), i.e. that the parties bear their own costs—at [26].