

STATE OF QUEENSLAND v. CONGOO & ORS (B39/2014)

Court appealed from: Full Court of the Federal Court of Australia
[2014] FCAFC 9

Date of judgment: 21 February 2014

Date special leave granted: 4 September 2014

In September 2001, the Bar Barrum People (the first respondents) made an application for a determination of native title over land on the Atherton Tableland in Far North Queensland. During the Second World War, extensive portions of that land were subject to five successive military orders (“the military orders”), made pursuant to the *National Security Act 1939* (Cth) and its Regulations. The issue is whether these orders impacted on the first respondents’ native title.

In August 2013, Justice Logan referred the following questions, together with a special case, to the Full Federal Court:

1. Whether the military orders made under the National Security Regulations were an acquisition of the property of the Bar Barrum People otherwise than on just terms contrary to s 51(xxxi) of the Constitution;
2. If yes, whether the Regulations underpinning the military orders constitute “past acts” under the *Native Title Act 1993* (Cth) (“the NTA”) and, if so, whether those past acts were validated under the NTA; and
3. Whether making the military orders extinguished native title rights and, if not, whether being in occupation pursuant to the military orders, extinguished native title rights and interests.

A majority of the Full Court (North and Jagot JJ, Logan J dissenting) held that the military orders did not extinguish any native title rights of the Bar Barrum People. The majority distinguished the effect of the military orders on native title from the effect of leases and fee simple grants, and held that it was apparent from the legislative scheme that all underlying rights and interests should continue.

Justice Logan (dissenting) found that when the military orders were made, they were of indefinite duration, proprietary in character and comprehensive in the rights they conferred on the Commonwealth, and that they were inconsistent with the continued existence of any of the native title rights claimed. His Honour further found that the Commonwealth took possession of the special case land merely by making the military orders. It was not necessary for the Commonwealth to occupy the land before taking possession of it.

The grounds of appeal are:

- The Full Federal Court erred in holding that the military orders made pursuant to regulation 54 of the *National Security (General) Regulations (Cth)* did not have the effect of extinguishing all the native title rights and interests with respect to the special case land.
- The Full Federal Court erred in holding that regulation 54 of the *National Security (General) Regulations (Cth)* did not allow the Commonwealth to take possession of the special case land simply by the making of orders purporting to take possession of that land.