



HIGH COURT OF AUSTRALIA

13 May 2015

STATE OF QUEENSLAND v TOM CONGOO, LAYNE MALTHOUSE AND JOHN WATSON
ON BEHALF OF THE BAR-BARRUM PEOPLE #4 & ORS

[2015] HCA 17

Today the High Court dismissed an appeal from a decision of the Full Court of the Federal Court of Australia, which held that military orders made under reg 54 of the National Security (General) Regulations 1939 (Cth) in relation to certain land did not extinguish the first respondents' native title rights and interests that subsisted on the land.

Section 5(1)(b)(i) of the *National Security Act* 1939 (Cth) provided for the making of regulations for securing the public safety and the defence of the Commonwealth, and in particular for authorising the taking of possession or control, on behalf of the Commonwealth, of any property. The Regulations were enacted pursuant to that section. Regulation 54(1) of the Regulations provided that if it appeared to the Minister of State for the Army to be necessary or expedient to do so in the interests of public safety, the defence of the Commonwealth or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the Commonwealth, the Minister could, on behalf of the Commonwealth, take possession of any land and give such directions as appeared necessary or expedient in connection with taking possession.

Between 1943 and 1945, a delegate of the Minister made military orders under reg 54 with respect to land, which was thereafter used as an artillery range and a live fire manoeuvre range for the training of infantry and armoured units. The military orders directed a particular officer to occupy the land, authorised that officer to do anything in relation to the land that the holder of an estate in fee simple in the land could do by virtue of that interest, and prohibited all other persons from exercising "any right of way over the land or any other right relating thereto". The military orders ceased to take effect no later than six months after the war finished.

The first respondents, the Bar-Barrum People, brought an application in the Federal Court for a determination of native title over land, part of which had been subject to the military orders. A Special Case was referred to the Full Court of the Federal Court setting out questions about the effect of the military orders on the native title rights and interests of the Bar-Barrum People. The parties accepted that, subject to the effect of the military orders, the Bar-Barrum People had native title rights and interests over the land. The Full Court of the Federal Court, by majority, held that the military orders did not have the effect of extinguishing the native title rights and interests.

By grant of special leave, the appellant appealed to the High Court. Three Justices would have dismissed the appeal, holding that the military orders did not have the effect of extinguishing the native title rights and interests. Three Justices would have allowed the appeal, holding that by taking exclusive possession of the land under the military orders, the Commonwealth asserted rights which were inconsistent with, and thereby extinguished, the native title rights and interests.

Where the High Court is equally divided in opinion, s 23(2)(a) of the *Judiciary Act* 1903 (Cth) provides that the decision appealed from shall be affirmed. Accordingly, the High Court ordered that the appeal be dismissed.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*