HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL AND GAGELER JJ

JOAN MONICA MALONEY APPELLANT

AND

THE QUEEN RESPONDENT

Maloney v The Queen
[2013] HCA 28
19 June 2013
B57/2012

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

C A Ronalds SC and J K Kirk SC with S E Pritchard SC and A L McAvoy for the appellant (instructed by Aboriginal & Torres Strait Islander Legal Service (Qld))

W Sofronoff QC, Solicitor-General of the State of Queensland with S A McLeod and A D Scott for the respondent (instructed by Crown Solicitor (Qld))

Interveners

J T Gleeson SC, Acting Solicitor-General of the Commonwealth with C L Lenehan and F T Roughley for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Hinton QC, Solicitor-General for the State of South Australia with M J Wait for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

G R Donaldson SC, Solicitor-General for the State of Western Australia with C S Bydder for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

K L Eastman SC for the Australian Human Rights Commission, intervening (instructed by Australian Human Rights Commission)

M J Richards with S M Fitzgerald for the National Congress of Australia's First Peoples Limited, appearing as amicus curiae (instructed by Human Rights Law Resource Centre Ltd)

CATCHWORDS

Maloney v The Queen

Discrimination law – Racial discrimination – Certain geographical areas on Palm Island subject to restrictions as to nature and quantity of liquor which may be possessed – Palm Island population overwhelmingly Aboriginal – Appellant, an Indigenous member of Palm Island community, convicted of possessing liquor in restricted area on Palm Island – Whether restrictions affected enjoyment of right to equal treatment before tribunals protected by Art 5(a) of International Convention on the Elimination of All Forms of Racial Discrimination ("Convention") – Whether restrictions affected enjoyment of right to own property protected by Art 5(d)(v) of Convention – Whether restrictions affected enjoyment of right of access to places or services for use by general public protected by Art 5(f) of Convention – Whether restrictions engaged s 10 of *Racial Discrimination Act* 1975 (Cth) – Whether restrictions valid as special measure within meaning of s 8 of *Racial Discrimination Act*.

Constitutional law (Cth) – Inconsistency between Commonwealth and State laws – Whether State law inconsistent with Commonwealth law and invalid to extent of inconsistency pursuant to s 109 of Constitution.

Words and phrases – "human rights or fundamental freedoms", "racial discrimination", "right of access to any place or service intended for use by the general public", "right to equal treatment before the tribunals and all other organs administering justice", "right to own property", "special measure".

Constitution, s 109.
Liquor Act 1992 (Q), ss 168B, 173G, 173H.
Racial Discrimination Act 1975 (Cth), ss 8, 10.
Liquor Regulation 2002 (Q), ss 37A, 37B, Sched 1R.

FRENCH CJ.

Introduction

1 The appellant, who is an Indigenous resident of Palm Island in Queensland, was charged on 31 May 2008 in the Magistrates Court for the District of Townsville with possession of more than a prescribed quantity of liquor in a restricted area on Palm Island contrary to s 168B of the *Liquor Act* 1992 (Q) ("Liquor Act").

2 Palm Island is a "community government area" within the meaning of the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* 1984 (Q)[1]. It is subject to regulations made under ss 173G and 173H of the Liquor Act declaring it a restricted area and restricting the nature and quantity of liquor which people may have in their possession in the community area on the Island[2]. The community itself is composed almost entirely of Indigenous people.

3 The appellant did not appear before the Magistrates Court. She entered no plea to the charge. The magistrate proceeded on the basis of facts agreed between the parties. It was agreed that the police had intercepted a motor vehicle on Park Road, Palm Island and that the appellant was an occupant of that vehicle. A black backpack in the boot of the vehicle was found to contain one 1125 ml bottle of Jim Beam bourbon and one 1125 ml bottle of Bundaberg Rum which was three-quarters full. The appellant admitted to being the owner of the liquor. A fine of $150 was imposed, to be paid within two months with one day imprisonment in default of payment.

4 The appellant appealed against the conviction to the District Court of Queensland[3] contending, inter alia, that s 168B of the Liquor Act, regulations made under the Act and the restrictions which they imposed relating to possession of alcohol on Palm Island were invalid by reason of inconsistency with s 10 of the *Racial Discrimination Act* 1975 (Cth) ("RDA"). Section 10 relevantly provides that if a State law has the effect that persons of a particular race do not enjoy a right enjoyed by persons of another race or enjoy it to a more

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1 *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* 1984 (Q), s 4.

2 Liquor Regulation 2002 (Q), ss 37A, 37B, Sched 1R, s 1(a) ("Liquor Regulation"). The restriction extends to the foreshore and the jetty, effectively preventing any alcohol except of that nature and quantity from being brought onto the Island: Sched 1R, s 1(b) and (c).

3 Pursuant to the *Justices Act* 1886 (Q), s 222.

limited extent, the person adversely affected shall, by force of s 10, enjoy that right to the same extent as the persons of that other race. The appellant's appeal to the District Court[4] and a subsequent application for leave to appeal to the Court of Appeal of the Supreme Court of Queensland[5] were dismissed[6]. The Court of Appeal held, by majority, that s 10 did not apply, but in any event, unanimously, that the impugned legislation was a "special measure" taken for the sole purpose of securing the adequate advancement of the Indigenous people of Palm Island and that by force of s 8 of the RDA s 10 did not apply to that legislation.

5 On 5 October 2012, this Court (French CJ and Crennan J) granted special leave to the appellant to appeal against the decision of the Court of Appeal[7]. The appeal should be dismissed on the basis that the impugned provisions were a special measure within the meaning of s 8 of the RDA.

6 The appeal requires an examination of the interaction between ss 8 and 10 of the RDA, which are of general application, and the specific provisions of the Liquor Act and regulations made under it, which underpin the charge brought against the appellant. It is convenient to begin by consideration of the relevant provisions of the RDA.

The statutory framework — the RDA

7 The purpose of the RDA, as appears from its Preamble, is to provide for the prohibition of racial discrimination and certain other forms of discrimination and to give effect to the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"). The term "racial discrimination" is defined in Art 1(1) of the ICERD to mean:

> "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

8 By Art 2 of the ICERD the parties to it "undertake to pursue by all appropriate means ... a policy of eliminating racial discrimination in all its

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4 *Maloney v Queensland Police Service* [2011] QDC 139.

5 Pursuant to the *District Court of Queensland Act* 1967 (Q), s 118(3).

6 *R v Maloney* [2013] 1 Qd R 32.

7 [2012] HCATrans 243.

forms". By Art 2(1)(c) each State Party must take effective measures "to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists". Each State Party is also required, by Art 2(1)(d), to "prohibit ... by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization".

9 Part II of the RDA, comprising ss 8 to 18A, is entitled "Prohibition of racial discrimination". Section 9(1), which is not directly in issue in this case, makes it unlawful to do any act which involves racial discrimination within the meaning of that term in the ICERD as defined by Art 1(1)[8]. Other provisions of Pt II prohibit specific kinds of racial discrimination[9]. Section 10 of the RDA, entitled "Rights to equality before the law", relevantly provides[10]:

> "(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention."

The non-exhaustive definition of "right" in s 10(2) picks up the enumerated rights in Art 5 of the ICERD and the larger class referred to in Art 1(1)[11], namely:

> "human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

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8 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 264 per Brennan J; [1982] HCA 27.

9 RDA, ss 14-16.

10 Section 10(3) brings within the scope of s 10(1) laws providing for non-consensual management of the property of Aboriginal and Torres Strait Islander persons but is not directly relevant for present purposes.

11 *Gerhardy v Brown* (1985) 159 CLR 70 at 85-86 per Gibbs CJ, 101 per Mason J; [1985] HCA 11.

That class of rights is not limited to legal rights enforceable under municipal law[12]. In the event, the appellant relied only upon enumerated rights in Art 5 in her invocation of s 10[13].

10 Section 10 was evidently inserted in the RDA to give effect to Art 2(1)(c) of the ICERD[14]. It is said to have been designed to bring about equality before the law[15]. It might more modestly be described as designed to overcome inequality before the law based on race, colour or national or ethnic origin. Two important applications of s 10(1) were identified by Mason J in *Gerhardy v Brown*[16] in reasoning approved by the plurality in *Western Australia v Ward*[17]:

- If a State law creates a right which is not universal because it is not conferred on people of a particular race, then s 10 will supply the right the subject of that omission and confer that right upon persons of that race. The right conferred by s 10 will be complementary to the rights conferred by the State law and the Commonwealth and State laws can stand together.

- If a State law prohibits persons of a particular race from enjoying a human right or fundamental freedom enjoyed by persons of another race, s 10 will confer that right upon the persons the subject of the prohibition. In that application, s 10 permits that which the State law prohibits and so will be inconsistent with the State law and, by reason of s 109 of the Constitution, will prevail[18].

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12 *Mabo v Queensland (No 1)* (1988) 166 CLR 186 at 217 per Brennan, Toohey and Gaudron JJ; [1988] HCA 69.

13 ICERD, Arts 5(a), 5(d)(v) and 5(f), which are set out later in these reasons.

14 *Viskauskas v Niland* (1983) 153 CLR 280 at 294; [1983] HCA 15.

15 *Gerhardy v Brown* (1985) 159 CLR 70 at 94 per Mason J; *Mabo v Queensland (No 1)* (1988) 166 CLR 186 at 198 per Mason CJ, 205 per Wilson J.

16 (1985) 159 CLR 70 at 98-99.

17 (2002) 213 CLR 1 at 99-100 [106]-[107]; [2002] HCA 28.

18 See for example *Miller v Miller* (1978) 141 CLR 269; [1978] HCA 44 (prohibition in State law on obtaining evidence by listening through extension telephone inconsistent with Commonwealth law permitting such conduct); *Yanner v Eaton* (1999) 201 CLR 351; [1999] HCA 53 (prohibition on taking and keeping fauna in *Fauna Conservation Act* 1974 (Q) directly inconsistent with rights conferred by s 211 of *Native Title Act* 1993 (Cth)).

The plurality in *Ward* also included in the second category a State law which deprives persons of a particular race of a human right or fundamental freedom otherwise enjoyed by all regardless of race[19]. An example of such a deprivation was the *Queensland Coast Islands Declaratory Act* 1985 (Q), s 3 of which purported to extinguish native title on all islands within a defined area in the Torres Strait. It was held in *Mabo v Queensland (No 1)*[20] to be inconsistent with s 10(1) of the RDA, which had the effect that the Miriam People, who sought recognition of their traditional native title, could enjoy their purportedly extinguished rights. The State Act was invalid to the extent of that inconsistency[21].

11 An important feature of s 10 is that it does not require that the law to which it applies make a distinction expressly based on race. The section is directed to the discriminatory operation and effect of the legislation[22]. It provides a mechanism to overcome the effects of Commonwealth, State or Territory legislation to which it applies.

12 The appellant's first line of argument in this Court was that the impugned provisions of the Liquor Act and the Liquor Regulation imposing the restrictions which gave rise to charges against her affected her rights under Arts 5(a), 5(d)(v) and 5(f) of the ICERD in a racially discriminatory way and, being inconsistent with s 10, were invalid. She then had to meet the argument that, even if one or more of her rights were so affected, the impugned provisions were a "special measure" within the meaning of s 8 of the RDA and s 10 did not apply to them. That line of argument requires consideration of s 8.

13 Section 8(1) of the RDA provides that Pt II does not apply to, or in relation to the application of, "special measures to which paragraph 4 of Article 1 of the [ICERD] applies"[23]. Article 1(4) excludes "special measures" from the definition of "racial discrimination" in Art 1(1):

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19 (2002) 213 CLR 1 at 100 [107].

20 (1988) 166 CLR 186.

21 See also *Western Australia v Ward* (2002) 213 CLR 1 at 101-102 [111].

22 *Gerhardy v Brown* (1985) 159 CLR 70 at 97, 99 per Mason J; *Mabo v Queensland (No 1)* (1988) 166 CLR 186 at 198-199 per Mason CJ, 216-219 per Brennan, Toohey and Gaudron JJ, 231-232 per Deane J; *Western Australia v Ward* (2002) 213 CLR 1 at 103 [115].

23 It excepts measures in relation to which s 10(1) applies by virtue of s 10(3), which are not material for present purposes.

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

Article 1(4) should be read with Art 2(2), which, subject to a proviso similar to that appearing in Art 1(4), obliges States Parties, when circumstances so warrant, to take "special and concrete measures" broadly of the kind referred to in Art 1(4)[24].

14 The term "special measures", as used in the ICERD, is the criterion for the qualification, created by s 8 of the RDA, upon the prohibitions imposed in Pt II of that Act and the remedial operation of s 10. It is to be construed according to its meaning in the ICERD and therefore according to the rules of construction applicable to the ICERD by Art 31(1) of the Vienna Convention on the Law of Treaties (1969) ("Vienna Convention")[25]:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

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24 "Special measure" provisions also appear in Art 5 of the Discrimination (Employment and Occupation) Convention of the International Labour Organisation (1958) and in Art 4 of the Convention on the Elimination of All Forms of Discrimination against Women (1979); see generally Freeman, Chinkin and Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*, (2012) at 124-129.

25 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 265 per Brennan J, who applied that interpretive approach to the RDA generally. See also *The Commonwealth v Tasmania* (*The Tasmanian Dam Case*) (1983) 158 CLR 1 at 177 per Murphy J; [1983] HCA 21; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230 per Brennan CJ, 240 per Dawson J, 251-253 per McHugh J, 277 per Gummow J; [1997] HCA 4; *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at 24-25 [67] per McHugh J; [2004] HCA 18; *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 87 ALJR 410 at 415 [8] per French CJ and Gageler J; 295 ALR 596 at 599; [2013] HCA 5.

Also relevant to interpretation is Art 31(3) of the Vienna Convention, which provides:

> "There shall be taken into account, together with the context:
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> (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
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> (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
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> (*c*) any relevant rules of international law applicable in the relations between the parties."

15 Difficulties can follow from the incorporation into a domestic law of criteria designed for an international instrument when those criteria have to be applied to the determination of rights and liabilities in a matter arising under that law in a municipal court. As Gummow J said in *Applicant A v Minister for Immigration and Ethnic Affairs*[26]:

> "The text of the international instrument may lack precision and clarity and may have been expressed in attractive but loose terms with a view to attracting the maximum number of ratifications. The terms of the criteria therein ... may be difficult of comprehension and application in domestic law. Moreover, their application in domestic law falls to administrators whose decisions, under the Australian structure of government, are, in the absence of an excess of constitutional authority, subject to curial involvement only by the limited processes of judicial review." (footnotes omitted)

The application in a court of criteria derived from an international instrument may require consideration by the court of whether it is constitutionally competent to apply the criteria and, if so, to what extent. Obligations imposed by international instruments on States do not necessarily take account of the division of functions between their branches of government. The difficulty is compounded when the interpretation of the international instrument is said to have been subject to change by reference to practices occurring since the enactment of legislative provisions implementing it into domestic law. Such practices may, by operation of Art 31(3) of the Vienna Convention, be taken into account in interpretation of the treaty or convention for the purposes of

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26 (1997) 190 CLR 225 at 275.

international law[27]. They may lead to its informal modification[28]. However, they cannot be invoked, in this country, so as to authorise a court to alter the meaning of a domestic law implementing a provision of a treaty or convention[29].

16 The word "measure" in Art 1(4) necessarily includes action by States Parties and therefore action taken by the legislative and executive branches of government[30]. Any legislative "measure" is likely to be linked, as it is in this case, to executive and judicial action implementing or enforcing the measure. In this case, enforcement of the impugned law was effected by way of prosecution, adjudication, and the imposition of a penalty.

17 The term "special" in Art 1(4) may be taken, in context, to describe measures whose purposes, in their formal application or in their practical operation and effect, are directed to particular groups and/or individuals. Article 1(4) is concerned with a species of the genus special measure whose attributes are not easily extracted from the difficult wording of the Article. That difficulty, as Deane J pointed out in *Gerhardy*, "go[es] beyond the possibly unavoidable vagueness of words such as 'adequate' and concepts such as 'human rights' and 'fundamental freedoms'."[31] Nevertheless, Deane J read the "general

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27 See eg, *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213 at 229-230 [36] per French CJ, 238-239 [65] per Gummow, Crennan, Kiefel and Bell JJ; [2012] HCA 28.

28 Waldock, "Third report on the law of treaties", (1964) 2 *Yearbook of the International Law Commission* 5 at 60.

29 As to the use of subsequent practice in the "evolutive interpretation" of treaties, see generally Arato, "Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences", (2010) 9 *The Law and Practice of International Courts and Tribunals* 443; Feldman, "Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice Derived from WTO Dispute Settlement", (2009) 41 *New York University Journal of International Law and Politics* 655 at 695-703; McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", (2005) 54 *International and Comparative Law Quarterly* 279 at 282-284.

30 This is not to exclude the possibility that some kinds of judicial function may constitute a "special measure", nor the possibility that non-State action within a State and permitted by the State may constitute a "special measure".

31 (1985) 159 CLR 70 at 148.

purport" of Art 1(4), subject to the proviso contained in that Article, as excluding from the ambit of racial discrimination[32]:

> '"special measures taken for the sole purpose' of securing the development and protection of disadvantaged racial or ethnic groups or individuals belonging to them to the extent necessary to ensure to such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms."

18 Beyond identification of the general purport of Art 1(4), it is necessary to distinguish those things which define the content of the "sole purpose" of the "special measures" referred to in the Article from the factual circumstances in which that purpose is engaged. Taking that approach, the circumstances required for a "special measure" to be taken are:

- the existence within a State Party of certain racial or ethnic groups or individuals;

- the existence of a requirement for the protection of those groups or individuals in order to ensure their equal enjoyment or exercise of human rights and fundamental freedoms.

The sole purpose of a "special measure" in those circumstances must be to secure the adequate advancement of those racial or ethnic groups or individuals to ensure their equal enjoyment or exercise of human rights and fundamental freedoms.

19 The circumstances and the purpose so identified direct attention to the proper function of a court in responding to a claim that a particular law is or is not a special measure for the purposes of s 8(1) of the RDA. There are limits to the constitutional functions and competencies of courts in making evaluative judgments about the existence of a necessity for protection of a racial or ethnic group or individual and, if such necessity exists, what constitutes "adequate advancement" towards their equal enjoyment or exercise of human rights and fundamental freedoms.

20 Brennan and Deane JJ in *Gerhardy* delineated the respective functions of the political branch of government and the courts in determining whether a law is a special measure. In summary, Brennan J made the following observations:

- When the legal rights and liabilities of individuals turn on the character of a law as a special measure, the court which has to determine those rights

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32 (1985) 159 CLR 70 at 148.

> or liabilities is bound to decide, for the purposes of municipal law, whether it bears that character[33].

- When the character of a special measure depends in part upon a political assessment about the need for advancement of a racial group and the measure that is likely to secure the advancement necessary, the court must accept the assessment made by the political branch of government[34].

- The court can determine whether the political branch acted reasonably in making the assessment which it did[35]. That is to say, the court can determine whether the assessment made by the political branch could reasonably be made[36].

Deane J took a similar approach to the question whether laws had been made for the "sole purpose" referred to in Art 1(4). His Honour said[37]:

> "They will not be properly so characterized unless their provisions are capable of being reasonably considered to be appropriate and adapted to achieving that purpose."

That was not a prescription for merits review of legislation[38]:

> "Beyond that, the Court is not concerned to determine whether the provisions are *the* appropriate ones to achieve, or whether they will in fact achieve, the particular purpose." (emphasis in original)

21 Consistently with the approach adopted by their Honours and the identification in these reasons of the circumstances in which a special measure may be taken and the sole purpose for which it may be taken, the court, in proceedings which turn upon the characterisation of a law as a special measure, may:

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33 (1985) 159 CLR 70 at 138.

34 (1985) 159 CLR 70 at 138.

35 (1985) 159 CLR 70 at 138.

36 (1985) 159 CLR 70 at 139.

37 (1985) 159 CLR 70 at 149.

38 (1985) 159 CLR 70 at 149.

- determine whether the law evidences or rests upon a legislative finding that there is a requirement for the protection of a racial or ethnic group or individuals in order to ensure their equal enjoyment or exercise of human rights and fundamental freedoms;

- determine whether that finding was reasonably open;

- determine whether the sole purpose of the law is to secure the adequate advancement of the relevant racial or ethnic group or individuals to ensure their equal enjoyment or exercise of human rights and fundamental freedoms; and

- determine whether the law is reasonably capable of being appropriate and adapted to that sole purpose.

If a court is called upon to make a finding of fact relevant to the characterisation of a law as a "special measure", it is likely to be analogous to a judgment about constitutional facts. It may require the court to take judicial notice of notorious facts and otherwise rely upon material placed before it. Fact-finding of this kind is not like finding facts in an issue between parties[39].

Special measures and the consultation requirement

22 As discussed above, the interpretation of the ICERD, by reference to international practice in its application since it came into effect, is contemplated by Art 31(3) of the Vienna Convention. The transposition of that approach to interpretation of a domestic statute giving effect to the ICERD and using its language is limited in Australia by the limits of the judicial function.

23 An interpretation of a treaty provision adopted in international practice, by the decisions of international courts or tribunals, or by foreign municipal courts may illuminate the interpretation of that provision where it has been incorporated into the domestic law of Australia. That does not mean that Australian courts can adopt "interpretations" which rewrite the incorporated text or burden it with glosses which its language will not bear.

24 The appellant submitted that since *Gerhardy* there have been developments in international jurisprudence and standard setting in relation to the concept of "special measures" and, in particular, the need for consultation and free and informed consent before their implementation. The appellant referred to General Recommendation No 32 adopted in 2009 by the Committee on the Elimination of Racial Discrimination, established pursuant to Art 8(1) of the

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39 *Gerhardy v Brown* (1985) 159 CLR 70 at 88-89 per Gibbs CJ, 105 per Mason J, 141-142 per Brennan J.

ICERD. The relevant part of the recommendation was that "States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities." The appellant also relied upon advice to the like effect, adopted in 2011, by a body called "the Expert Mechanism on the Rights of Indigenous Peoples", established by the United Nations Human Rights Council. She submitted that the recommendation of the Committee and the advice of the Expert Mechanism bore upon the meaning to be given to "special measure" in s 8 of the RDA. That submission should not be accepted. The text of Art 1(4) of the ICERD, as imported by the RDA, did not bring with it consultation as a definitional element of a "special measure". Nor can such a requirement be imported into a text which will not bear it by the subsequent opinions of expert bodies, however distinguished.

25 That being said, it should be accepted, as a matter of common sense, that prior consultation with an affected community and its substantial acceptance of a proposed special measure is likely to be essential to the practical implementation of that measure. That is particularly so where, as in this case, the measure said to be a "special measure" involves the imposition on the affected community of a restriction on some aspect of the freedoms otherwise enjoyed by its members. It can also be accepted, as the appellant submitted, that in the absence of genuine consultation with those to be affected by a special measure, it may be open to a court to conclude that the measure is not reasonably capable of being appropriate and adapted for the sole purpose it purports to serve. As appears below, the impugned legislation had built into it a consultation requirement, and a consultation process was undertaken, although its coverage and adequacy were challenged by a number of deponents in affidavits filed in the District Court appeal. It is also clear enough from the Explanatory Notes to the relevant regulation under the Liquor Act that there was a division of opinion within the Palm Island community about what, if any, measures should be undertaken to restrict the use of alcohol within the community.

26 Against that background, it is necessary to consider the impugned provisions of the Liquor Act and regulations made under it.

Statutory framework — Liquor Act and Liquor Regulation

27 Section 168B(1) of the Liquor Act provided at the relevant time[40]:

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40 In circumstances specified in s 168B(2) and (3) the subsection does not apply to possession of liquor in the ordinary course of lawful business by a licensee or carrier.

> "A person must not, in a public place in a restricted area to which this section applies because of a declaration under section 173H, have in possession more than the prescribed quantity of liquor for the area, other than under the authority of a restricted area permit."

That provision must be read, with Pt 6A of the Liquor Act, at the relevant time comprising ss 173F to 173J, which provides for the making of regulations embodying declarations of the kind referred to in s 168B(1). Section 168B and Pt 6A were introduced into the Liquor Act by the *Indigenous Communities Liquor Licences Act* 2002 (Q) as part of a government response to the Cape York Justice Study Report prepared by the Hon Tony Fitzgerald. As recorded in the Explanatory Notes to the 2002 Bill, that Report said of Indigenous communities in North Queensland[41]:

> "Alcohol abuse and associated violence are so prevalent and damaging that they threaten the communities' existence and obstruct their development."

Consistently with its presentation to the Parliament as a response to the findings of the Cape York Justice Study, the purpose of Pt 6A, as stated in s 173F, is to minimise harm caused by alcohol abuse and misuse and associated violence[42] and alcohol-related disturbances or public disorder[43].

28 The declaration process under Pt 6A, relevant to s 168B, involves two steps:

- the making of a regulation under s 173G(1) declaring an area to be a restricted area — which may encompass a community area or part of a community area[44]; and

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41 Queensland, Legislative Assembly, Indigenous Communities Liquor Licences Bill 2002 (Q), Explanatory Notes at 2.

42 Liquor Act, s 173F(a).

43 Liquor Act, s 173F(b).

44 Liquor Act, s 173G(2). "Community area" is defined in s 4 of the Liquor Act with reference to the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* 1984 (Q), s 4 of which defines it to include a "community government area", which at the relevant time was defined in that section by reference to the *Local Government (Community Government Areas) Act* 2004 (Q), Sched 4. The definition of that term in that Schedule included Palm Island.

- the making of a regulation under s 173H(1) declaring that a restricted area is an area to which s 168B applies and prescribing a quantity of liquor that a person may have in possession in a public place in that restricted area without a restricted area permit[45].

29 Before recommending to the Governor in Council the making of a regulation declaring a community area to be a restricted area, the Minister must be satisfied the declaration is necessary to advance the purpose of Pt 6A[46]. He or she must also have consulted with the community justice group for the community area about the declaration or must have considered a recommendation about the declaration from the group, if it has made one[47]. Failure to comply with those requirements does not affect the validity of a regulation to which they applied[48]. Nevertheless, the question whether there had been consultation in relation to the regulation affecting Palm Island was in issue in the District Court[49].

30 A mechanism for the declaration by regulation of areas pursuant to s 173G and the application to them of s 168B pursuant to s 173H was created by the Liquor Regulation. Schedules to that regulation define community areas to which the relevant declarations were applied[50]. Schedule 1R, which was added to the Liquor Regulation by the Liquor Amendment Regulation (No 4) 2006 (Q), defined each of the following areas to be a restricted area and thereby an area to which s 168B applied:

> "(a) the community area of the Palm Island Shire Council;
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> (b) any foreshore of the community area of the Palm Island Shire Council;
>
> (c) the jetty on Greater Palm Island known as Palm Island jetty."

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45 Liquor Act, s 173H(2).

46 Liquor Act, s 173G(3).

47 Liquor Act, s 173I(2).

48 Liquor Act, s 173I(4).

49 A non-statutory community justice group was in existence on Palm Island before 21 April 2006 as appears from affidavit evidence in the District Court. A statutory community justice group was created by regulation on and from 21 April 2006.

50 Liquor Regulation, ss 37A and 37B.

The prescribed quantity of liquor permitted in the restricted areas so defined, other than in the canteen, was 11.25 litres of beer for which the concentration of alcohol is less than four per cent. The prescribed quantity of any other liquor was zero.

31 The Explanatory Notes to the Liquor Amendment Regulation (No 4) 2006 (Q) state that the Palm Island Community Justice Group and the Palm Island Shire Council had recommended limits on the use of alcohol as part of a community alcohol management strategy. However, the restrictions imposed differed from those recommendations. The Explanatory Notes record that there was ongoing division within the Community Justice Group and between the Community Justice Group and the Council which inhibited community agreement about an alcohol management plan. The plan eventually adopted was said to be based on a compromise between four separate alcohol management plans previously presented to government by the Community Justice Group and the Council[51]. There was said to be agreement across the community that unrestricted alcohol was a major concern that needed to be addressed[52]. The Notes state that the restrictions proposed were "necessary for Palm Island to effectively address its alcohol related issues" and that, in the government's experience, "in other Indigenous communities where similar alcohol related issues were present and an [alcohol management plan] was implemented, the quality of life has generally improved."[53]

The District Court decision

32 In the District Court, the appellant argued, on the basis of affidavit evidence adduced in that Court, that the consultation requirements imposed by the Liquor Act with respect to the restricted area declaration had not been complied with. Durward DCJ held that consultation was "not required as a matter of law"[54], by which his Honour may be taken to have meant that the lack of consultation did not vitiate the making of a regulation declaring a restricted area. So much would seem to flow from s 173I(4). His Honour also held that, in any event, the evidence which had been adduced was insufficient to displace a

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51 Queensland, Legislative Assembly, Liquor Amendment Regulation (No 4) 2006, Explanatory Notes at 2.

52 Queensland, Legislative Assembly, Liquor Amendment Regulation (No 4) 2006, Explanatory Notes at 3.

53 Queensland, Legislative Assembly, Liquor Amendment Regulation (No 4) 2006, Explanatory Notes at 3.

54 [2011] QDC 139 at [59].

strong inference open from the Explanatory Notes to the amendment regulation that a consultation process did occur as a matter of fact[55].

33 His Honour went on to hold, in effect, that the question whether the provisions of the Liquor Act and of the Liquor Regulation imposing the restrictions were a special measure was not justiciable. It was a matter for the legislature[56].

The *Morton* decision

34 The decision of the Court of Appeal dismissing the appellant's appeal must be read in light of its prior decision, concerning the validity of the same restrictions, in *Morton v Queensland Police Service*[57]. That was another case concerning possession of alcohol on Palm Island. The Court of Appeal in *Morton* held, unanimously, that:

- s 168B in its application to Palm Island by operation of ss 173G and 173H and the Liquor Regulation are discriminatory on the grounds of race[58];
- the practical effect of the legislation is to restrict possession of alcohol by members of a group who are overwhelmingly Aboriginal persons[59];
- the impugned provisions were a special measure within the meaning of s 8 of the RDA[60];
- the residents of Palm Island had been adequately consulted[61].

By majority (Chesterman and Holmes JJA), the Court of Appeal further held that, contrary to the submissions on behalf of the appellant, the rights referred to

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55 [2011] QDC 139 at [59].

56 [2011] QDC 139 at [69].

57 (2010) 271 ALR 112.

58 (2010) 271 ALR 112 at 114 [5] per McMurdo P, 129 [54] per Chesterman JA (Holmes JA agreeing with the reasoning of Chesterman JA at 125 [39]).

59 (2010) 271 ALR 112 at 114 [5] per McMurdo P, 129 [54] per Chesterman JA.

60 (2010) 271 ALR 112 at 125 [36]-[37] per McMurdo P, 139 [109]-[110] per Chesterman JA.

61 (2010) 271 ALR 112 at 125 [36] per McMurdo P, 139-140 [111]-[114] per Chesterman JA.

in s 10 are limited to those defined or described by Art 1(1) of the ICERD as "human rights and fundamental freedoms"[62].

The application of s 10

35 The majority view in *Morton* of the class of rights protected by s 10 was accepted by the appellant for the purposes of her appeal to the Court of Appeal[63]. She argued that the impugned legislation deprived her of human rights set out in Arts 5(a), 5(d)(v) and 5(f) of the ICERD. Those rights are:

- the right to equal treatment before the tribunals and all other organs administering justice[64];
- the right to own property alone as well as in association with others[65];
- the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks[66].

36 The appellant's reliance upon the equal treatment right was not well-founded. Her complaint, as a majority (Chesterman JA and Daubney J) of the Court of Appeal characterised it, was not that the Magistrates Court discriminated against her on the basis of race, but that the law pursuant to which she was prosecuted had a discriminatory operation[67]. In this Court the appellant did not argue that she had been treated in the courts of Queensland any differently in matters of procedure from the way in which a non-Aboriginal person would have been treated. She submitted, in effect, that her unequal treatment was constituted by her being charged and convicted for an offence against a law which, in its practical operation and effect, was directed to persons of a particular race. That complaint, however, was not one about equal treatment before the courts. As the respondent submitted, the Liquor Act and the Liquor Regulation did not require any court to apply the law to the appellant in a manner that was different from the way in which the law was applied to non-Aboriginal persons.

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62 (2010) 271 ALR 112 at 129 [58] and 133 [75], cf 118-119 [18] per McMurdo P.

63 [2013] 1 Qd R 32 at 59 [87].

64 ICERD, Art 5(a).

65 ICERD, Art 5(d)(v).

66 ICERD, Art 5(f).

67 [2013] 1 Qd R 32 at 60 [90], cf 36-37 [9]-[15] per McMurdo P.

37 As to the right to own property, referred to in Art 5(d)(v), the Court of Appeal accepted that the impugned law interfered with the appellant's right to possession of a particular kind of liquor in a particular location. However, the right to own property was not absolute, but subject to regulation in the public interest[68]. The right to possess liquor was regulated by different legal systems in many different ways, all reflecting local rather than universal policies and values[69]. Having regard to the objects of Pt 6A of the Liquor Act, the impugned provisions imposed restrictions which were reasonable and legitimate to achieve those stated objectives. They did not have the effect that the human right and fundamental freedom to own property had been infringed[70].

38 With respect to the Court of Appeal, its analysis in relation to the right to own property should not be accepted. The impugned provisions were directed at an Indigenous community. It is not a sufficient answer to the appellant's complaint about those provisions that she was not deprived of her property and that property rights are frequently qualified by regulation, especially in the case of alcohol. In this case, the impugned provisions had the effect that Indigenous persons who were the Palm Island community, including the appellant, could not enjoy a right of ownership of property, namely alcohol, to the same extent as non-Indigenous people outside that community. The impugned provisions effected an operational discrimination notwithstanding the race-neutral language of s 168B of the Liquor Act, under which the appellant was charged.

39 The rights protected by Art 5 are not so weak that their limits can be defined by reference to regulations, however reasonable, which effect operational discrimination by way of restrictions imposed on the people of a particular racial group. Such an argument diminishes, if it does not render otiose, the particular and limited exemption for operational discrimination provided by the special measures provisions of the ICERD. Subject to the application of s 8, s 10 would have applied to invalidate the impugned provisions on the basis of their discriminatory effects on the appellant's right to own property within the meaning of Art 5(d)(v) of the ICERD.

40 As to the appellant's contention that the impugned provisions infringed her right of access to services intended for the general public, a majority of the Court of Appeal (Chesterman JA and Daubney J) accepted the respondent's submission that the right described in Art 5(f) of the ICERD was concerned with discrimination based on race among the occupants of places or the patrons of services. The right did not dictate what services must be supplied. The right was

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68 [2013] 1 Qd R 32 at 41 [30] per McMurdo P, 60 [94] per Chesterman JA.

69 [2013] 1 Qd R 32 at 61 [96] per Chesterman JA.

70 [2013] 1 Qd R 32 at 41 [30] per McMurdo P, 62 [97]-[99] per Chesterman JA.

not infringed by the supply to an outlet's patrons, regardless of their race, of the limited range of goods available for sale[71].

41 The appellant submitted that the impugned provisions denied her the right of access to a service at the Palm Island canteen, being a service intended for use by the general public, namely the ability to purchase and consume alcohol other than light or mid-strength beer. It was submitted for the respondent that the Liquor Act and the Liquor Regulation did not affect the appellant's enjoyment of her right under Art 5(f). The only effect of the impugned provisions was to restrict possession of liquor in public places. It did not affect access to any place or service. That submission should be accepted. The impugned legislation did not affect the appellant's right of access to any place or service intended for use by the general public.

The "special measure" question

42 Although the majority of the Court of Appeal found against the appellant in relation to the operation of s 10, their Honours went on to consider in any event whether the impugned provisions constituted a special measure attracting the application of s 8 as the Court had found in *Morton*. As the Court of Appeal pointed out, the appellant did not seek to challenge the correctness of *Morton*, but to distinguish it on the basis of the affidavit evidence which was said to establish error in the facts underpinning the finding in *Morton*[72]. The affidavit evidence, however, went only to the issue of consultation.

43 The Court of Appeal rejected submissions put by the appellant that, absent the agreement of a substantial majority of the inhabitants or their prior informed and free consent, the impugned provisions could not constitute a special measure. Chesterman JA, with whom Daubney J agreed, held that nothing in Art 1(4) or Art 2(2) rendered prior consent necessary to the validity of a special measure, although it might be relevant for that characterisation[73]. For reasons already given, their Honours were correct in so holding. Their Honours also rejected a contention that a measure could only be special if it were expressed to be temporary. In so doing, their Honours applied *Gerhardy*[74].

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71 [2013] 1 Qd R 32 at 62 [101] per Chesterman JA, cf 41 [27]-[29] per McMurdo P.

72 [2013] 1 Qd R 32 at 41 [32], 49-50 [47] per McMurdo P, 62-63 [102] per Chesterman JA.

73 [2013] 1 Qd R 32 at 69 [118] per Chesterman JA, cf 51 [52] per McMurdo P.

74 [2013] 1 Qd R 32 at 70 [120]-[122] per Chesterman JA, cf 52 [57] per McMurdo P.

44 In addition to her arguments based upon consultation and the requirement for prior informed and free consent, the appellant challenged the characterisation of the impugned provisions as a special measure on the following bases:

- the absence of any or any sufficient evidence to establish the existence of the requisite circumstances, the necessity for the restriction and its purpose;

- want of proportionality in the measure, which involved the criminalisation, within the declared restricted areas, of conduct which would be lawful outside those areas;

- the absence of a temporal limit in the regulation.

As to the last of these points, s 54 of the *Statutory Instruments Act* 1992 (Q) relevantly provides that subordinate legislation expires on 1 September first occurring after the day of its making unless its operation is extended.

45 The appellant's submissions should be considered in light of the task of the court, discussed earlier in these reasons, in determining whether an impugned law is a "special measure" for the purposes of s 8(1) of the RDA. That task is to be undertaken having regard to the respective functions of the legislature, the executive and the court. To the extent it involves any fact-finding in aid of characterisation, that fact-finding is analogous to constitutional fact-finding and is not governed by the rules of evidence applicable to findings of fact on an issue between parties. The characterisation of a law as a "special measure" is, in the end, an answer to a legal question. There is no question of an onus of proof involved in relation to that process of characterisation.

46 Applying the preceding approach, a number of conclusions follow which lead to the dismissal of the appeal:

- Section 168B and Pt 6A of the Liquor Act, read with ss 37A and 37B and Sched 1R of the Liquor Regulation, rest upon legislative findings that there is a requirement for the protection of a number of Indigenous communities in North Queensland from the effects of prevalent alcohol abuse and misuse and associated violence. That finding was supported by the Cape York Justice Study Report, which observed that the level of such abuse threatens the existence and obstructs the development of Indigenous communities in which it occurs.

- There was a judgment made by the Executive Government that the Palm Island community was affected by the problem of alcohol abuse and a finding, reflected in the Explanatory Notes to the Liquor Amendment Regulation (No 4) 2006 (Q), that this was recognised in that community. There was no evidence to suggest that that finding was wrong. The evidence of internal debate on Palm Island, to the extent it was disclosed

in the Explanatory Notes and the affidavit material, was directed to the appropriate response and whether there had been adequate consultation. The requisite legislative findings can be inferred from the Explanatory Notes for the impugned provisions of the Liquor Act and the Liquor Regulation, the stated purpose of Pt 6A and the nature of the mechanisms created by the impugned provisions to control alcohol abuse.

- There was nothing to suggest that the findings, both general and specific, were not open to the Parliament and to the Minister when he recommended the amendment regulation and the application of the restrictions imposed by Sched 1R.

- The sole purpose of the impugned provisions, reflected in their stated purpose and the circumstances which brought them about, was the adequate advancement of the Palm Island community to ensure their equal enjoyment or existence of human rights and fundamental freedoms.

- While there might be debate about alternative and perhaps less restrictive mechanisms that could have been adopted, it cannot be said that the impugned provisions were not reasonably capable of being appropriate and adapted to their purpose. The criminalisation of the conduct prohibited by s 168B does not take the law out of the category of "special measure" as defined in Art 1(4) of the ICERD and incorporated in s 8 of the RDA. Such a provision is not in terms excluded by the text or by implication from the scope of special measures, which must be capable of application to a wide variety of circumstances. In so saying, it may be accepted that "special measures" are ordinarily measures of the kind generally covered by the rubric "affirmative action".

47 The Liquor Act, the Liquor Regulation and Sched 1R to the Liquor Regulation were respectively enacted and proclaimed to deal with a serious social problem affecting Indigenous communities in North Queensland, including the Palm Island community. There were difficult judgments to be made about what was necessary to address that problem. Within the boundaries set by the provisions of the RDA, those judgments were a matter, in this case, for the Parliament and the Executive Government of Queensland. The impugned provisions were properly characterised as a special measure for the purposes of s 8(1) of the RDA.

Conclusion

48 For the preceding reasons, the appeal should be dismissed.

49 HAYNE J. The appellant, an Aboriginal woman resident on Palm Island, Queensland, was charged with having in her possession, on 31 May 2008, in a public place in a restricted area on Palm Island, a bottle of bourbon whiskey and a bottle of rum. She alleged that the provisions of the *Liquor Act* 1992 (Q) ("the Liquor Act") and the Liquor Regulation 2002 (Q) ("the Liquor Regulation") which made it an offence to have particular kinds and quantities of liquor in possession in that place were inconsistent with s 10 of the *Racial Discrimination Act* 1975 (Cth) ("the RDA") and consequently invalid by operation of s 109 of the Constitution. Although the appellant directed her argument in this Court chiefly (perhaps even entirely) to the validity of the relevant provisions of the Liquor Regulation, it is necessary to consider the relevant provisions of both the Liquor Act and the Liquor Regulation. (It is convenient to refer to them together as "the impugned provisions".)

50 The appellant did not appear in the Magistrates Court of Queensland and, on appeal to the District Court of Queensland and on application for leave to appeal to the Court of Appeal of the Supreme Court of Queensland[75], she failed in her challenge to the validity of the impugned provisions. By special leave she appealed to this Court.

51 The appeal raises two principal questions. The RDA provides that the persons of one race shall enjoy rights to the same extent as persons of another race unless the difference in enjoyment is by reason of what are called "special measures". The residents of Palm Island, who were all affected by the impugned provisions, are overwhelmingly Aboriginal persons. The first question is: did the impugned provisions have the effect that Aboriginal persons enjoy a right to a more limited extent than non-Aboriginal persons so as to engage s 10 of the RDA? The second question is: were the impugned provisions a "special measure" within s 8(1) of the RDA with the consequence that s 10 does not apply?

52 In the Court of Appeal, McMurdo P and Chesterman JA (with whom Daubney J agreed) expressed[76] differing opinions about the first question. All members of the Court of Appeal held[77] that the impugned provisions constituted a "special measure".

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75 *R v Maloney* [2013] 1 Qd R 32.

76 [2013] 1 Qd R 32 at 41 [30] per McMurdo P, 62-63 [102] per Chesterman JA (Daubney J agreeing).

77 [2013] 1 Qd R 32 at 53 [64] per McMurdo P, 71 [126] per Chesterman JA (Daubney J agreeing).

53 In this Court, the appellant submitted that the first question should be answered "Yes" and the second "No". These reasons will demonstrate that both questions should be answered "Yes". By reason of the impugned provisions, Aboriginal persons did enjoy a right to a more limited extent than non-Aboriginal persons. But the impugned provisions constituted a "special measure". Accordingly, s 10 of the RDA does not apply to the impugned provisions.

54 To explain and justify these answers, it is necessary to examine the impugned provisions and the relevant provisions of the RDA in some detail.

The Liquor Act and the Liquor Regulation

55 Part 6A (ss 173F-173J) of the Liquor Act provided for the declaration of an area as a "restricted area"[78] and for the declaration of a prohibition on possession of liquor in a public place in a restricted area[79]. Section 168B(1) made it an offence to have in possession, in a public place in a restricted area, more than the prescribed quantity of liquor for the area, other than under the authority of a "restricted area permit"[80].

56 At the time relevant to this appeal, 31 May 2008, the Liquor Regulation declared[81] each of the areas stated in 18 schedules to be a restricted area. The Explanatory Notes for the regulations which inserted these schedules suggest[82] strongly that each of the areas stated in the schedules is associated in some way with an Indigenous community. The details of those associations were not identified or examined in argument. Instead, attention was confined to Sched 1R, which related to Palm Island. The Court of Appeal found[83], and there was no dispute in this Court, that the residents of Palm Island are "overwhelmingly" Aboriginal people.

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78 s 173G.

79 s 173H.

80 See s 103L. No party or intervener submitted that the provision for restricted area permits bore upon the issues arising in the appeal.

81 s 37A.

82 See, for example, Queensland, Legislative Assembly, Liquor Amendment Regulation (No 3) 2006, Explanatory Notes at 1.

83 [2013] 1 Qd R 32 at 38 [18], 58 [84].

57 Schedule 1R declared each of three areas[84] of Palm Island to be a restricted area and stated[85] the prescribed quantity of liquor for each of those areas (other than the licensed premises known as the Palm Island Canteen) to be 11.25 litres of beer in which the concentration of alcohol is less than four per cent[86]. The prescribed quantity of liquor for the canteen was stated[87] to be any quantity of beer in which the concentration of alcohol is less than four per cent. The effect of these provisions was that no person could have any other form of liquor in possession in a public place in a restricted area on Palm Island.

58 Although Pt 6A of the Liquor Act was cast in terms that did not confine its operation to Indigenous communities, there can be no doubt that the mischief to which its provisions were immediately directed was the evil of alcohol-fuelled violence and disturbance in those communities. The purpose of Pt 6A was said, in s 173F, to be to provide for the declaration of areas for minimising "harm caused by alcohol abuse and misuse and associated violence" and "alcohol related disturbances, or public disorder, in a locality". Under s 173G(3), the Minister "must be satisfied the declaration is necessary to achieve the purpose of this part" before recommending the Governor in Council make the declaration. (The declaration was to be made by regulation[88].) The Bill for the Act[89] which inserted Pt 6A into the Liquor Act was described[90] as "part of a package of reforms to address the prevalence of alcohol abuse and violence in Indigenous communities in Cape York and other parts of Queensland". The stated purpose[91] of that Act was "to prevent harm in community areas caused by alcohol abuse and misuse and associated violence". Subsequent Explanatory Notes for

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84 The community area of the Palm Island Shire Council, any foreshore of that community area and the jetty on Greater Palm Island known as Palm Island Jetty.

85 Sched 1R, s 2(1).

86 A quantity equivalent to one case of "mid-strength" or "light" beer.

87 Sched 1R, s 2(2).

88 s 173G(1).

89 *Indigenous Communities Liquor Licences Act* 2002 (Q).

90 Queensland, Legislative Assembly, Indigenous Communities Liquor Licences Bill 2002, Explanatory Notes at 1.

91 *Indigenous Communities Liquor Licences Act*, s 3(1).

regulations made to declare restricted areas described[92] the objective of Pt 6A as being:

> "to minimise harm caused by alcohol abuse and misuse and associated violence, and alcohol related disturbances or public disorder *in Indigenous communities*". (emphasis added)

The RDA

59 The objects of the RDA are, and in both its long title[93] and its preamble[94] are expressed as being, the prohibition and elimination of racial discrimination. These are large objects.

60 This appeal directed particular attention to two provisions of Pt II of the RDA: s 10 and s 8(1). Part II (ss 8-18A) is entitled "Prohibition of racial discrimination". Section 10 bears the heading "Rights to equality before the law". It provides (in part):

> "(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention."

Section 8(1) provides that, subject to a qualification that is not relevant to this appeal, Pt II of the RDA "does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies".

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92 See, for example, Queensland, Legislative Assembly, Liquor Amendment Regulation (No 3) 2006, Explanatory Notes at 1; Queensland, Legislative Assembly, Liquor Amendment Regulation (No 4) 2006, Explanatory Notes at 1.

93 "An Act relating to the *Elimination* of Racial and other Discrimination" (emphasis added).

94 "[I]t is desirable ... to make the provisions contained in this Act for the *prohibition* of racial discrimination" (emphasis added).

61 The Convention to which these provisions refer is the International Convention on the Elimination of All Forms of Racial Discrimination, which was opened for signature on 21 December 1965 and entered into force on 2 January 1969 ("the Convention"). The preamble to the RDA recites that the RDA "make[s] provision for giving effect to the Convention" and this Court has held[95] that the RDA is a valid enactment of the Parliament because it implements Australia's obligations under the Convention. Of course, resort may be had to the Convention in interpreting provisions of the RDA[96]. But, because an Act like the RDA is to be interpreted "by the application of ordinary principles of statutory interpretation"[97], the only extrinsic materials that may bear upon that task are materials of a relevant kind that existed at the time the RDA was enacted. Material published later, such as subsequent reports of United Nations Committees, may usefully direct attention to possible arguments about how the RDA should be construed but any debate about its construction is not concluded by reference to or reliance upon material of that kind[98].

Section 10(1) of the RDA

62 The text of s 10(1) of the RDA shows that its application requires consideration of five questions. First, who are the persons of a particular race, colour or national or ethnic origin whose enjoyment of rights is to be considered? Second, how is it said that those persons do not enjoy, or enjoy to a more limited extent, a right? Third, what is the right that (i) is enjoyed by persons of another race, colour or national or ethnic origin, but which (ii) is not enjoyed (or is enjoyed to a more limited extent) by the persons identified in answer to the first question? Fourth, who are the persons of another race, colour or national or ethnic origin? Fifth, is the absence of enjoyment (or enjoyment to a more limited extent) of that right "by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory"? The order in which the issues raised by these questions should be considered may differ from case to case.

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95 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; [1982] HCA 27.

96 *Acts Interpretation Act* 1901 (Cth), s 15AB(2)(d); *Yager v The Queen* (1977) 139 CLR 28 at 43-44 per Mason J; [1977] HCA 10.

97 *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213 at 238 [65] per Gummow, Crennan, Kiefel and Bell JJ; [2012] HCA 28, citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28 and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47]; [2009] HCA 41.

98 cf *Coleman v Power* (2004) 220 CLR 1 at 27-30 [17]-[24] per Gleeson CJ; [2004] HCA 39.

63 As to the third question (what is the right), s 10(2) provides that a reference in s 10(1) to a right includes a reference to a right of a kind referred to in Art 5 of the Convention. Article 5 records the undertaking of States Parties "to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of" the rights set out in the balance of the Article. Those rights include:

> "(a) The right to equal treatment before the tribunals and all other organs administering justice;
>
> (b) The right to security of person and protection by the State against violence or bodily harm ...;
>
> (c) Political rights, in particular the rights to participate in elections ... to take part in the Government ... and to have equal access to public service;
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> (d) Other civil rights, in particular:
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> ...
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> (v) The right to own property alone as well as in association with others;
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> ...
>
> (e) Economic, social and cultural rights ...;
>
> (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks."

64 The operation of s 10(1) has been examined in a number of previous decisions of this Court including, in particular, *Western Australia v Ward*[99]. The plurality in that case took up and developed a number of propositions that had been made in *Gerhardy v Brown*, especially in the reasons of Mason J[100]. Two of those propositions[101] are of particular relevance to the issues in this appeal.

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99 (2002) 213 CLR 1 at 99-109 [104]-[134]; [2002] HCA 28.

100 (1985) 159 CLR 70 at 97-99; [1985] HCA 11.

101 See *Ward* (2002) 213 CLR 1 at 99-100 [105]-[107].

65 First, s 10(1) does not use the word "discriminatory" or any cognate expression, yet the language of discrimination is used throughout the authorities in which s 10(1) has been considered. That use of language follows from the sub-section's focus on the *enjoyment* of rights by some but not by others or to a more limited extent by others but it must always be kept at the forefront of consideration that it is the statutory text which is controlling. Questions about the *enjoyment* of rights do not necessarily require consideration of the concepts that are often associated with "discrimination". Something more will be said about "discrimination" later in these reasons but it is enough for the moment to notice that questions about the enjoyment of rights require consideration of more than the purpose of the relevant law. So much is also made clear by the opening words of s 10(1): "If, by reason of"[102]. It follows that the operation of s 10(1) is not confined to laws the *purpose* of which can be described as "discriminatory".

66 Second, s 10(1) may be engaged in two different kinds of case. If a relevant law omits to make enjoyment of a right universal, by failing to confer that right on persons of a particular race, s 10(1) operates to confer that right on persons of that race[103]. This may be contrasted with the operation of s 10(1) when a relevant law imposes a discriminatory burden or prohibition. As Mason J said in *Gerhardy*[104]:

> "When racial discrimination proceeds from a prohibition in a State law directed to persons of a particular race, forbidding them from enjoying a human right or fundamental freedom enjoyed by persons of another race, by virtue of that State law, s 10 confers a right on the persons prohibited by State law to enjoy the human right or fundamental freedom enjoyed by persons of that other race. This necessarily results in an inconsistency between s 10 and the prohibition contained in the State law."

And as the plurality added in *Ward*[105]: "The same is true of a State law that deprives persons of a particular race of a right or freedom previously enjoyed by all regardless of race."

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102 *Mabo v Queensland* (1988) 166 CLR 186 at 230; [1988] HCA 69; *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 437; [1995] HCA 47.

103 *Ward* (2002) 213 CLR 1 at 99-100 [106], quoting *Gerhardy* (1985) 159 CLR 70 at 98 per Mason J.

104 (1985) 159 CLR 70 at 98-99, quoted in *Ward* (2002) 213 CLR 1 at 100 [107].

105 (2002) 213 CLR 1 at 100 [107].

67 To these two points it is necessary to add a third and more fundamental consideration. It will be recalled that the RDA is directed to the prohibition and elimination of racial discrimination. These are very general objects and the relevant provisions of the RDA are expressed in very general terms. Section 10 is especially broad. It is directed to the operation of the laws of the Commonwealth and of the States and Territories. It may be contrasted with s 9(1), which makes it unlawful, but not an offence[106], for a person "to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life". Whatever the scope of s 9(1), it is sufficient to notice that it contains elements which s 10(1) does not[107].

68 In many, perhaps most, cases it will be accurate to describe a law which is found to engage s 10 as a racially discriminatory law. Given the objects of the RDA, that is unsurprising. Care is needed, however, to ensure that this statement of conclusion is not used in a way that inadvertently narrows or confines the operation of s 10. To do so would be contrary to the large objects which the RDA evidently pursues and the generality of the words which it uses. Reference to "discrimination" is apt to bring with it conceptual baggage which has been developed in other contexts[108] but which finds no reflection in the text of s 10. One understanding of "discrimination" is that differential treatment does not amount to discrimination if that treatment is justifiable. Transplanting this understanding to s 10[109] would cut down the section's operation. Section 10 does not say that persons of a particular race may enjoy a right to a more limited extent than persons of another race by reason of a Commonwealth, State or Territory law if that difference is justifiable or proportionate to a legitimate end[110]. If the law is not a special measure within the meaning of s 8(1), the

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106 *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 364-365 [25]-[26]; [1998] HCA 73; *Ward* (2002) 213 CLR 1 at 97-98 [102]; cf *Gerhardy* (1985) 159 CLR 70 at 93 per Mason J.

107 See *Gerhardy* (1985) 159 CLR 70 at 97 per Mason J; *Mabo* (1988) 166 CLR 186 at 196-198 per Mason CJ.

108 See, for example, *Purvis v New South Wales* (2003) 217 CLR 92; [2003] HCA 62.

109 cf *Bropho v Western Australia* (2008) 169 FCR 59 at 83-84 [83]; *Aurukun Shire Council v Chief Executive Officer, Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 at 46-47 [64]-[65], 71 [163], 73 [169], 103 [266]; *Maloney* [2013] 1 Qd R 32 at 39-40 [24], 40 [26], 62 [97], [99].

110 cf Committee on the Elimination of Racial Discrimination, "General Recommendation XIV (42) on article 1, paragraph 1, of the Convention", in *Report*

(Footnote continues on next page)

conclusion that persons of a particular race enjoy a right to a more limited extent than persons of another race is necessary and sufficient to engage s 10. Section 10 should not, as the appellant suggested, be "read ... down" by "read[ing] in" notions of discrimination[111].

69 The arguments advanced in this appeal must be considered against the background of these fundamental propositions.

The arguments about s 10

70 The appellant, with the general support of the Australian Human Rights Commission (intervening) and the National Congress of Australia's First Peoples Ltd (as amicus curiae), submitted that, by declaring a restricted area and subjecting those in that area to special restrictions, the *effect* of the impugned provisions was to treat the exercise by some Aboriginal persons (the Aboriginal persons on Palm Island) of their right to own property differently from the exercise by persons of another race (non-Aboriginal persons elsewhere in Queensland) of their right to own property. By contrast, the respondent submitted that s 10 is not engaged because the impugned provisions applied equally to persons of every race on Palm Island. And the Commonwealth, intervening generally in the interests of the respondent, submitted that s 10 is not engaged because, even comparing persons on Palm Island with persons elsewhere in Queensland, it was open to the Minister to have other areas in Queensland declared as "restricted areas" if those places met the statutory requirements for a declaration to be made.

71 There was no dispute that the persons who it was alleged did not enjoy the relevant right or rights were Aboriginal persons on Palm Island. The submissions that have just been described focused upon two issues. What is the right which it is said that those Aboriginal persons did not enjoy to the same extent as persons of another race? How should the persons of that other race be

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of the Committee on the Elimination of Racial Discrimination, UN GAOR, 48th sess, Supp No 18, UN Doc A/48/18 (1993) 115 at 115 [2]; Committee on the Elimination of Racial Discrimination, "General recommendation XXX on discrimination against non-citizens", in *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 59th sess, Supp No 18, UN Doc A/59/18 (2004) 93 at 94 [4]; Committee on the Elimination of Racial Discrimination, "General recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination", in *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 64th sess, Supp No 18, UN Doc A/64/18 (2009) 152 at 153-154 [7]-[8].

111 cf *Gerhardy* (1985) 159 CLR 70 at 99 per Mason J.

identified: as persons (Aboriginal persons or non-Aboriginal persons) in places *other than* Palm Island, or as non-Aboriginal persons on Palm Island?

The relevant right

72 The appellant referred to three rights set out in Art 5 of the Convention as relevant to the application of s 10(1) in this appeal: Art 5(a) (the right to equal treatment before courts and tribunals), (d)(v) (the right to own property) and (f) (the right of access to places and services). Because these rights are specifically listed in Art 5, and thus within the meaning of the term "right" in s 10(1), it is not necessary to explore what other rights, beyond those listed in Art 5, might fall within s 10(1)[112]. In particular, it is not necessary to consider whether, as the Australian Human Rights Commission and the National Congress suggested, there is a right to be free from racial discrimination.

73 It may be doubted that by reason of the impugned provisions Aboriginal persons (whether those who reside on Palm Island or some wider class) do not enjoy the same rights to equal treatment before the courts and the same rights of access to any place or service as persons of any other race. It is not necessary, however, to decide these issues. It is sufficient in this appeal to consider only the right to own property.

The right to own property

74 The ambiguity and looseness with which the word "property" can be used is notorious[113]. Particularly when speaking of a human right to own property, it is necessary to identify the level of generality or abstraction at which that right is being considered.

75 The right to own property might be spoken of in terms of a freedom: the right to own (or perhaps possess or use) property without any (arbitrary, disproportionate or unwarranted) interference[114]. But adopting this framework for analysis would inevitably shift debate to when and in what circumstances an interference with ownership of property is unacceptable. In relation to liquor, the production and sale of which has long been regulated, the debate may well centre upon whether the particular form of regulation was necessary or desirable. There is no textual or other footing for an analysis of that kind to be undertaken in

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112 See generally *Native Title Act Case* (1995) 183 CLR 373 at 436.

113 *Yanner v Eaton* (1999) 201 CLR 351 at 366-367 [18]-[19], 388-389 [85]-[86]; [1999] HCA 53; Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 *Yale Law Journal* 16 at 21-22.

114 cf, for example, *Aurukun* [2012] 1 Qd R 1 at 103 [266].

applying s 10. Indeed, this framework for analysis would appear to be little more than another species of those arguments about "discrimination" which would restrict impermissibly the operation of s 10.

76 At its most abstract, reference might be made to the right to own property without attempting to elucidate what is meant by "own" or to connect the right with any particular object of tangible or intangible property. Approaching the matter in this way will often, perhaps usually, be unhelpful. It is an approach which does not focus attention sufficiently upon how the impugned provisions intersect with the right. And it is an approach which tends to assume either that the relevant right is absolute or that s 10 applies only where persons of one race do not enjoy a right enjoyed by persons of another race. That is, this form of analysis tends to obscure the operation of s 10 in cases, like the present, where it is said that persons of one race enjoy a right "to a more limited extent" than persons of another race. Consideration of that issue requires close attention to the legal and practical operation of the legislation to which it is alleged s 10 applies in order to identify with some specificity what right is enjoyed by persons of one race and how that right is not enjoyed, or is enjoyed to a more limited extent, by persons of another.

Enjoyment of the right to own property to a more limited extent

77 It will be recalled that one of the central disputes in this Court was whether the groups of persons for consideration should be identified by reference to place. Because argument proceeded by reference to concepts of "discrimination", the issue was treated as depending upon selecting an appropriate comparator to decide whether there was racial discrimination. Was the relevant comparator a non-Aboriginal person on Palm Island (as the respondent submitted) or was the relevant difference in enjoyment of rights to be discerned (as the appellant submitted) by comparing the rights of an Aboriginal person on Palm Island with the rights of a non-Aboriginal person not in a restricted area?

78 Neither argument can be accepted in its entirety because both arguments were framed largely by reference to the conceptual apparatus of discrimination rather than the statutory inquiry about different enjoyment of rights. But the respondent's argument must be wholly rejected. Observing, as the respondent did, that non-Aboriginal persons on Palm Island are subject to the same restrictions as Aboriginal persons demonstrates only that the impugned provisions do not take race as a criterion for their operation. That is a necessary but not a sufficient condition for a law to be consistent with s 10. Section 10 is not confined to laws the purpose of which can be described as discriminatory and is not confined in its application to laws which expressly use race as a criterion of operation.

79 Implicit in the respondent's argument was the proposition that the fact that the impugned provisions applied to some (if relatively few) non-Aboriginal persons on Palm Island denied the application of s 10. That proposition cannot stand with the text of s 10(1). Section 10(1) applies where, by reason of a relevant law, *some* persons of one race do not enjoy a right to the same extent as persons who are not of that race.

80 Section 10(1) neither expressly nor impliedly requires demonstration that *all* persons of a particular race do not enjoy a particular right to the same extent as members of another race. If it had been intended to confine the operation of s 10(1) to laws which applied generally to all members of one race, that might have been done by expressing the condition as "if *the* (or *all*) persons of a particular race". But that was not done. There is no foundation in the text and purpose of s 10 or the RDA more generally for concluding that s 10(1) deals only with laws which affect *all* members of one race.

81 It will be recalled that the Commonwealth submitted that s 10 is not engaged because any place in Queensland, regardless of the race of those who reside or are present there, could be declared a "restricted area". This submission sought to compare the rights enjoyed by persons on Palm Island with the rights that would be enjoyed by persons elsewhere in Queensland *if* provisions like the impugned provisions were to be applied in areas in which the latter group of persons resided or were present. The utility of making such a hypothetical comparison was not demonstrated. It should be put aside as irrelevant.

82 The Liquor Act regulates the acquisition and disposition of rights in respect of particular forms of chattel. It prescribes who may buy and who may sell liquor and where those transactions may occur. It regulates where liquor may be consumed[115] and, in some cases, forbids[116] having liquor in possession for consumption outside a specified area.

83 In its critical operation, the Liquor Act (with the Liquor Regulation) regulates possession of liquor in public in certain places. That is, the impugned provisions prohibit the exercise of one of the bundle of rights which together make up that legally recognised and enforced relationship between a person and a chattel described as "ownership" of the chattel. The prohibition operates only in some places. Outside those places, a legally competent person may have in possession in a public place any liquor which he or she owns or has the right to possess. The Liquor Act and the Liquor Regulation, together, treat the exercise

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115 See, for example, ss 100 and 101 dealing with the consumption of liquor sold under the authority of a "general purpose permit".

116 See s 101(1)(b).

by persons of their rights of ownership of particular chattels differently according to the place of exercise.

84 It is important to recognise that, even though the impugned provisions take geographical place as the criterion for their operation, they deal with the rights of persons. When it is said, correctly, that the impugned provisions apply equally according only to whether a person is in a restricted area on Palm Island, it remains of the very first importance to the application of the RDA to recognise that the *effect* of the impugned provisions is on the rights of those who live on Palm Island (and any other person who is visiting Palm Island). Those who live on Palm Island are overwhelmingly Aboriginal persons. The extent to which the residents of Palm Island enjoy the right to own property differs from the extent to which persons resident elsewhere in Queensland enjoy that right, and argument in this Court proceeded on the implicit footing that those who are resident elsewhere are predominantly non-Aboriginal persons. Unless s 8(1) of the RDA applies, s 10 is engaged.

85 This conclusion neither proceeds from the premise nor entails the conclusion that the appellant has a universal right to possess or consume liquor. The appellant rightly disclaimed any right of that kind. Section 10 does not entail that those affected by the impugned provisions, who are predominantly Aboriginal persons, have any absolute right to possess or consume liquor. Rather, unless s 8(1) applies, those Aboriginal persons are entitled to enjoy the right to possess or consume liquor to the same extent as non-Aboriginal persons.

Section 8(1) of the RDA and Art 1(4) of the Convention

86 In so far as presently relevant, s 8(1) of the RDA provides that "[t]his Part [which includes s 10] does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies". Paragraph 4 of Art 1 provides:

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

The provisos within Art 1(4) deal with the maintenance of separate rights for different racial groups and with how long special measures may be maintained. It was not suggested that either of these provisos had to be considered in this appeal and they may be put aside from consideration.

87 It is also useful to notice Art 2(2) of the Convention, which imposes an obligation on States Parties to take special measures in the following terms:

> "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

88 Section 8(1) and Art 1(4) (together with Art 2(2)) were examined by this Court in *Gerhardy* but no settled interpretation of these provisions emerges from that case. Brennan J, who considered the provisions in the most detail, said[117] that four indicia of a "special measure" emerge from Arts 1(4) and 2(2):

> "A special measure (1) confers a benefit on some or all members of a class, (2) the membership of which is based on race, colour, descent, or national or ethnic origin, (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms."

89 The indicia which Brennan J identified do not refer to that part of Art 1(4) which speaks of the group in question "requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms". Gibbs CJ[118] and Dawson J[119], and perhaps Mason J[120], treated these words in Art 1(4) as providing a requirement that must be met if a particular measure is to be a "special measure". Other members of the Court did not advert to this issue.

90 The text of Art 1(4) suggests that a "special measure" has two characteristics. First, the measure must be for a group described in the Article in the following way: "racial or ethnic groups or individuals requiring such

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117 (1985) 159 CLR 70 at 133.

118 (1985) 159 CLR 70 at 88.

119 (1985) 159 CLR 70 at 161-162.

120 (1985) 159 CLR 70 at 105; but see at 99-100.

protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms". Second, the measure must be one "taken for the sole purpose of securing adequate advancement" of those groups. What is "adequate advancement" can sensibly be understood only in the sense of "ensur[ing] such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms". This understanding is reinforced by reference to Art 2(2), which refers to "measures to ensure the adequate development and protection of [the relevant group] *for the purpose of* guaranteeing [the relevant group] the full and equal enjoyment of human rights and fundamental freedoms" (emphasis added).

91 Two further points must then be made about "special measures". First, the text of Arts 1(4) and 2(2) does not require that the racial or ethnic groups or individuals whose interests are said to be advanced be consulted by government before the measure in question is enacted. Contrary to the National Congress' submissions, government consultation is not a legal requirement for a measure to be characterised as a "special measure" under s 8(1) of the RDA. There is no textual or other basis in the RDA or the Convention for imposing such a requirement. And contrary to the appellant's submissions, lack of consultation does not have the consequence that a "compelling justification" will be required before a law will be characterised as a "special measure". That too has no foundation in the statutory text. At most, the fact that consultation has taken place may assist, in some cases, in determining whether a particular law meets the statutory criteria for a "special measure".

92 Second, the respondent and the Commonwealth were right to submit that the reference in Art 1(4) to such protection "as may be necessary in order to ensure" qualifies the category of persons for whom special measures may be taken. The expression does not qualify, and become a condition for, the measure itself. This conclusion follows from the English text of the Convention set out in the schedule to the RDA. It may also be noted, however, that it is a conclusion which follows even more clearly from the French text of the Convention, where the words "ayant besoin de la protection qui peut être nécessaire" attach to "certains groupes raciaux ou ethniques ou d'individus" and not to "[l]es mesures spéciales".

93 Each of those asserting that the impugned provisions were not a "special measure" submitted that, to be a "special measure", the relevant law must be "proportionate" to a legitimate end. Expressly or implicitly, proportionality analysis was said to enter into the debate through the term "necessary" in Art 1(4). Once it is understood, however, that the idea introduced by the word "necessary" qualifies the group affected by the purported "special measure", and not the measure itself, its use provides no foundation for proportionality analysis.

94 These submissions pointed to larger questions about s 8(1). How does the Court decide whether a law is a "special measure"? Is the Court to decide what is

"adequate advancement"? On what materials is that decision to be made? No comprehensive answer to these questions need be given in this appeal. It is enough for present purposes to consider only some aspects of them.

95 In *Gerhardy*, there was some discussion[121] about whether, and to what extent, questions of need for advancement and suitability of the chosen legislative means for achieving that advancement could be the subject of evidence and controversy in deciding whether a challenged law was a special measure. Brennan J referred[122] to these issues as being "at least in some respects, a political question". The utility of that particular description need not be examined in this appeal and it is neither necessary nor desirable to embark upon any general consideration of whether facts relevant to these issues are to be treated as facts which "cannot and do not form issues between parties to be tried"[123] in the ordinary manner.

96 In *Gerhardy*, some members of the Court identified the relevant question as whether the law in question is "capable of being reasonably considered to be appropriate and adapted to achieving"[124] the sole purpose described in Art 1(4). That formulation would appear not to admit of any proportionality analysis. It might be said, however, that framing the question in this way may not sufficiently direct attention to the possibility that what is said to be a "special measure" is in truth the maintenance of separate rights for different racial groups and that this possibility can only be revealed by considering questions of proportionality. But what is the relevant question to ask to determine whether the relevant law is "proportionate" and what is the textual basis for asking it?

97 It might be said that "necessary" in Art 1(4) means "proportionate" with the result that that Article should be read as postulating a group of persons who require "proportionate" protection to ensure their enjoyment and exercise of human rights and fundamental freedoms. It might then be said that a measure will only secure "adequate advancement" within the meaning of Art 1(4) if the

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121 (1985) 159 CLR 70 at 87-88 per Gibbs CJ, 105 per Mason J, 107-108 per Murphy J, 113 per Wilson J, 137-139, 141-143 per Brennan J, 152-153 per Deane J, 161-162 per Dawson J.

122 (1985) 159 CLR 70 at 138.

123 (1985) 159 CLR 70 at 87-88 per Gibbs CJ, 141-142 per Brennan J, both by reference to *Breen v Sneddon* (1961) 106 CLR 406 at 411 per Dixon CJ; [1961] HCA 67 and *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 per Dixon CJ; [1959] HCA 11.

124 (1985) 159 CLR 70 at 149 per Deane J; see also at 113 per Wilson J, 137-139 per Brennan J, 161-162 per Dawson J; cf at 105 per Mason J.

measure is proportionate. To adapt one formulation put forward by the Commonwealth in oral argument, the measure must be taken for the sole purpose of ameliorating a group's more limited enjoyment of rights in a manner which is proportionate to the extent and nature of that limited enjoyment.

98 Little attention was given in argument to what precisely might be involved in this kind of proportionality analysis beyond making passing reference to *Castlemaine Tooheys Ltd v South Australia*[125], *Betfair Pty Ltd v Western Australia*[126] and other decisions of this Court about the operation of the Constitution. Those cases were decided in contexts far removed from the RDA and, more particularly, the text of s 8(1). Section 8(1), by reference to Art 1(4), sets out the statutory criteria for a "special measure". In applying s 8(1), what the Court is engaged in is an exercise in characterisation. Does a particular law meet those statutory criteria?

99 The first criterion directs attention to the existence of a racial or ethnic group (or individuals of a group of those kinds) members of which are not enjoying or exercising human rights or fundamental freedoms to the same extent as persons of another racial or ethnic group. In cases where s 8(1) is in issue because s 10 will otherwise be engaged, this question can often, perhaps usually, be answered by reference to the particular group (or individuals) which is (or who are) enjoying or exercising human rights or fundamental freedoms to a more limited extent than another group (or other individuals).

100 The second criterion directs attention to the connection between the measure and its sole purpose, which must be the advancement of the particular racial or ethnic group (or individuals) in need of that protection. No doubt that connection must be discerned by reference to the legal and practical operation of the measure in question. But, as has already been explained, it is to be doubted whether s 8(1) requires any proportionality analysis of the kind that has found favour in certain other jurisdictions. The text of s 8(1) (and through it Art 1(4)) provides more specific guidance about the content of the connection which is required.

101 It will be recalled that the definition of "special measures" in Art 1(4) provides that the measure must be taken for the sole purpose of "securing adequate advancement" of the relevant group or individuals, which must be understood in the sense of "ensur[ing] such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms". Some content to the relevant connection to be considered can be derived from the term "securing". That term suggests that a court applying s 8(1) must consider

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125 (1990) 169 CLR 436; [1990] HCA 1.

126 (2008) 234 CLR 418; [2008] HCA 11.

whether the relevant law is conducive to ensuring the relevant groups or individuals equal enjoyment or exercise of their rights and freedoms. The same idea is captured in the first element of a special measure identified by Brennan J, which was[127] that it confer "a benefit on some or all members of a class".

102 Further, and much more substantial, content can be derived from the term "adequate". The term "adequate" does not direct a court to consider whether a goal could be achieved in any better way. What the term "adequate" naturally directs attention to is whether the same goal can be achieved to the same extent by an alternative that would restrict the rights and freedoms of the relevant group or individuals to a lesser extent. If an alternative of that kind exists, it could readily be concluded that the law said to be a special measure is not "adequate". It would not be adequate because the same result could be achieved in a way that is less restrictive of the rights and freedoms of the group or individuals in question. It is in this way, and to this extent, that proportionality analysis is relevant to s 8(1)[128].

103 That the existence of less restrictive alternatives for achieving the same goal to the same extent is relevant to the application of s 8(1) is not to suggest that a parliament cannot create a norm of conduct and provide that contravention of the norm is a crime. Much more often than not, this will be the only effective way of ensuring, as far as possible, compliance with the norm. The National Congress' submission that a law which makes it a criminal offence to engage in certain conduct "is not capable of being characterised as a special measure" must therefore be rejected. And the Australian Human Rights Commission's submission that "an exceptional circumstance" would be required to justify the making of criminal offences as a special measure must also be rejected.

104 Against this background, it is possible to summarise the questions that are presented by s 8(1) in this appeal as follows. First, is there a racial group members of which are not enjoying or exercising human rights or fundamental freedoms to the same extent as persons of another race? Second, do the impugned provisions have a sole purpose which is conducive to the equal enjoyment and exercise of rights and freedoms by the relevant racial group and could the same goals be achieved to the same extent by some alternative means? The balance of these reasons will show that the impugned provisions are a "special measure".

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127 *Gerhardy* (1985) 159 CLR 70 at 133.

128 See *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 133-142 [431]-[466] per Kiefel J; [2010] HCA 46; *Momcilovic v The Queen* (2011) 245 CLR 1 at 214 [556] per Crennan and Kiefel JJ; [2011] HCA 34.

Application of s 8(1) to the impugned provisions

105 It is of the very first importance to notice that, under s 173G(3) of the Liquor Act, the Minister may recommend a regulation declaring a place to be a "restricted area" only if satisfied that the declaration "is necessary to achieve the purpose of this part". And, as noted earlier in these reasons, the purpose of Pt 6A, expressed in s 173F, is "minimising ... harm caused by alcohol abuse and misuse and associated violence; and ... alcohol related disturbances, or public disorder, in a locality".

106 The appellant did not submit that the declaration of areas on Palm Island as restricted areas was made beyond power. It must be assumed, therefore, that the areas of Palm Island were declared to be restricted areas for the purpose of "minimising ... harm caused by alcohol abuse and misuse and *associated violence*; and ... alcohol related disturbances, or public disorder" (emphasis added) on Palm Island, the residents of which are overwhelmingly Aboriginal persons. And it must be assumed that the Minister was satisfied that a declaration was necessary for the purpose of Pt 6A.

107 The impugned provisions affected the enjoyment of rights by Aboriginal persons. The impugned provisions themselves, and the extrinsic materials relating to them, demonstrate that they related to persons within a racial group. They related to Aboriginal persons resident on Palm Island. Alcohol abuse and misuse, and the violence, disturbances and public disorder associated with those evils, all detract from the equal enjoyment and exercise of human rights and fundamental freedoms. Minimising those evils and their consequences, particularly the incidence of alcohol-fuelled violence, is essential to equal enjoyment and exercise of rights and freedoms. Those who live in fear of violence cannot exercise their rights. They are not free. And when the violence is spread through a community, the members of that community cannot exercise their rights and freedoms.

108 The condition for declaring areas of Palm Island to be restricted areas and the extrinsic materials relating to the impugned provisions demonstrate that Aboriginal persons on Palm Island constituted a group who required protection as may be necessary to ensure their equal enjoyment and exercise of rights and freedoms. They also demonstrate that the impugned provisions were directed solely to the purpose of minimising both the causes and the consequences of abuse and misuse of alcohol in the areas declared as restricted areas. Indeed, the appellant expressly accepted that "some form of alcohol management plan is appropriate for Palm Island". It follows that the impugned provisions must be taken to have been framed with an intention that would meet the definition of a special measure. That is, these matters demonstrate that the impugned provisions were directed solely to the adequate advancement of the community of Palm Island in the sense of ensuring members of that community the equal enjoyment or exercise of their human rights and fundamental freedoms.

109 There was limited debate in this Court about the availability of less restrictive means to achieve the goals sought by the Queensland Parliament and Executive. In argument, there was a faint suggestion that the Queensland Parliament could, and thus should, have provided "better support services for those who drink excessively" or provided for "restricted hours of sale". Assuming that these measures could have been implemented, they would not have achieved the same goals to the same extent as the impugned provisions. If either or both of these measures could have been implemented, their availability would not demonstrate that the impugned provisions were not enacted for the sole purpose of securing the adequate advancement of Aboriginal persons on Palm Island.

110 The impugned provisions are a "special measure" within s 8(1). Because that is so, s 10 does not apply to the impugned provisions.

Conclusion and orders

111 For these reasons, the appeal should be dismissed. The respondent did not seek costs.

112 CRENNAN J. The issues, the facts and the legislation are set out in the reasons of Hayne J, and the same definitions as used by his Honour are employed in these reasons. For the reasons given by his Honour, I agree that unless s 8(1) of the RDA applies, s 10 of the RDA is engaged in respect of the impugned provisions. I also agree that the appeal should be dismissed as proposed by his Honour. What follow are my reasons for concluding that the impugned provisions fit the character of "special measures", as defined by Art 1(4) of the Convention, and given effect by s 8(1) of the RDA.

113 In question was, principally, whether the characterisation of a law as a "special measure" within the meaning of Art 1(4) depends on whether the government implementing that law engages in consultation with its beneficiaries, or their representative bodies, in order to obtain their consent to that law. It was also contended that the impugned provisions, which prohibited and penalised certain conduct, and which contained no temporal limitation, were a disproportionate means of achieving their stated purpose.

Submissions on consultation

114 The appellant accepted that there is no universal human right to possess or consume alcohol. Further, the appellant accepted that "some form of alcohol management plan is appropriate for Palm Island". It became clear in oral argument that such a plan would have as an element the reduction of the consumption of alcohol on Palm Island, in order to reduce alcohol-related problems, the existence of which was not disputed.

115 The appellant contended, however, that a law made in the absence of consultation directed to obtaining the consent of those affected by it, and which would otherwise engage s 10 of the RDA, would require a "compelling justification", and, as a correlative, a high level of judicial scrutiny, to determine whether it fell within the terms of s 8(1) of the RDA. Consultation of the kind mentioned was said to be a factor of "significant importance" in applying s 8(1). The National Congress, appearing as amicus, went further, and contended that in the absence of consent from at least a representative body of beneficiaries, a law could not be characterised as a "special measure" intended to benefit indigenous peoples.

116 The arguments in support of the proposition that the degree or type of consultation with beneficiaries prior to enactment affects whether a law can be characterised as a "special measure" within the meaning of Art 1(4) of the Convention were based on a number of considerations.

117 Recitals in the Preamble to the Convention, which identify its objects and purposes, refer to securing understanding of and respect for "the dignity and equality inherent in all human beings", and the necessity of eliminating racial discrimination. The dignity and equality of beneficiaries were said to underpin

the idea that, in the absence of consultation, a "compelling justification" (or a higher degree of persuasion) was needed for a measure to qualify as a "special measure".

118 As well, reliance was placed on what was said by Brennan J in *Gerhardy v Brown*[129] referring to Arts 1(4) and 2(2) of the Convention. In discussing the third of four identified indicia for determining whether a measure is a special measure, namely, that a special measure must be "for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms"[130], his Honour said[131]:

> "The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement."

119 Reliance was also placed on materials extraneous to the Convention, described as evidencing developments in the international understanding of the meaning of "special measures" as defined in Art 1(4) of the Convention.

120 Article 2(2) imposes a positive obligation on States Parties to take special measures "to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms". Under Art 5, States Parties undertake "to prohibit and to eliminate racial discrimination in all its forms" and to guarantee the right of everyone to equality before the law in the enjoyment of identified human rights, which include "[t]he right to security of person and protection by the State against violence or bodily harm"[132].

121 Under Art 9, States Parties undertake to submit regular reports on measures which they have adopted and which give effect to the provisions of the Convention, for consideration by the Committee on the Elimination of Racial Discrimination, instituted under Art 8 of the Convention ("the Committee"). The Committee "may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties" to

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129 (1985) 159 CLR 70; [1985] HCA 11.

130 (1985) 159 CLR 70 at 133.

131 (1985) 159 CLR 70 at 135.

132 International Convention on the Elimination of All Forms of Racial Discrimination, Art 5(b).

the General Assembly of the United Nations[133]. A general recommendation made by the Committee in 1997 noted that indigenous peoples have been and are discriminated against and "in particular ... they have lost their land and resources to colonists, commercial companies and State enterprises" and that indigenous peoples' culture and historical identity require recognition and respect in order to be preserved. In that context, States Parties were called upon to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent"[134]. General Recommendation 32, made by the Committee in 2009, dealt in some detail with "special measures" in Art 1(4) and "special and concrete measures" in Art 2(2), and the relationship between Arts 1(4), 2(2) and 1(1) (which defines "racial discrimination")[135]. The Committee stated that its purpose was to assist States Parties in discharging their obligations under the Convention, including reporting obligations. The Committee noted that the Convention is "based on the principles of the dignity and equality of all human beings"[136]. The Committee then stated that "[s]pecial measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality" and "should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned"[137]. In that context, the Committee then

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133 International Convention on the Elimination of All Forms of Racial Discrimination, Art 9(2).

134 Committee on the Elimination of Racial Discrimination, "General Recommendation on the rights of indigenous peoples", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 52nd sess, Supp No 18, UN Doc A/52/18 (1997) 122 at 122.

135 Committee on the Elimination of Racial Discrimination, "General recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 64th sess, Supp No 18, UN Doc A/64/18 (2009) 152 at 152-153 [4].

136 Committee on the Elimination of Racial Discrimination, "General recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 64th sess, Supp No 18, UN Doc A/64/18 (2009) 152 at 153 [6].

137 Committee on the Elimination of Racial Discrimination, "General recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination", recorded in the *Report of*

(Footnote continues on next page)

stated that States Parties "should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities"[138]. Statements to similar effect in the United Nations Declaration on the Rights of Indigenous Peoples[139], and an advice adopted by the United Nations Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples[140], were also relied upon. Each of those latter materials referred to a duty on States to obtain the "free, prior and informed consent" of indigenous peoples before adopting legislation affecting them[141].

The statutory scheme and consultation

122 Before turning to consider the above submissions, it is convenient to consider briefly the statutory scheme at issue in this case and the manner in which it provides for consultation. The scheme for declaring, by regulation, an area as a "restricted area" and for regulating the quantity and type of liquor a person may have in his or her possession, in a public place, in a restricted area (s 168B and Pt 6A (ss 173F-173J)) was inserted into the Liquor Act by the *Indigenous Communities Liquor Licences Act* 2002 (Q). An area so declared might be a "community area", or part of a community area, under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* 1984 (Q)[142]. Under regulations made pursuant to that Act, a "community justice group" could be established for a community area[143]. The stated purpose of Pt 6A of the Liquor Act, in providing for the declaration of areas, is to minimise

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the Committee on the Elimination of Racial Discrimination, UN GAOR, 64th sess, Supp No 18, UN Doc A/64/18 (2009) 152 at 155 [16].

138 Committee on the Elimination of Racial Discrimination, "General recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 64th sess, Supp No 18, UN Doc A/64/18 (2009) 152 at 155 [18].

139 Adopted by the General Assembly of the United Nations on 13 September 2007.

140 Expert Mechanism Advice No 2 (2011): Indigenous peoples and the right to participate in decision-making.

141 United Nations Declaration on the Rights of Indigenous Peoples, Art 19; Expert Mechanism Advice No 2 (2011): Indigenous peoples and the right to participate in decision-making, par 21.

142 *Liquor Act* 1992 (Q), s 173G(2).

143 *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* 1984 (Q), s 18(1).

"harm caused by alcohol abuse and misuse and associated violence" and "alcohol related disturbances, or public disorder, in a locality"[144].

123 Section 173G(3) of the Liquor Act provides that in recommending the Governor in Council make a regulation, the Minister administering the Act "must be satisfied the declaration is necessary to achieve the purpose of [Pt 6A]". Section 173I applies to consultation with community justice groups for community areas affected by declarations, and relevantly provides:

> "(2) The Minister may recommend the Governor in Council make the regulation only if the Minister has consulted with the community justice group for the community area about the declaration or, if the group made a recommendation about the declaration, the Minister has considered the recommendation.
>
> ...
>
> (4) However, failure to comply with subsection (2) ... does not affect the validity of a regulation made for the subsection."

124 Where subordinate legislation follows consultation, an explanatory note is required to accompany the tabling of the legislation in the Queensland Parliament, where that legislation is subject to disallowance[145].

125 In the explanatory note accompanying the subordinate legislation which declared the relevant parts of Palm Island to be restricted areas[146] it was explained that there was a division of opinion about proposed alcohol restrictions on Palm Island, which division it was said "inhibited community agreement on an Alcohol Management Plan"[147]. The Court of Appeal found that that statement about the division of opinion on Palm Island was not contradicted by affidavits tendered in the Townsville District Court[148]. In a subsequent explanatory note, it was stated that alcohol-related harm levels in communities subject to regulation

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144 *Liquor Act* 1992, s 173F. See also *Indigenous Communities Liquor Licences Act* 2002 (Q), s 3(1).

145 *Statutory Instruments Act* 1992 (Q), ss 49 and 50; *Legislative Standards Act* 1992 (Q), s 24(1).

146 Liquor Amendment Regulation (No 4) 2006 (Q).

147 Queensland, Legislative Assembly, Liquor Amendment Regulation (No 4) 2006, Explanatory Notes at 2 [9].

148 *R v Maloney* [2013] 1 Qd R 32 at 68 [112].

of the possession of liquor (which included Palm Island) "range from 7.5 times to 13.6 times Queensland's expected number of hospital admissions for assault; and from 11.2 times to 24.6 times the expected number of reported offences against the person"[149].

Section 8(1) of the RDA and the Convention

126 It was observed by Mason J in *Gerhardy v Brown* that the text of s 10(1), which concerns a law's differential effect on the enjoyment of rights, is focused on adverse discrimination against, rather than positive discrimination in favour of, a particular race[150]. For that reason, a measure which effects a differential restriction on a right identified in Art 5, albeit in order to achieve protection of the kind identified in Arts 1(4) and 2(2) in respect of another right identified in Art 5, will inevitably fall to be considered under s 8(1).

127 In *Gerhardy v Brown*, Brennan J identified four indicia about which a court would need to be satisfied before characterising a measure as a special measure[151]. The appellant's arguments involved particularly the third and fourth indicia, which together raise questions of the proportionality of a measure involving a restriction on a right or freedom such as would otherwise engage s 10.

Liquor restrictions and dignity and equality

128 The appellant's argument that the dignity and equality of the beneficiaries of a measure are necessarily compromised in the absence of consultation about the measure must be rejected. Laws regulating the liquor industry and the consumption of liquor are legion, and commonly involve restrictions on the availability of liquor, expressed most obviously in licensing regimes. Such laws have long been premised on the straightforward assumption that alcohol is susceptible to misuse, and that restrictions on the availability of liquor reduce consumption, which in turn reduces the extent and frequency of social problems associated with excessive consumption of alcohol, such as violence and public disorder. The Liquor Act is no exception, although it must be acknowledged that the restrictions on the possession of liquor in a public place which apply on Palm Island, the residents of which are overwhelmingly Aboriginal people, go further than restrictions on other persons in Queensland and in Australia more broadly.

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149 Queensland, Legislative Assembly, Liquor Amendment Regulation (No 3) 2008, Explanatory Notes at 2.

150 *Gerhardy v Brown* (1985) 159 CLR 70 at 100-101.

151 (1985) 159 CLR 70 at 133.

129 In the general context of liquor regulation, and in the specific context of protecting a community against alcohol-related violence and public disorder, infringement of the dignity and equality of some members of a racial or ethnic group or individuals is not demonstrated by the enactment of a law, containing a prohibition and a penalty in relation to the possession of liquor, without consultation with, or the prior agreement of, persons affected by the prohibition.

"such protection as may be necessary"

130 The test of whether a law is a "special measure" as posited by Art 1(4) of the Convention directs attention to the expression "such protection as may be necessary", which was dealt with most explicitly in *Gerhardy v Brown* by Brennan J, in his fourth indicium[152]. That language in the text of Art 1(4), to which effect is given in domestic law by s 8(1) of the RDA, directs attention to the test of reasonable necessity, which has been identified and explained by this Court as a test of the legitimacy and proportionality of a legislative restriction of a freedom or right which is constitutionally, or ordinarily, protected[153].

131 In this regard, Art 1(4) does not express or imply a test by reference either to unanimity of views among members of the relevant group or, in the absence of consultation or consent, to a legislative purpose, or justification, which is "compelling". The question of whether or not members of a particular group have been consulted does not bear on the assessment whether the protection given to the beneficiaries by the relevant measure is "necessary in order to ensure [the beneficiaries] equal enjoyment or exercise of human rights and fundamental freedoms"[154]. The notions of a need for a "compelling justification" or purpose of a law, and of differing levels of judicial scrutiny, seem to owe something to the principles developed in the United States of America in relation to the equal protection clause of the Fourteenth Amendment to the United States Constitution, as explained in *Regents of the University of California v Bakke*[155], cited by Brennan J in *Gerhardy v Brown*[156]. There, legislative restrictions employing "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination" to determine their

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152 (1985) 159 CLR 70 at 133.

153 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 477 [102]-[103]; [2008] HCA 11. See also *Thomas v Mowbray* (2007) 233 CLR 307 at 331-333 [20]-[26] per Gleeson CJ; [2007] HCA 33.

154 See *Gerhardy v Brown* (1985) 159 CLR 70 at 133 per Brennan J.

155 438 US 265 at 290-291 (1978).

156 (1985) 159 CLR 70 at 130-131. See also *Grutter v Bollinger* 539 US 306 (2003).

constitutionality[157]. Such a law can only be justified if it furthers "a compelling ... purpose" and, even then, only if no less restrictive alternative is available[158].

132 Notwithstanding distinct echoes in the appellant's submissions, the language of "compelling justification" was stated by the appellant to have been drawn from Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth*[159]. The idea of "compelling justification" underpinned the appellant's use of the acknowledged distinction between direct and incidental burdens on a constitutionally guaranteed freedom[160]. The appellant deployed that distinction to contend that a law involving a prohibition and a penalty should be seen as analogous to a direct, rather than an incidental, burden on a constitutionally guaranteed freedom. Continuing the analogy, the appellant contended "more rigorous" assessment is required when the issue is whether a law involving a restriction on a right or freedom is a proportionate means to the end of protecting a group, or individuals, in respect of another right or freedom if, in its implementation, no consultation with beneficiaries has occurred. However, nothing in the text of Art 1(4) or Art 2(2), or in the balance of the Convention, supports these propositions. Protective measures in respect of one right or freedom, which achieve their purpose by effecting restrictions on another right or freedom, may not necessarily command consent from those affected. The appellant acknowledged that the consent of beneficiaries to a restrictive, albeit protective, measure might be elusive, but still pressed the arguments regarding consultation.

"sole purpose of securing adequate advancement"

133 When Brennan J spoke of "the wishes of beneficiaries" in *Gerhardy v Brown*[161], it was clear from the context that his Honour was making the point that a legislature's conception of "adequate advancement" might be tendentious. This was made plain by his Honour's immediate contrast of an advancement, by a grant of land rights leaving intact the human right of the beneficiaries to freedom of movement, with a purported advancement, by a grant of land rights conditioned on the asserted beneficiaries being confined to that land against their wishes. In the former case, it will be clear that the advancement is capable of

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157 *Regents of the University of California v Bakke* 438 US 265 at 290-291 (1978).

158 *Regents of the University of California v Bakke* 438 US 265 at 356-357 (1978).

159 (1992) 177 CLR 106 at 143; [1992] HCA 45.

160 *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[99]; [2011] HCA 4; *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30]; [2012] HCA 2.

161 (1985) 159 CLR 70 at 135, 139.

ensuring that the beneficiaries exercise and enjoy equally with others their human rights and fundamental freedoms; in the latter, not so. His Honour appears to have been saying no more than that the wishes of the beneficiaries may be relevant evidence when determining whether a measure is established to be, as distinct from asserted to be, for the sole purpose of securing an "adequate advancement".

Developments in international understanding and the Convention

134 Finally, however generously canons of construction may be applied to the text of an international convention, which often reflects long negotiation and compromise[162], the text of Art 1(4) (and Art 2(2)) cannot be amended except by the subsequent agreement of States Parties. The ordinary canons of statutory construction apply to a domestic statute which incorporates an international treaty or convention[163]. The principle that a statute is to be interpreted and applied, so far as language permits, so that it is in conformity, and not in conflict, with established rules of international law[164] is a canon of statutory construction[165] which does not elevate non-binding extraneous materials over the language of the text of an international convention to which States Parties have agreed. To the extent that extraneous materials were relied upon as support for arguments about the need for consultation, they do not alter the text of the Convention as incorporated into domestic law or import rights or obligations beyond those stated in the Convention, even though they guide States Parties in respect of the reporting obligations to which States Parties have agreed.

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162 *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 at 305. See also *Gerhardy v Brown* (1985) 159 CLR 70 at 86 per Gibbs CJ; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 255-256 per McHugh J, 275 per Gummow J; [1997] HCA 4.

163 *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213 at 238 [65]; [2012] HCA 28.

164 *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69 per Latham CJ (citing Maxwell, *The Interpretation of Statutes*, 8th ed (1937) at 130), 77 per Dixon J, 81 per Williams J; [1945] HCA 3.

165 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288; [1995] HCA 20; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 [97] per Gummow and Hayne JJ; [1998] HCA 22; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [29] per Gleeson CJ; [2003] HCA 2; *Coleman v Power* (2004) 220 CLR 1 at 27-28 [19] per Gleeson CJ; [2004] HCA 39; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at 234 [247] per Kiefel J; [2011] HCA 32.

135 In any event, and just as importantly, those materials take democratic society as their background, which includes democratic mechanisms by which representative governments resolve contested policy. Those mechanisms include free, informed public debate, a free press and regular elections. Because of those mechanisms, however precautionary or desirable in some sense consultation with constituents may be (and even if a legislature encourages consultation, as here), ordinarily neither consultation with constituents nor their consent to a law is a precondition to the legality of a statute, particularly a protective measure, passed in Australia by an elected Parliament.

136 Once it is accepted that neither consultation with beneficiaries, nor their consent, nor, in the absence of either, a "compelling justification", are legal prerequisites of a "special measure" within the meaning of Art 1(4) of the Convention, the appellant's main argument in respect of s 8(1) of the RDA falls away.

Disproportionate means in respect of purpose?

137 The discrete contentions that the impugned provisions were disproportionate to the need to have some alcohol management plan for Palm Island (as conceded), because they penalised certain conduct and contained no temporal limitations, must be rejected. This is because there was no material before the Court which would permit the Court to doubt that the means were directed to the purpose explained in the extrinsic materials. Nor was there a basis put forward for assessing the capacity of alternative and less restrictive means to effect an equivalent protection of the Palm Island community, and its individual members, from violence and public disorder associated with the misuse of alcohol. This bears on the issue of proportionality and the application of the test of reasonable necessity[166].

A special measure?

138 In the context of this case, it was not suggested by any party, or intervener, that the legislative purpose of protecting a community, and all individuals within that community, against alcohol-related violence and public disorder was an illegitimate or tendentious legislative purpose, or that it failed to qualify as a purpose capable of securing "the adequate development and protection" (Art 2(2)) or the "adequate advancement" (Art 1(4)) of the community, and its individuals, in relation to security of the person and freedom

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166 As to which, see *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289 at 335-336 [206]; 295 ALR 197 at 254; [2013] HCA 3; *Monis v The Queen* (2013) 87 ALJR 340 at 396 [280]; 295 ALR 259 at 330; [2013] HCA 4.

from violence. As already mentioned, the weight of the appellant's arguments rested on contentions about the need for consultation, and subsidiary arguments that the impugned provisions were a disproportionate means of achieving an admittedly legitimate end.

139 The materials before the Court conveyed the background to the impugned provisions, namely, the existence of violence and public disorder in certain communities caused by the misuse of alcohol. Relevant decisions taken, and explained in the extrinsic materials by the responsible arms of government, in respect of the need to protect communities, including Palm Island, from such violence and public disorder were also before the Court. As has been noted above, the appellant accepted the need for an alcohol management plan for Palm Island, the details of which divided the community. Those materials justify the conclusion that the Aboriginal people of the Palm Island community require the protection afforded by the impugned provisions, and that those provisions are reasonably necessary to achieve that protection. The sole purpose of the impugned provisions is the adequate development or advancement of the community of Palm Island, and the individuals within it, and their protection from alcohol-related violence and public disorder. That protection is integral to the rights of all members of the group to personal security and freedom from violence and bodily harm. Accordingly, those provisions are a special measure within Art 1(4) of the Convention.

140 KIEFEL J. The appellant is an Aboriginal woman who resides on Palm Island, which lies off the coast of North Queensland. All but some three per cent of the residents of Palm Island are Aboriginal persons. The appellant was convicted in the Magistrates Court of Queensland of the offence, under s 168B(1) of the *Liquor Act* 1992 (Q), of being in possession of more than a prescribed quantity of liquor in a public place within a restricted area declared under s 173H of the *Liquor Act*, namely Palm Island.

141 Sections 173G and 173H, which appear in Pt 6A of the *Liquor Act*, provide for the declaration, by regulation, of an area as a restricted area and require the regulation to state the quantity of a type of liquor that a person may have in his or her possession in the restricted area. The community area of the Palm Island Shire Council, its foreshore and the Palm Island jetty were declared restricted areas in s 1 of Sched 1R to the Liquor Regulation 2002 (Q). The "prescribed quantity" of liquor for each of these restricted areas is, by s 2, 11.25 litres for beer in which the concentration of alcohol is less than four per cent, and zero for any other type of alcohol. The effect of the provisions of Sched 1R is to make it an offence to possess more than one carton of mid-strength or light beer in any public place on Palm Island and to prohibit the possession of any other form of alcohol. The operation of Sched 1R has the practical effect that whether a resident of Palm Island is able to purchase alcohol (other than beer of the strength and quantity permitted)[167] on the island or elsewhere, that person will not be able to transport the alcohol through a public place on Palm Island without committing an offence. Consequently, the possession of other alcohol is effectively prohibited anywhere on Palm Island.

142 Part 6A was inserted into the *Liquor Act* in 2002 by s 66 of the *Indigenous Communities Liquor Licences Act* 2002 (Q). That amending Act formed part of a legislative scheme[168] that was said to address problems associated with the use of alcohol in indigenous communities, which had been identified in the *Cape York Justice Study*[169]. The purpose of declaring areas to be restricted was said to be to minimise:

> "(a) harm caused by alcohol abuse and misuse and associated violence; and

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167 In these reasons, the alcohol that is prohibited by Sched 1R will be referred to as "other alcohol".

168 See also *Community Services Legislation Amendment Act* 2002 (Q): Queensland, Legislative Assembly, Indigenous Communities Liquor Licences Bill 2002, Explanatory Notes at 1.

169 Fitzgerald, *Cape York Justice Study*, (2001).

(b) alcohol related disturbances, or public disorder, in a locality"[170].

143 The appellant challenges the validity of Sched 1R. It is her contention that s 10 of the *Racial Discrimination Act* 1975 (Cth) ("the RDA") applies to the provisions of Sched 1R and renders them inconsistent such that they are invalid by reason of s 109 of the Constitution. The threshold issue which her argument raises is whether there may be identified a "right" which Sched 1R affects and to which s 10 refers. If there is such a right, the respondent contends, and the Court of Appeal of the Supreme Court of Queensland held[171], that the laws in question are "special measures" within the meaning of s 8 of the RDA, so that s 10 does not apply. Section 10, entitled "Rights to equality before the law", relevantly provides:

> "(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention."

144 Section 8, entitled "Exceptions", relevantly provides:

> "(1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies".

The RDA is a Commonwealth law, which, as its preamble explains, is intended to make provision for giving effect to the International Convention on the Elimination of All Forms of Racial Discrimination (1965)[172] ("the Convention"). Sections 10 and 8 are to be understood accordingly.

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170 *Liquor Act* 1992 (Q), s 173F.

171 *R v Maloney* [2013] 1 Qd R 32.

172 Opened for signature and ratification on 21 December 1965; signed by Australia on 13 October 1966; ratified on 30 September 1975 and entered into force in Australia

(Footnote continues on next page)

Section 10

145 The concern of s 10 is expressed, by sub-s (1), to be whether persons of one race[173] enjoy the same right that is enjoyed by persons of another race, or enjoy it only to a lesser extent. The focus is upon a "right" of the kind to which the Convention refers. This follows from the fact that the RDA was enacted to give effect to the Convention and that the provisions in question, ss 10 and 8, expressly refer to the Convention. Article 1(1) of the Convention refers to "human rights and fundamental freedoms" which may apply in "the political, economic, social, cultural or any other field of public life". Article 5 lists certain specific civil rights which are human rights or fundamental freedoms. Section 10(2) ensures that the rights which may be considered human rights for the purposes of s 10(1) are not limited to those listed in Art 5, but requires that they be of that kind.

146 Decisions of this Court confirm that the rights to which s 10 refers are human rights or fundamental freedoms[174]. The concept of human rights and fundamental freedoms is much broader than rights or freedoms which are recognised within a particular society. The term "human rights" evokes some universal value common to all societies, even though there may not be agreement between the States Parties to the Convention as to the content of those rights[175]. In *Western Australia v Ward*[176], it was said that some care is required in identifying the respective "rights" involved in the comparison which s 10 requires. The proper identification of the right or freedom here contended for and the question which follows, whether that right or freedom amounts to a human right or a fundamental freedom, are matters which assume particular importance in this case.

147 The comparison which is undertaken, when it is contended that s 10 should apply to a law, is between persons of one race who enjoy a right and

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on 30 October 1975: International Convention on the Elimination of all forms of Racial Discrimination [1975] ATS 40.

173 For brevity, that term should be taken in these reasons to include reference to colour, or national or ethnic origin.

174 *Gerhardy v Brown* (1985) 159 CLR 70 at 86, 101; [1985] HCA 11; *Mabo v Queensland* (1988) 166 CLR 186 at 229; [1988] HCA 69; *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 437; [1995] HCA 47.

175 *Gerhardy v Brown* (1985) 159 CLR 70 at 102 per Mason J.

176 (2002) 213 CLR 1 at 103 [116]; [2002] HCA 28.

persons of another race who do not, or do so only to a more limited extent. Clearly there are non-Aboriginal persons in Queensland and in Australia who are not subject to the restrictions imposed by Sched 1R on their enjoyment of relevant rights or freedoms relating to alcohol.

148 A discrimination by reference to race may be effected by a law, but s 10 is not expressed to refer to racial discrimination or to require an approach which is informed by a legislative purpose to discriminate on account of race. Section 10(1) enquires whether persons of a particular race *enjoy* the same right as others *by reason of the law*. "By reason of" directs attention to the operation and effect of the law in question. This is consistent with the Convention, which speaks of laws having the *effect* of creating discrimination[177]. Therefore it would be incorrect to confine the operation of s 10 to laws the purpose of which can be identified as a discriminatory purpose[178].

149 Where s 10(1) is engaged, it operates on Commonwealth, State and Territory laws such that if the relevant law does not make enjoyment of a human right universal, s 10 confers that right upon persons of the race that has been so deprived. Where a State law contains a prohibition on a particular racial or other group enjoying a human right or fundamental freedom, s 10 confers that right. In the latter case, an inconsistency will arise between s 10 and the impugned law to which s 109 of the Constitution will apply[179]. It may be expected that the inconsistency will be resolved in favour of s 10.

A human right or fundamental freedom?

150 The appellant contends that there are three rights which are denied Aboriginal persons on Palm Island but which are enjoyed by others. The first right to which the appellant refers is that listed in Art 5(a) of the Convention, namely the "right to equal treatment before the tribunals and all other organs administering justice". The appellant says that the laws in question deny that right because they criminalise conduct and prevent her[180] from enjoying equal protection of the law without discrimination. In so saying, the appellant identifies the right in Art 5(a) as equated to a right to equality by reference to the substantive provisions of the law.

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177 International Convention on the Elimination of All Forms of Racial Discrimination (1965), Arts 1, 2(1)(c).

178 *Western Australia v Ward* (2002) 213 CLR 1 at 99 [105].

179 *Gerhardy v Brown* (1985) 159 CLR 70 at 98-99.

180 Necessarily, with other Aboriginal persons on Palm Island. Section 10(1) of the *Racial Discrimination Act* 1975 (Cth) does not refer to individuals.

151 The terms of Art 5(a) are apt to refer to a right of a person to be treated by a tribunal or other adjudicative body, which is dealing with a matter affecting that person, as that body would treat any other person. Article 5(a) concerns a guarantee of procedural equality and gives effect to the principle of equality in legal proceedings[181]. Procedural equality, as the respondent submits, may be taken to extend to equality in the application of the law. Article 5(a) is not apposite to the right or freedom here in question.

152 The second right referred to by the appellant, that in Art 5(f) of the Convention, may be dealt with shortly. Article 5(f) refers to the right of access to a place or service intended for use by the general public such as hotels, restaurants and cafes. Argument concerning the effect that the provisions of Sched 1R have upon such a right was not really developed. Whatever be the relevant right or freedom, the enjoyment of which is affected by Sched 1R, it is not the right referred to in Art 5(f). Schedule 1R does not restrict access to licensed premises on Palm Island or the right to be served as would be enjoyed by any other member of the public. The appellant's claim is really of a right of access to other alcohol. This is not the subject addressed by Art 5(f).

153 The appellant also places reliance upon the civil right listed in Art 5(d)(v): the "right to own property alone as well as in association with others". This brings to mind the right referred to in *Mabo v Queensland*[182] ("*Mabo [No 1]*"), namely the "human right to own and inherit property"[183]. Article 5(d)(vi) contains a reference to the right to inherit. In this context, a reference to property may be taken to extend to chattels[184]. However, it is difficult to conceive of the relevant right or freedom, the enjoyment of which is restricted by Sched 1R, as a right of ownership.

154 Before turning to that question, it is necessary to deal with a further qualification the respondent places upon the description of the relevant right or freedom. The respondent identifies the relevant right or freedom which Sched 1R affects as the possession of other alcohol in a public place. Limiting the possession of alcohol to a public place would enable a comparison to be

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181 Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (1993) at 238 [5].

182 (1988) 166 CLR 186.

183 *Mabo v Queensland* (1988) 166 CLR 186 at 217; *Western Australia v Ward* (2002) 213 CLR 1 at 103-104 [116].

184 *Western Australia v Ward* (2002) 213 CLR 1 at 103-104 [116], citing *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 437.

made with other rights which are subject to similar legislative restriction in Queensland. In addition to the restrictions challenged in this appeal, other provisions of the *Liquor Act*[185] prohibit the consumption of liquor in a public place, which term is defined to include roads and land owned or controlled by a local government[186] and includes parks. But the provisions of Sched 1R have a more far-reaching effect. As has been noted[187], they effectively prohibit the possession of other alcohol anywhere on Palm Island. It is therefore not correct to describe the relevant right or freedom as that to possess other alcohol in a public place.

155 It is also unrealistic to speak of the freedom in question as the ability to own or to possess other alcohol. Article 5(d)(v) is concerned with denying the possibility of owning property, but Sched 1R is not directed to that right. It neither expresses nor effects a prohibition or restriction on a right to own alcohol. A person can possess alcohol and offend against the provisions of Sched 1R without owning the alcohol. Possession is of course an incident of ownership, but that connection seems an artificial basis upon which to construct the relevant right or freedom. It is not the enjoyment of the ownership of other alcohol which is the right or freedom restricted by Sched 1R but enjoyed by non-Aboriginal persons not resident on Palm Island.

156 Likewise, the possession of other alcohol is not sufficient to describe the content of the relevant right or freedom. It is not sensible to speak of the freedom to possess alcohol without connecting the possession to a purpose. People do not possess alcohol for the enjoyment of its possession. Those collecting it do so to benefit from its accretion in value or quality. The freedom which the provisions of Sched 1R restrict is the freedom to possess other alcohol for the purpose of its consumption, whether by the person who possesses it or others. The possession spoken of in Sched 1R is that which is necessary, however briefly, antecedent to consumption. It is the freedom to possess alcohol for consumption which is enjoyed by groups elsewhere in Queensland and which is denied the residents of Palm Island.

157 In any event, whether it is understood as a bare freedom to possess other alcohol or to possess it for consumption, the relevant freedom cannot be said to evoke some value common to all societies and therefore to qualify as a human right[188]. No value fundamental to the life of a human, of the kind to which the

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185 *Liquor Act* 1992, Pt 6, Div 4.

186 *Liquor Act* 1992, s 173B(1).

187 See [141] above.

188 See *Gerhardy v Brown* (1985) 159 CLR 70 at 102.

Convention refers, inheres in the freedom to possess alcohol for consumption. Many countries do not permit the consumption of alcohol. Even in countries where it is permitted, it cannot be equated with a freedom which, in any real sense, can be said to be guaranteed.

158 In our society, where the freedom to purchase and consume alcohol is taken for granted, the freedom has been subject to regulation and restriction by government measures since colonial days. Laws typically may regulate the quantity of alcohol that may be consumed, as is demonstrated by laws which prohibit the sale of alcohol to intoxicated persons. Laws impose minimum age requirements for the purchase and consumption of alcohol. They restrict the times of day when alcohol can be consumed. Some laws affect the price at which certain types of alcohol are sold. They prohibit persons, such as offenders in rehabilitation programmes, from consuming alcohol at all. The designation of alcohol free zones and the prohibition on the consumption of alcohol in public places are common. Some western societies, in certain periods, have effected a total prohibition on the consumption of alcohol. An understanding of the level of restriction that may be applied does not suggest that the freedom can be regarded as certain in some societies. It provides no basis for a view of the freedom as something upon which the community of nations would place a value attributable to a human right or fundamental freedom.

159 Notwithstanding that the freedom to possess alcohol for consumption does not amount to a fundamental freedom of the kind to which the Convention is addressed, it must be acknowledged that many other persons in Queensland and in Australia enjoy a freedom to possess and consume alcohol to a greater extent than that enjoyed by Aboriginal persons on Palm Island. The submissions of the Australian Human Rights Commission ("the AHRC"), which was given leave to intervene as a party, respond to this differentiation. It submits that the relevant right is the right to be protected against discrimination from the practical effect of any substantive law[189]. The submission is similar to that made by the appellant in connection with Art 5(a). The source of this right is said to be Art 26 of the International Covenant on Civil and Political Rights (1966) ("the ICCPR") (the right to equality before the law) and the right is said to have been interpreted by the United Nations Human Rights Committee ("the UNHRC") as referable to the content of legislation[190].

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189 By reference to *Morton v Queensland Police Service* (2010) 271 ALR 112 at 119 [20] per McMurdo P.

190 Human Rights Committee, *CCPR General Comment No 18: Non-discrimination*, (1989) at [12].

160 Something more will be said, in the section which follows in these reasons, concerning the use of such opinions in the construction of a statute such as the RDA. It is sufficient for present purposes to observe that what the AHRC speaks of is not a right or freedom upon which s 10 can operate. Rather, what is spoken of is the broader objective to which the Convention and the RDA are addressed. That objective, the elimination of racial discrimination, cannot itself be a right for the purposes of ss 10 and 8.

161 A right not to be discriminated against in any way by a law would render ss 10 and 8, and much of the Convention, unnecessary. Sections 10 and 8 are legislative measures implemented by Australia, in accordance with its obligations under Art 2(1)(c) of the Convention, "to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists". Section 10 does so by operating on a law which denies or restricts the enjoyment of an identifiable human right or fundamental freedom by a race, so that that right or freedom is provided. Section 10 cannot operate in the manner intended with respect to a broad right not to be discriminated against. In its operation, s 10 is not directly informed by the purpose of a law, but rather by the differential effect that a law has upon the enjoyment of a human right or fundamental freedom.

162 If s 10 was to be understood to refer only to one right, which clearly it does not, and then to equate that right with the broader objective of the RDA and the Convention, it would be expected that a law made in contravention of the protection so provided would be invalid outright, rather than remaining valid but being modified by s 10. Section 10 cannot be taken as intended to refer to such a broadly framed right. Further, to identify a right in the way contended for is to deny the possibility that a law may nevertheless be a special measure under s 8 and therefore a law to which s 10 does not apply.

Proportionality and s 10

163 Because I have concluded that the relevant right is not a human right or fundamental freedom, it is not strictly necessary for me to deal with the other aspect of the AHRC's submissions concerning s 10, nor with submissions on the issue whether the provisions of Sched 1R are a special measure in accordance with s 8. Nevertheless, these submissions concern important questions as to the place of proportionality analysis in ss 10 and 8 of the RDA and the source of such an analysis and therefore some consideration is warranted.

164 The AHRC refers to the decision of the Full Court of the Federal Court[191] in *Bropho v Western Australia*[192], which holds that an interference with the enjoyment of a right to which s 10 of the RDA refers will not be inconsistent with s 10 provided that it is effected in accordance with a legitimate public interest[193]. In the Court of Appeal in this case, McMurdo P considered that she was bound to follow that decision[194]. Chesterman JA, with whom Daubney J agreed, also referred[195] to *Bropho v Western Australia*, and held that s 10 was not engaged because the restrictions imposed by Sched 1R are reasonable and legitimate to achieve the stated purpose of reducing alcohol-related violence[196].

165 The AHRC submits that *Bropho v Western Australia* is correct, as far as it goes, but that more is required in applying the decision. The "more" is to be found in proportionality analysis. Certainly the reasons in *Bropho v Western Australia* do not employ proportionality analysis, although the premises stated for the approach taken in that case might suggest it was applicable. The case concerned the human right to own property, which, as the Full Court observed, is not an absolute right. The Full Court reasoned from that premise that the human right must accommodate legitimate laws in the public interest[197]. If a law satisfies that requirement, s 10 is not engaged.

166 The rationale for proportionality analysis is that no freedom, even a constitutionally guaranteed freedom, can be regarded as absolute[198]. While some legislative restriction is permissible, a test of the limits of legislative power is necessary in order to ensure that the freedom is not so limited as to be lost. Proportionality analysis is the obvious candidate. Proportionality analysis tests a law imposing restrictions upon a guaranteed freedom by determining the

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191 Ryan, Moore and Tamberlin JJ.

192 (2008) 169 FCR 59.

193 *Bropho v Western Australia* (2008) 169 FCR 59 at 83 [83].

194 *R v Maloney* [2013] 1 Qd R 32 at 39 [22]-[23].

195 *R v Maloney* [2013] 1 Qd R 32 at 61 [95].

196 *R v Maloney* [2013] 1 Qd R 32 at 62 [99].

197 *Bropho v Western Australia* (2008) 169 FCR 59 at 83 [81], 83-84 [83].

198 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561; [1997] HCA 25; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 136 [444]; [2010] HCA 46; *Momcilovic v The Queen* (2011) 245 CLR 1 at 214 [557], 249 [683]; [2011] HCA 34.

reasonableness of the means employed by the statute to achieve its legitimate statutory objective. It may be observed that *Bropho v Western Australia* required that there be a legitimate purpose to a law if s 10 is not to apply to it, but that decision did not further test the legislative restriction. That is the AHRC's criticism of it. However, neither the test applied in *Bropho v Western Australia* nor a test of proportionality applies to s 10.

167 It will be explained in these reasons that there is a proper foundation for proportionality analysis of a law as a special measure. It is provided by Art 1(4) of the Convention, to which s 8 refers. No such foundation is evident in the terms of s 10 and the aspects of the Convention to which it refers. Nothing in s 10 requires or permits a justification for a legal restriction on a human right or fundamental freedom. As has been mentioned, when such a right or freedom is identified and the required comparison evidences a denial or restriction of the enjoyment of it by a racial or other group, s 10(1) supplies the right to that group. By this means, the differentiation or discrimination is corrected. Such an approach leaves no room for a law, which denies or restricts a human right or fundamental freedom, to be exempt from the operation of s 10. It is left to s 8 to test whether a law is a special measure to which s 10 does not apply. Yet the AHRC's submission suggests that there may be no inconsistency with s 10, or no relevant discrimination, if a law satisfies the test applied in proportionality analysis.

168 The AHRC's approach to the operation of s 10 requires the implication of words which are referable to proportionality analysis, for none are evident in the section's express terms. The only textual basis the AHRC gives for its approach is the words "enjoy a right" in s 10(1). It submits that those words must encompass a qualification of the right. So much may be accepted. For the purpose of the comparison required by s 10(1), the reference to a right or freedom said to be enjoyed by others must take account of any lawful restrictions on that enjoyment. More to the point, there is nothing in the terms of s 10 which permits the legislative restriction or prohibition complained of to be justified. That would be inconsistent with its operation and with that of s 8.

169 It is notable that the appellant does not support the AHRC's submission that proportionality analysis should be applied to s 10. Indeed, it might be thought curious why the AHRC would wish such an analysis to apply, given that the consequence would be that the operation of s 10 would be reduced because laws which satisfy the test would not be subject to it. The reason may be that the AHRC, having identified a broad general right to be free of discrimination as the relevant right, was obliged to find a delimiting test.

170 The basis for the AHRC's submission on proportionality is the views expressed in a general recommendation of the United Nations Committee on the

Elimination of Racial Discrimination ("the CERD Committee") in 2005[199] and a general comment of the UNHRC concerning Art 26 of the ICCPR[200]. The AHRC says these views are to the effect that laws which meet the requirements of proportionality may not contravene the Convention and may not amount to discrimination. There are other recommendations of the CERD Committee to similar effect[201].

171 The CERD Committee was established pursuant to Art 8 of the Convention. By Art 9(1), States Parties to the Convention undertake to submit, for the consideration of the CERD Committee, reports on the legislative and other measures which they have adopted to give effect to the provisions of the Convention. By Art 9(2), the CERD Committee has the function of reporting annually and may make suggestions and general recommendations based on its examination of the reports received.

172 The abovementioned general recommendation of the CERD Committee[202] suggests that States Parties "respect the principle of proportionality in its

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199 Committee on the Elimination of Racial Discrimination, "General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 60th sess, Supp No 18, UN Doc A/60/18 (2005) 98.

200 Human Rights Committee, *CCPR General Comment No 18: Non-discrimination*, (1989) at [13].

201 Committee on the Elimination of Racial Discrimination, "General Recommendation XIV (42) on article 1, paragraph 1, of the Convention", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 48th sess, Supp No 18, UN Doc A/48/18 (1993) 115 at 115 [2]; Committee on the Elimination of Racial Discrimination, "General recommendation XXX on discrimination against non-citizens", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 59th sess, Supp No 18, UN Doc A/59/18 (2004) 93 at 94 [4]; Committee on the Elimination of Racial Discrimination, "General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 64th sess, Supp No 18, UN Doc A/64/18 (2009) 152 at 153-154 [8].

202 Committee on the Elimination of Racial Discrimination, "General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 60th sess, Supp No 18, UN Doc A/60/18 (2005) 98 at 101 [4(b)].

application to persons belonging to the groups referred to in the last paragraph of the preamble" to the recommendation. The preamble refers to particular racial groups and expands upon the persons to whom the Convention refers. The UNHRC's General Comment No 18, referred to above, contains the observation, with respect to Art 2 of the Convention, that "not every differentiation of treatment will constitute discrimination, if the criteria … are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]"[203].

173 The Convention does not contain a test of proportionality save in Art 1(4) with respect to special measures, which are dealt with in the RDA by s 8. Article 2(1)(c), which imposes the obligation on States Parties to prohibit racial discrimination including by taking legislative measures, and Art 1(1), in its definition of the term of "racial discrimination", do not mention a proportionality test. There is no suggestion that the CERD Committee's views in question reflect an agreement between Australia and other States Parties concerning an addition to the text of the Convention or as to how it is to be understood to operate.

174 In *Salomon v Commissioners of Customs and Excise*[204], Lord Diplock discussed the relevance of a treaty or convention to the task of a domestic court in construing legislation which was passed to implement that treaty or convention. The starting point is that the task of the court is to construe the legislation, for that is what the court has to apply. The ordinary rules of statutory construction apply where a domestic statute incorporates provisions of a convention or treaty[205] or when resort is necessary to them because the terms of the legislation are ambiguous[206].

175 When resort is had to a convention or treaty, an Australian court may have regard to views expressed in extraneous materials as to the meaning of its terms, provided that they are well founded and can be accommodated in the process of construing the domestic statute, which is the task at hand. The court could also have regard to any subsequent terms affecting the international instrument that

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203 Human Rights Committee, *CCPR General Comment No 18: Non-discrimination*, (1989) at [13].

204 [1967] 2 QB 116 at 143.

205 *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213 at 238 [65]; [2012] HCA 28.

206 *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116 at 143-144; *Yager v The Queen* (1977) 139 CLR 28 at 43-44; [1977] HCA 10; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; [1995] HCA 20.

are agreed upon by the States Parties, including Australia. But the parties to an international instrument cannot be taken to have agreed that which they have not[207].

176 The views of the committees travel beyond the international obligations that Australia has agreed to and the terms of the Convention they recommend, in effect, are implications. This Court cannot apply views which would have the effect of altering the text of the Convention to which Australia has agreed and which has formed the basis for the relevant measures provided by the RDA, which the Court is required to construe.

Special measures

177 Proportionality analysis is engaged by s 8 in the consideration of whether a law is a special measure. It is engaged because s 8 applies Art 1(4) of the Convention, the terms of which refer, in relevant part, to:

> "Special *measures taken* / *for the sole purpose* of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection / *as may be necessary* in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms".

178 I have added the emphasis and the separation marks to better identify what the word "necessary" qualifies. It seems to me that it refers to special measures as are necessary to advance or protect the exercise of a human right or fundamental freedom by a group. That is the legitimate end ("the sole purpose") to which a special measure may be directed. The human right or fundamental freedom sought to be protected by Sched 1R, and which is the subject of that purpose, is the right of Aboriginal persons on Palm Island, in particular women and children, to a life free of violence, harm and social disorder brought about by alcohol abuse.

179 It is not an uncommon experience with treaties or international conventions that their drafting is not as clear as it could be. Sometimes that is the result of a conscious choice made by those drafting. Nevertheless, I do not consider that the words "as may be necessary" in Art 1(4) of the Convention are intended to qualify, or at least to qualify only, the word "protection". I confess to reading the Article with the possibility in mind that some kind of proportionality test was intended. Certainly the indicia are present in the words of Art 1(4) and a principle of proportionality, involving a test of necessity, was well known in

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207 See *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426 at 439 [4] per Lord Bingham of Cornhill.

Europe before the Convention was opened for signature and had been utilised by the European Court of Justice[208].

180 The test implied by the reference in Art 1(4) to measures "as may be necessary" for the permitted purpose is that of reasonable necessity. The test was accepted as a doctrine of this Court in *Betfair Pty Ltd v Western Australia*[209] and has subsequently been discussed and applied in judgments of members of the Court[210]. The test as expounded is not inconsistent with the test of proportionality to which the Convention refers. No party to the appeal suggested otherwise.

181 The test is applied by the Court to determine the limits of legislative power exercised to effect a prohibition or restriction of a freedom which is made the subject of protection by the Constitution or, as here, by statute. The role of the Court in determining these limits is to ensure that the freedom sought to be protected is not effectively lost.

182 The test of reasonable necessity does not permit a court to consider whether, in its view, the measure was necessary in accordance with its views of social policy. Proportionality analysis, as has been applied in this Court, is not generally concerned with how the objectives of the law may otherwise be fulfilled. It requires that objective standards be applied if the Court is not to intrude into areas of policy. The inquiry undertaken to determine whether a law is proportionate is directed to the relationship between a valid legislative object and the means adopted for its attainment. To be proportionate, a law must go no further than necessary having regard to that object[211]. *Lange v Australian Broadcasting Corporation*[212] explained the basis of the earlier decision in

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208 See Schwarze, *European Administrative Law*, rev ed (2006) at 677; *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community* [1956] ECR 292 at 299; *Mannesmann AG v High Authority of the European Coal and Steel Community* [1962] ECR 357 at 370-371.

209 (2008) 234 CLR 418 at 477 [102]-[103]; [2008] HCA 11.

210 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 134 [436], 135 [440] per Kiefel J; *Momcilovic v The Queen* (2011) 245 CLR 1 at 214 [556] per Crennan and Kiefel JJ; *Monis v The Queen* (2013) 87 ALJR 340 at 394 [268], 396 [280] per Crennan, Kiefel and Bell JJ; 295 ALR 259 at 327, 330; [2013] HCA 4.

211 *Monis v The Queen* (2013) 87 ALJR 340 at 396 [280], 408 [347]; 295 ALR 259 at 330, 345-346.

212 (1997) 189 CLR 520 at 568.

Australian Capital Television Pty Ltd v The Commonwealth[213], which concerned legislative restrictions on the implied freedom of political communication, as being that "there were other less drastic means by which the objectives of the law could be achieved". The conclusion reached in *Betfair Pty Ltd v Western Australia*[214] can also be explained on this basis. The test of reasonable necessity looks to whether there are reasonable practicable alternative measures available which are less restrictive in their effect than the measures in question[215]. If there are such alternatives, a law cannot be said to be reasonably necessary.

183 The existence of any possible alternative is not sufficient to show that the measure chosen was not reasonably necessary according to the test. An alternative measure needs to be equally as effective, before a court can conclude that the measure is a disproportionate response[216]. Moreover, in *Monis v The Queen*[217], Crennan and Bell JJ and I said that the alternative means must be obvious and compelling, having regard to the role of the courts in undertaking proportionality analysis.

184 It is not necessary to traverse the reports and other extrinsic materials which provided the impetus for Sched 1R. It is not disputed that there were problems on Palm Island with alcohol and violence. Prior to the enactment of the *Liquor Act*, it had been recognised that residents of Palm Island, in particular women, were regularly exposed to violence and that children were abused and neglected because of alcohol abuse[218]. It cannot be disputed that those people require the protection of the law and that Sched 1R is a means of achieving that

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213 (1992) 177 CLR 106; [1992] HCA 45.

214 (2008) 234 CLR 418.

215 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 134-135 [438]-[439], 135 [442], 136 [444]; *Momcilovic v The Queen* (2011) 245 CLR 1 at 214 [556]; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289 at 335-336 [206]; 295 ALR 197 at 254; [2013] HCA 3; *Monis v The Queen* (2013) 87 ALJR 340 at 396 [280]; 295 ALR 259 at 330.

216 *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 616; [1975] HCA 45; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 134 [438], referring to *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 306; [1980] HCA 40.

217 (2013) 87 ALJR 340 at 408 [347]; 295 ALR 259 at 346.

218 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 17 September 2002 at 3595.

end. In terms of Art 1(4), some such action was necessary in order that they enjoy the human right[219] to a life free from violence[220].

185 The appellant submits that the measures taken in Sched 1R are not proportionate to that legislative objective because: (1) they involve the criminalisation of personal conduct; (2) they were opposed by representatives of institutions on the island, which I take to be a reference to the Palm Island Aboriginal Shire Council; (3) there is no "compelling justification" for dispensing with the requirement of consultation, which was not adequately undertaken; and (4) the measures have no temporal limitation. It is further asserted that the respondent has a legal onus of proof, although how this is intended to apply was not made clear. It may be accepted that this Court must be satisfied that Sched 1R is a measure that is reasonably necessary in the sense described.

186 No temporal limitation is required for a measure to be special. Article 1(4) of the Convention requires only that a measure not continue after its objectives have been achieved. This is consistent with the requirement of reasonable necessity. It cannot be said that consultation to a particular level is required for a measure to be special. The reference made by Brennan J in *Gerhardy v Brown*[221] to the importance of consultation cannot be taken to have elevated consultation to a condition of a special measure. The Court's assessment of a law as a special measure cannot be conditioned upon the occurrence of consultation to a particular level or the obtaining of consent of all, or most, persons affected. The law is judged according to its operation and effect and the legitimacy of the objective to which it is directed. The fact that the measure prescribes an offence is taken into account in the test of reasonable necessity.

187 The appellant's submissions rely upon the severity of the measures in Sched 1R, but these must be understood by reference to the objective to which they are directed[222]. The examples given by the appellant in argument of other

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219 International Convention on the Elimination of All Forms of Racial Discrimination (1965), Art 5(b).

220 An analogy with these measures may be drawn with a case decided by the German Federal Constitutional Court concerning a statute which criminalised the use of cannabis. The Court held that the prohibition on the use of certain drugs was not disproportionate to the aim of the protection of others: the "*Hashish Drug Case*" 90 BVerfGE 145 (1994), cited in Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd ed (2012) at 399-400.

221 (1985) 159 CLR 70 at 135.

222 *Davis v The Commonwealth* (1988) 166 CLR 79 at 100; [1988] HCA 63.

measures which could have been taken include better enforcement of existing laws; better support services for those who drink excessively and are detrimentally affected by alcohol; and restricted hours of sale of alcohol. But these examples do not identify alternatives which are equally practicable and which would provide the extent of protection which Sched 1R seeks to achieve.

188 The result is that Sched 1R does not interfere with a right referred to by s 10. And, although not strictly necessary therefore to consider, s 8 would protect its provisions. The measures Sched 1R provides cannot be said to be disproportionate to the aim of affording the residents of Palm Island the human right to a life free of alcohol-related violence and strife.

189 The appeal should be dismissed.

190 BELL J. The facts and the provisions of the *Liquor Act* 1992 (Q) ("the Liquor Act") and the Liquor Regulation 2002 (Q) ("the Liquor Regulation") giving rise to the appeal (collectively, "the liquor restrictions") are detailed in the reasons of other members of the Court and need not be repeated save to the extent that is necessary to explain my reasons.

191 The Court of Appeal of the Supreme Court of Queensland (McMurdo P, Chesterman JA and Daubney J) rejected Ms Maloney's challenge to the validity of the liquor restrictions under s 10(1) of the *Racial Discrimination Act* 1975 (Cth) ("the RDA")[223]. The Court of Appeal was unanimous in considering that the liquor restrictions discriminate on the ground of race[224]. However, the majority (Chesterman JA and Daubney J) concluded that the liquor restrictions do not engage s 10(1) because the rights that the RDA protects are the human rights and fundamental freedoms referred to in the International Convention on the Elimination of All Forms of Racial Discrimination ("the Convention"). The right to possess liquor of any type and in any quantity was said not to be such a right[225]. McMurdo P, in dissent on this issue, considered that the liquor restrictions contravened Ms Maloney's rights to equality before the law and access to services[226]. The Court of Appeal was unanimous in holding that the liquor restrictions do not engage the prohibition on racial discrimination in Pt II of the RDA because they qualify as "special measures" within the exception in s 8(1)[227].

192 Ms Maloney appeals by special leave from the dismissal of the challenge to her conviction. The respondent by notice of contention submits that the Court of Appeal should have held that the liquor restrictions do not affect the enjoyment of a right of persons of a particular race, colour or national or ethnic origin (collectively, "race") for the purposes of s 10(1). The Attorneys-General of the Commonwealth, South Australia and Western Australia intervened in support of the respondent. The Australian Human Rights Commission ("the AHRC") was also granted leave to intervene. Its submissions, directed to the construction of ss 8 and 10 of the RDA, are not made in support of either party.

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223 *R v Maloney* [2013] 1 Qd R 32.

224 *R v Maloney* [2013] 1 Qd R 32 at 38 [18] per McMurdo P, 58 [84] per Chesterman JA, 71 [127] per Daubney J.

225 *R v Maloney* [2013] 1 Qd R 32 at 61 [96].

226 *R v Maloney* [2013] 1 Qd R 32 at 36 [9], 41 [28]-[30].

227 *R v Maloney* [2013] 1 Qd R 32 at 54 [65] per McMurdo P, 71 [126] per Chesterman JA, 71 [127] per Daubney J.

The National Congress of Australia's First Peoples Limited ("the National Congress") was granted leave to appear as amicus curiae.

193 The stated legislative purpose of Pt 6A, which was inserted into the Liquor Act by the *Indigenous Communities Liquor Licences Act* 2002 (Q) ("the 2002 Amendment Act"), is the minimisation of harm caused by alcohol abuse and misuse and associated violence, and of alcohol related disturbances or public disorder in a locality[228].

194 The link between the excessive consumption of alcohol and violence is notorious. It is equally notorious that alcohol related violence is not confined to Aboriginal communities. In 1995, the Race Discrimination Commissioner ("the Commissioner") reported that nationally the abstinence rate among Aboriginal Australians was higher than the abstinence rate among non-Aboriginal Australians[229]. The Commissioner went on to observe that the impact of alcohol use is worse on Aboriginal people who drink than on non-Aboriginal people who drink because of the degree of harmful consumption by indigenous drinkers[230]. The Commissioner's report contains a summary of authoritative statements of the historical reasons which are considered to explain the devastating impact of alcohol on Aboriginal society[231]. The Commissioner concluded that alcohol poses "a major threat to the survival of Aboriginal culture and to the achievement of self-determination by Aboriginal and Torres Strait Islander peoples"[232].

195 Ms Maloney does not challenge the Commissioner's conclusion. Ms Maloney does not dispute that a valid law may impose restrictions on the availability of alcohol in an indigenous community area including Palm Island without engaging the prohibition on racial discrimination in Pt II of the RDA. A

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228 Liquor Act, s 173F.

229 Commonwealth of Australia, Race Discrimination Commissioner, *Race Discrimination, Human Rights and the Distribution of Alcohol*, (1995) at 15. See also Australian Institute of Health and Welfare, *2010 National Drug Strategy Household Survey Report*, (2011) at 60.

230 Commonwealth of Australia, Race Discrimination Commissioner, *Race Discrimination, Human Rights and the Distribution of Alcohol*, (1995) at 15. See also Australian Institute of Health and Welfare, *2010 National Drug Strategy Household Survey Report*, (2011) at 60.

231 Commonwealth of Australia, Race Discrimination Commissioner, *Race Discrimination, Human Rights and the Distribution of Alcohol*, (1995) at 16-18.

232 Commonwealth of Australia, Race Discrimination Commissioner, *Race Discrimination, Human Rights and the Distribution of Alcohol*, (1995) at 4.

law may do so provided the law meets the criterion of being a special measure within s 8(1). Her submission is that in the absence of compelling justification a law will not qualify as a special measure unless its introduction has been preceded by a process of genuine consultation with its intended beneficiaries and it is manifest that it is a law of temporary duration. The liquor restrictions are challenged in each of these respects. Ms Maloney also asserts that they are disproportionate to the attainment of their object.

196 The respondent submits that in the event it fails on its notice of contention, the liquor restrictions are nonetheless outside the reach of s 10(1). It asserts that no invalid diminution in the enjoyment of a right occurs where the State enacts a law to achieve "a legitimate and non-discriminatory public goal". The Commonwealth, South Australia and the AHRC each support the respondent's analysis subject to the further requirement that the law not effect a disproportionate limitation on rights in the attainment of its legitimate object. The respondent and the Attorneys-General submit that the liquor restrictions do not limit the enjoyment of a right of a kind that is protected by s 10(1). In the event they do limit a right of that kind, the respondent and the Attorneys-General submit that the liquor restrictions are special measures under s 8(1) to which s 10(1) does not apply.

197 For the reasons that follow, I consider that the Court of Appeal was right to find that the liquor restrictions are racially discriminatory. In my opinion, Aboriginal persons on Palm Island enjoy rights recognised by the RDA to a more limited extent than non-Aboriginal persons by reason of the liquor restrictions. I do not consider the application of s 10(1) to be subject to a test of proportionality. It follows that Sched 1R to the Liquor Regulation will be inconsistent with s 10(1) unless it is a special measure under s 8(1). The characterisation of a law as a special measure does not, in my opinion, import a test of reasonable necessity. I consider that the liquor restrictions are special measures within s 8(1). It follows that the appeal must be dismissed.

Do the liquor restrictions apply with relevantly differential effect on the basis of race?

198 The first issue is raised by the respondent's notice of contention. The respondent contends that the liquor restrictions do not engage s 10(1) because they apply generally to all persons present on Palm Island and do not limit the freedom of the residents of Palm Island to possess liquor elsewhere in Queensland, whatever their race. The discriminant for the operation of the liquor restrictions is place. A comparison between Ms Maloney, an Aboriginal person in a public place on Palm Island, and a person of any other race in a public place on Palm Island is sufficient, in the respondent's submission, to demonstrate the irrelevance of race to their operation. On this analysis, a State law that does not directly or indirectly use race as the discriminant in denying or limiting the

enjoyment of rights of persons of a particular race is immune from the operation of the RDA.

199 Section 10(1) provides:

> "If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin."

200 As explained by Mason J in *Gerhardy v Brown*[233], in an analysis taken up in the joint reasons in *Western Australia v Ward*[234], s 10(1) does not refer to discrimination or to the concepts associated with discrimination. The provision is directed to "the *enjoyment* of rights by some but not by others or to a more limited extent by others"[235]. The fact that Aboriginal persons may possess alcohol in public places elsewhere in Queensland is not relevant to the engagement of s 10(1). The provision does not require that the limitation on the enjoyment of rights apply to all persons of a particular race. Nor does the fact that the law applies to the small minority of non-Aboriginal persons present on Palm Island take the law outside the protection of the RDA. Were it otherwise, s 10(1) might be readily circumvented.

201 The purpose of the RDA is to implement Australia's Convention obligations. Section 10(1) implements the obligations assumed under Arts 2(1)(c) and 5 of the Convention[236]. In summary, these are the obligations to nullify laws having the effect of creating or perpetuating racial discrimination and to guarantee equality before the law. Equality before the law is the counterpart of the elimination of racial discrimination. Section 10(1) is to be interpreted in the light of these related purposes. A law creates or perpetuates racial discrimination when it applies any distinction, exclusion, restriction or

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233 (1985) 159 CLR 70 at 99; [1985] HCA 11.

234 (2002) 213 CLR 1 at 99 [105] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2002] HCA 28.

235 *Western Australia v Ward* (2002) 213 CLR 1 at 99 [105] per Gleeson CJ, Gaudron, Gummow and Hayne JJ (emphasis in original).

236 *Gerhardy v Brown* (1985) 159 CLR 70 at 95 per Mason J.

preference based on race which has the purpose or *effect* of nullifying or impairing the enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life[237].

202 The purpose of enacting Pt 6A of the Liquor Act, which provides for the declaration of restricted areas, was stated to be the need to address the problem of the abuse of alcohol and alcohol related violence in remote indigenous communities[238]. Explicit provision is made for the declaration of a "community area" or part of a community area as a restricted area[239], and for consultation with the "community justice group" of a community area before a declaration is made[240]. "Community area" means a community area under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* 1984 (Q)[241]. "Community justice group" means a group established under the same Act[242]. As at 31 May 2008, each of the 18 areas declared to be "restricted areas" under the Liquor Act, including Palm Island, were "community areas"[243]. The overwhelming majority of persons resident on Palm Island are Aboriginal persons. The purpose and practical operation and effect of the liquor restrictions are to target the Aboriginal community of Palm Island and limit the right of its members to possess alcohol. To the extent that the possession of alcohol by adult members of the Australian community is a right recognised by s 10(1), the enjoyment of the right by Aboriginal persons on Palm Island is limited in

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237 Convention, Art 1(1).

238 2002 Amendment Act, long title and s 3(1). Section 66 of the 2002 Amendment Act introduced Pt 6A, which provides for the declaration of "restricted areas", into the Liquor Act. Section 173F of the Liquor Act states that the purpose of Pt 6A is to provide for the declaration of areas for minimising (a) harm caused by alcohol abuse and misuse and associated violence; and (b) alcohol related disturbances, or public disorder, in a locality. See also the second reading speech to the Bill that became the 2002 Amendment Act: Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 August 2002 at 2631-2634.

239 Liquor Act, s 173G(2).

240 Liquor Act, s 173I.

241 Liquor Act, s 4, definition of "community area".

242 Liquor Act, s 4, definition of "community justice group".

243 Liquor Regulation, Scheds 1A-1R read with *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* 1984 (Q), s 4, definition of "community area".

comparison with the enjoyment of the right by persons elsewhere in Queensland, the vast majority of whom are non-Aboriginal.

203 The respondent and the Commonwealth submit that if s 10(1) is applied without regard to whether the purpose of the impugned law is a legitimate non-discriminatory purpose, unintended and anomalous results are likely to occur. The Commonwealth instances a planning law requiring buildings in a coastal locality to meet specifications suitable for withstanding extreme weather events. What if the overwhelming majority of building owners affected by the law are persons of a particular race? Arguably the planning law limits the enjoyment of the right to own property. Does s 10(1) invalidate the law?

204 In *Western Australia v Ward*, the joint reasons explained that as the obligations undertaken under the Convention include nullifying laws having the effect of creating or perpetuating racial discrimination, s 10(1) cannot be confined to laws whose purpose can be shown to be discriminatory[244]. Their Honours went on to say, respecting the determination of whether a law is in breach of s 10(1), that the provision does not require "that the law, *in terms*, makes a distinction based on race"[245]. Section 10(1) must be interpreted consistently with the purpose of the Convention as being directed to the lack of enjoyment of a right by reason of a law whose purpose or effect is to create racial discrimination[246]. In determining whether a law has that purpose or effect the court looks to the "practical operation and effect" of the law and is "concerned not merely with matters of form but with matters of substance"[247]. It may be that the hypothesised planning law would not engage s 10(1) because, construed in its context, any limitation on the enjoyment of the right of the building owners would have no connection to race. The appeal does not raise a question of the kind raised by the hypothesised planning law because the liquor restrictions unarguably target Aboriginal persons. In the circumstances it is not appropriate to determine the extent of the connection with race that is required to validly engage s 10(1).

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244 (2002) 213 CLR 1 at 99 [105] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

245 *Western Australia v Ward* (2002) 213 CLR 1 at 103 [115] per Gleeson CJ, Gaudron, Gummow and Hayne JJ (emphasis added).

246 *Gerhardy v Brown* (1985) 159 CLR 70 at 99 per Mason J.

247 *Western Australia v Ward* (2002) 213 CLR 1 at 103 [115] per Gleeson CJ, Gaudron, Gummow and Hayne JJ citing *Mabo v Queensland* (1988) 166 CLR 186 at 230 per Deane J; [1988] HCA 69.

Do the liquor restrictions limit the enjoyment of a right of a kind protected by s 10(1)?

205 The first question in the appeal is whether the liquor restrictions engage a right that is protected by s 10(1). The rights to which s 10(1) applies include any right of a kind referred to in Art 5 of the Convention[248]. Relevantly, Art 5 provides:

> "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
>
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;
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> …
>
> (d) Other civil rights, in particular:
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> …
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> (v) The right to own property alone as well as in association with others;
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> …
>
> (f) The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks."

206 The rights on which Ms Maloney bases her challenge are those described in Arts 5(a), 5(d)(v) and 5(f). The focus of her submissions is upon the limitation of the right to own property. The majority in the Court of Appeal reasoned that the right in question is not an "abstract right to own property" but rather a right to

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248 RDA, s 10(2).

"ownership or possession of a particular kind of liquor in a particular location"[249]. Such a right, it was said, did not evoke a universally recognised and observed right that is common to all societies[250]. The majority also said, by reference to the decision of the Full Federal Court in *Bropho v Western Australia*[251], that to the extent that the liquor restrictions interfere with the right of possession of liquor, they have been imposed for a "legitimate reason"[252].

207 Had the matter been free of authority, McMurdo P would have concluded that the liquor restrictions limited Ms Maloney's enjoyment of the right to own property. Her Honour doubted that any balancing of rights is involved in the determination of whether s 10(1) is infringed, observing that the approach adopted in *Bropho* seemed to "merge s 8 and s 10"[253].

208 *Bropho* concerned a challenge to restrictions on entry to a reserve designated for the use of Aboriginal persons. The Full Federal Court (Ryan, Moore and Tamberlin JJ) had regard to the recognition in human rights jurisprudence that rights in a democratic society must be balanced against competing rights and values[254]. To the extent that the rights engaged in *Bropho* were property rights, the Full Federal Court said that they were not absolute given the State's right to control uses of property in the general interest. Interference with the enjoyment of those rights effected in accordance with a legitimate public interest was said not to be inconsistent with s 10(1)[255]. To the extent that the restrictions in *Bropho* interfered with the rights of the indigenous residents of the reserve, they did so for the purpose of protecting the residents, particularly the women and children[256].

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249 *R v Maloney* [2013] 1 Qd R 32 at 62 [97].

250 *R v Maloney* [2013] 1 Qd R 32 at 61 [96].

251 (2008) 169 FCR 59.

252 *R v Maloney* [2013] 1 Qd R 32 at 62 [97].

253 *R v Maloney* [2013] 1 Qd R 32 at 39 [22].

254 *Bropho v Western Australia* (2008) 169 FCR 59 at 83 [81].

255 *Bropho v Western Australia* (2008) 169 FCR 59 at 83 [83].

256 *Bropho v Western Australia* (2008) 169 FCR 59 at 83 [82].

209 The Full Federal Court concluded[257]:

> "although the authorities on s 10 of the [RDA] recognise that there is no basis for distinguishing between different species of ownership of property, no property right, regardless of its source or genesis, is absolute in nature, and no invalid diminution of property rights occurs where the State acts in order to achieve a legitimate and non-discriminatory public goal."

210 The Commonwealth, South Australia and the AHRC each support the approach adopted by the Full Federal Court, and would not limit the approach to the right to own property. They each submit that, in addition to the law pursuing a legitimate and non-discriminatory goal, the means adopted by the law must be proportionate to the attainment of that goal. In contrast, the respondent adopts the *Bropho* test and submits that there is no requirement to import considerations of proportionality.

211 In the AHRC's submission the textual footing in s 10 for the proportionality analysis is the words "enjoy a right". The concept, it is said, must take account of any limitation on the enjoyment of the right that is recognised in human rights jurisprudence. The Committee on the Elimination of Racial Discrimination ("the CERD Committee") established under Art 8 of the Convention, in its general recommendation on the functioning of the criminal justice system, appears to accept that laws having a legitimate objective and which respect the principle of proportionality will not contravene the Convention[258]. In a similar vein, the United Nations Human Rights Committee, speaking of Art 26 of the International Covenant on Civil and Political Rights ("the ICCPR")[259], states that if the criteria for differentiation are reasonable and objective, and if the aim of differentiation is to achieve a purpose which is legitimate under the ICCPR, the differentiation will not constitute

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257 *Bropho v Western Australia* (2008) 169 FCR 59 at 83-84 [83].

258 CERD Committee, "General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 60th sess, Supp No 18, UN Doc A/60/18 (2005) 98.

259 Article 26 states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

discrimination[260]. Drawing on these statements, the AHRC submits that a law imposing a limitation on a right for a legitimate purpose will not engage s 10(1) if its effect on the enjoyment of rights is not disproportionate to the claimed purpose or benefit of the law.

212 The starting point in the Commonwealth's analysis is the recognition that the Convention is directed to securing substantive equality in the enjoyment of rights. The principle of equality is discussed by Brennan J in *Gerhardy*[261]. As his Honour observes, the recognition that "formal equality" is insufficient to eliminate all forms of racial discrimination is of long standing[262]. In this context, the Commonwealth submits that a law which results in the differential enjoyment of rights does not infringe the protection of s 10(1) if it serves a purpose that may be regarded as legitimate in the context of the overriding norm of equality enshrined in the Convention.

213 The RDA allows that the enjoyment of Convention rights may be denied or limited by a law of a State that has a legitimate object consistent with the attainment of substantive equality for persons of a particular race. Section 8(1) excludes such a law from the operation of Pt II of the RDA (which includes ss 9 and 10 and the prohibition on racial discrimination in the respects identified in ss 11-17) provided the law meets the criterion of being a "special measure" to which Art 1(4) of the Convention applies. Where it is engaged, s 8(1) also provides an answer to any claim of unlawful discrimination under Pt II[263]. The provision in s 8(1) for the exclusion of a law which has as its sole purpose the attainment of substantive equality in the enjoyment of Convention rights argues against confining the protection of s 10(1) by considerations of the same character.

214 Nothing in the text of s 10 interpreted in its statutory context warrants reading the provision as engaged only by a law that limits the enjoyment of rights for a purpose that is not "legitimate" or in a manner that is disproportionate to the achievement of a "legitimate" purpose. Section 8(1) is the means by which laws

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260 United Nations Human Rights Committee, *CCPR General Comment No 18: Non-discrimination*, (1989) at [13].

261 (1985) 159 CLR 70 at 128-131.

262 *Gerhardy v Brown* (1985) 159 CLR 70 at 128 citing *Advisory Opinion on Minority Schools in Albania* (1935) Ser A/B No 64 at 19; and see McKean, *Equality and Discrimination under International Law*, (1983) at 285-288.

263 Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", (1985) 79 *American Journal of International Law* 283 at 305.

may validly provide for the differential enjoyment of Convention rights based on race in order to secure substantive equality.

215 The first right which Ms Maloney submits the liquor restrictions limit is the right to equal treatment before the tribunals and all other organs administering justice recognised by Art 5(a). Ms Maloney does not complain that she was treated differently from the way non-Aboriginal accused persons are treated before the courts in Queensland. Her contention is that the right to equality of treatment extends to the substantive provisions of the law. She complains that she has been convicted of an offence against a law that in its practical operation and effect is directed to Aboriginal persons. Those submissions should be rejected. The right in Art 5(a) is akin to the right declared in Art 14 of the ICCPR and is to be understood as a right to equality of access to courts and other adjudicative bodies and in the application of the law by them[264].

216 Ms Maloney's submission that there is a human right not to be discriminated against in the substantive provisions of the law is supported by the AHRC. In the AHRC's submission, the right is sourced in the guarantee of equality before the law expressed in the opening words of Art 5. The identification of human rights, it submits, is not to be treated as a selection of discrete items from "a shopping catalogue of rights". The right of equality before the law, the AHRC submits, is recognised in *Gerhardy* in Mason J's statement that "[t]he expression [human rights] includes claims of individuals as members of a racial or ethnic group to equal treatment of the members of that group in common with other persons"[265]. In the same case, Brennan J said[266]:

> "The conception of human rights and fundamental freedoms in the Convention definition of racial discrimination describes that complex of rights and freedoms the enjoyment of which permits each member of a society equally with all other members of that society to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of that society. If it appears that a racially classified group or one of its members is unable to live in the same dignity as other people who are not members of the group, or to engage in a public activity as freely as others can engage in such an activity in similar circumstances, or to enjoy the public benefits of that society to the same extent as others may do, and

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264 Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (1993) at 466; United Nations Human Rights Committee, *General Comment No 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (2007) at [8], [12], [13].

265 *Gerhardy v Brown* (1985) 159 CLR 70 at 101-102.

266 *Gerhardy v Brown* (1985) 159 CLR 70 at 126-127.

> that the disability exists because of the racial classification, there is a prima facie nullification or impairment of human rights and fundamental freedoms."

217 The guarantee of equality before the law stated in Art 5 is said to embrace the concept of the equal protection of the law that is recognised in Art 7 of the Universal Declaration of Human Rights ("the UDHR"), which provides:

> "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

218 So, too, Art 26 of the ICCPR recognises a right of equality before the law and to the equal protection of the law. On the AHRC's analysis, s 10(1) invalidates a law that creates or results in "adverse distinctions because of race". A "right" engaging s 10(1) thus becomes the freedom to engage in conduct that is not otherwise prohibited by law.

219 The enjoyment of the rights which engage s 10(1) is the enjoyment of "human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life"[267]. Neither the Charter of the United Nations, Art 55(c) of which commits the member States to universal respect for and observance of "human rights and fundamental freedoms", nor the Convention essays a definition of what those rights and freedoms are. Whatever their scope, they are protected by the Convention, which unlike the ICCPR is not confined to the particular rights stated in it[268]. The rights and freedoms protected by the Convention should be interpreted widely, in accord with the Convention's beneficial purpose. The right stated in Art 7 of the UDHR and its analogue in Art 26 of the ICCPR may now form part of the customary law of nations[269]. The right should be accepted to be a human right of a kind that is within the scope of the Convention and s 10(1). The difficulty lies in ascertaining the content of the right.

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267 Convention, Art 1(1), definition of "racial discrimination".

268 Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", (1985) 79 *American Journal of International Law* 283 at 286.

269 Humphrey, "The Implementation of International Human Rights Law", (1978) 24 *New York Law School Law Review* 31 at 32-33; Lillich, "Civil Rights", in Meron (ed), *Human Rights in International Law*, (1984), vol 1 at 116.

220 The AHRC's contention that the right is one not to be discriminated against in the provisions of a law is illustrated by Professor Nowak's statement of the scope of Art 26 of the ICCPR[270]:

> "The [ICCPR] contains no provision granting a right to sit on a park bench. But when a State Party enacts a law forbidding Jews or blacks from sitting on public park benches, then this law violates Art 26."

221 The power of the illustration is reflected by the respondent's submissions on its notice of contention. In this part of its argument, the respondent accepted that had the liquor restrictions prohibited the possession of alcohol on Palm Island only by Aboriginal persons, they would have engaged s 10(1). It was said:

> "That result would have followed because the comparator, a non-Aboriginal person in a public place on Palm Island, would have enjoyed a right, *the freedom from a legal prohibition* against the possession of alcohol on Palm Island, which was not enjoyed by Aboriginal persons." (emphasis added)

222 The United Nations Human Rights Committee distinguishes the right stated in Art 14 of the ICCPR, of equality before courts and tribunals, from Art 26. The latter, in the Committee's view, is "an autonomous right" prohibiting discrimination in law in any field regulated and protected by public authorities[271]. However, as Professor Nowak's Commentary makes plain, the content of the right is controversial[272]. Indeed, Australia's acceptance of Art 26 was "on the basis that the object of the provision is to confirm the right of each person to equal treatment in the application of the law"[273], an understanding that Australia's

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270 Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (1993) at 465.

271 United Nations Human Rights Committee, *CCPR General Comment No 18: Non-discrimination*, (1989) at [12].

272 Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (1993) at 458-475; Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", (1985) 79 *American Journal of International Law* 283 at 291-293; Lillich, "Civil Rights", in Meron (ed), *Human Rights in International Law*, (1984), vol 1 at 132-133; Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", (1966) 15 *International and Comparative Law Quarterly* 996 at 1018-1019.

273 Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", (1985) 79 *American Journal of International Law* 283 at 292 fn 49 citing Multilateral Treaties Deposited with

(Footnote continues on next page)

representative suggested was more in keeping with the original intention of the framers of the ICCPR[274].

223 In circumstances in which, as will be explained, Ms Maloney's submission that her rights under Arts 5(d)(v) and 5(f) are impaired by the liquor restrictions should be accepted, it is unnecessary and for that reason inappropriate to determine whether s 10(1) protects a right to equality before the law of the breadth for which the AHRC contends.

224 As earlier noted, the right that forms the principal focus of Ms Maloney's challenge is the right to own property recognised in Art 5(d)(v). It is not an answer to Ms Maloney's claim to observe that the right to the ownership and possession of alcohol does not enjoy universal recognition or that one incident of the right – possession in a public place – is commonly subject to legal restriction. The civil, economic, social and cultural rights and the right of access recognised in Art 5 may all be the subject of lawful non-discriminatory regulation. The content of a number of the rights recognised in Art 5 is likely to vary between nations. The Convention requires States Parties to nullify laws that create distinctions based on race which have the purpose or effect of impairing equality in the enjoyment of the rights to which it refers. In Australian society, competent adults may own alcohol. Aboriginal persons on Palm Island enjoy that right to a more limited extent than persons elsewhere in Queensland (the vast majority of whom are not Aboriginal) by reason of the liquor restrictions. McMurdo P, correctly, said that "[t]he right is not the right to own rum or bourbon, but the right to own rum or bourbon in the same way and to the same extent as non-Indigenous Australians"[275].

225 Article 5(f) recognises a right of access not only to any place intended for use by the general public but also to any service intended for public use. The right of access to places and services recognised by the Convention is not found in other international human rights instruments. The right of all persons of access without distinction based on race to places and services intended for use

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the Secretary-General: Status as at 31 December 1981, UN Doc ST/LEG/Ser.E/1 (1982) at 119.

274 Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", (1985) 79 *American Journal of International Law* 283 at 292-293 fn 49 citing *Report of the Human Rights Committee*, UN GAOR, 38th sess, Supp No 40, UN Doc A/38/40 (1983), pars 155, 175.

275 *R v Maloney* [2013] 1 Qd R 32 at 38 [18].

by the public is an important aspect of the ability to live in full dignity and enjoy the public benefits of the society[276].

226 The majority in the Court of Appeal rejected Ms Maloney's contention that the liquor restrictions impair her right of access to a service under Art 5(f) on the ground that the right is not concerned with the nature of the services provided. The right, it was said, is for all persons, regardless of race, to have access to the services which the premises in fact supply[277]. It is uncontroversial that the Art 5(f) right is not a right to require the proprietor of licensed premises to supply a particular service. Ms Maloney does not make such a claim. Her submission is that adult patrons of licensed premises elsewhere in Queensland are at liberty to order a range of alcoholic beverages including full strength beer, wine and spirits. The liquor restrictions make it unlawful for the licensed premises on Palm Island to supply its adult patrons with any form of alcohol apart from mid-strength or low alcohol beer[278]. Access to a service of the kind that is available to non-Aboriginal members of the general public elsewhere in Queensland – the supply at licensed premises of wine, spirits and full strength beer – is denied to the Aboriginal community of Palm Island by reason of the liquor restrictions.

227 By reason of the liquor restrictions, Aboriginal persons on Palm Island enjoy the rights under Art 5(d)(v) and (f) to a more limited extent than persons of another race present elsewhere in Queensland. It follows that s 10(1) is engaged subject to consideration of whether the liquor restrictions qualify as special measures under s 8(1). If they do not, they will be invalidated because they impose a discriminatory burden[279].

Are the liquor restrictions "special measures"?

228 Section 8(1) excludes from Pt II of the RDA "special measures" to which Art 1(4) of the Convention applies[280]. Article 1(4) states:

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276 *Gerhardy v Brown* (1985) 159 CLR 70 at 126 per Brennan J.

277 *R v Maloney* [2013] 1 Qd R 32 at 62 [101].

278 Liquor Act, s 168B(1) and Liquor Regulation, Sched 1R, s 2.

279 *Western Australia v Ward* (2002) 213 CLR 1 at 100 [107]-[108] per Gleeson CJ, Gaudron, Gummow and Hayne JJ citing *Gerhardy v Brown* (1985) 159 CLR 70 at 98-99 per Mason J.

280 The exception under s 8(1) respecting special measures does not apply to measures in relation to which s 10(1) applies by virtue of s 10(3). Section 10(3) is not relevant to the appeal.

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

229 The declaration of Palm Island as a restricted area for the purposes of Pt 6A of the Liquor Act was made by the Liquor Amendment Regulation (No 4) 2006 (Q) ("the Amendment Regulation"). There is no challenge to the making of the Amendment Regulation and it may be taken that the Minister was satisfied that the declaration was necessary to achieve the purposes of Pt 6A[281].

230 The Explanatory Notes to the Amendment Regulation included the following information[282]:

> "**4 Reasons for the subordinate legislation**
>
> The Amendment Regulation will declare a restricted area for the community of Palm Island. The Amendment Regulation is based on the recommendations of the Palm Island Community Justice Group (CJG) and Palm Island Shire Council (Council).
>
> ...
>
> **8 Consultation**
>
> **(a) Community**
>
> The CJG and Council for the Indigenous community of Palm Island have recommended alcohol limits as part of their community alcohol management strategies.
>
> ...

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281 Liquor Act, s 173G(3).

282 Queensland, Legislative Assembly, Liquor Amendment Regulation (No 4) 2006, Explanatory Notes at 1-3.

9 Results of consultation

The proposed alcohol restrictions do differ from the recommendations of the CJG and Council. There is ongoing division within the CJG and between the CJG and the Council. This division has inhibited community agreement on an Alcohol Management Plan (AMP). Subsequently, the Government developed an AMP based on a compromise between the four separate AMPs that have previously been presented to Government by the CJG and the Council.

On 19 January 2005, the Government presented a draft AMP to the Council and CJG for consideration and comment by 7 February 2005.

On 3 February 2005, Government received correspondence from the Mayor of the Council accompanied by 22 completed survey forms. The Council feedback did not comment on the detail of the proposed AMP. However the Council did state that the AMP would not be successful without appropriate support structures. No other formal feedback has been received from the community …

Extensive consultation has been undertaken with the community. The final round of consultation occurred in February 2006. Across the community there was common agreement that unrestricted alcohol was a major concern that needed to be addressed."

231 Ms Maloney was convicted in her absence before the Magistrates Court at Palm Island. On her appeal to the District Court of Queensland (Durward DCJ) against her conviction she was given leave to adduce new or further evidence. She tendered the affidavits of 14 residents of Palm Island. The deponents comprised members of the Palm Island Aboriginal Shire Council, the statutory community justice group, the former non-statutory community justice group and community elders. None were required for cross-examination. The purpose of the tender was to demonstrate the absence of a sufficient process of consultation with the community prior to the introduction of the liquor restrictions.

232 Chesterman JA found the affidavit evidence established the deponents' opposition to the liquor restrictions and the existence of a division of opinion within the Palm Island community about their desirability or efficacy[283].

233 Ms Maloney submits that the Court of Appeal adopted an "unduly permissive" approach in characterising the liquor restrictions as a special measure, at odds with contemporary international jurisprudence. The concept of special measures, she submits, should be given a meaning that is consistent with

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283 *R v Maloney* [2013] 1 Qd R 32 at 68 [112].

principles of international law. The requirement that a special measure be taken for the sole purpose of securing adequate advancement of the group, and that such protection be necessary to achieve equality, are indicia that are said to invite "characterisation of the measure as judged against the need and purported end". Ms Maloney here draws an analogy with the characterisation of a law that is challenged as a burden on interstate trade or on the implied freedom of communication on governmental and political matters[284]. Ms Maloney acknowledges that it is for the political branch of government to determine whether the occasion exists for taking a particular measure. In determining the limits within which that assessment is made, she contends for "a significant role for the courts in evaluating the political judgment of the legislature and in declining to give effect to a putative special measure". Evidence of a process of genuine consultation in order to obtain the consent of the affected group permits the court to more readily accept that a measure is a special measure. In the absence of evidence of such a process, Ms Maloney submits that compelling justification is required for a measure to be held to be a special measure. The National Congress argues for a more stringent test conditioning special measures on the consent of the beneficiaries.

234 In support of her submissions on the importance of consultation, Ms Maloney referred the Court to "general recommendations" issued by the CERD Committee as part of its functions under the Convention. The Committee recommends that communities should be consulted prior to the implementation of special measures or other actions affecting their rights[285]. Ms Maloney also referred to the United Nations Declaration on the Rights of Indigenous Peoples ("the UNDRIP"), Art 19 of which declares that States shall consult with

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284 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; [1990] HCA 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562; [1997] HCA 25; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 477 [102]-[103] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ; [2008] HCA 11.

285 CERD Committee, "General Recommendation on the rights of indigenous peoples", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 52nd sess, Supp No 18, UN Doc A/52/18 (1997) 122 at 122 [4(d)]; CERD Committee, "General recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 64th sess, Supp No 18, UN Doc A/64/18 (2009) 152 at 155 [16], [18].

indigenous communities to obtain their consent before adopting measures that may affect them[286].

235 The text of Art 1(4) is transposed into s 8(1) of the RDA. The legislative intention to be discerned is that the expression "special measures" in s 8(1) bear the same meaning as in the treaty[287]. That meaning is ascertained by reference to the ordinary meaning of the words in their context and in the light of the object and purpose of the Convention[288], and by reference to the materials comprising context and referred to in Art 31(2) and (3) of the Vienna Convention. Neither the recommendations of the CERD Committee nor the provisions of the UNDRIP are extrinsic materials of that kind (or of the kind mentioned in s 15AB(2) of the *Acts Interpretation Act* 1901 (Cth)). The criteria stated in Art 1(4) cannot be supplemented by additional criteria reflecting the non-binding recommendations of the CERD Committee.

236 It may be accepted in light of the RDA's object that it is appropriate to give weight to the construction that the international community places upon the Convention[289]. This approach is evident in Brennan J's recognition in *Gerhardy* that the rights embraced by the Convention may come to be identified with more precision under international law[290]. Clarification of the content of the "human rights and fundamental freedoms" referred to in Art 1(1) under international law may result in s 10(1) engaging a greater or lesser number of rights than might have been understood in 1975. To acknowledge this is not to alter the meaning of s 10(1)[291]. Section 10(1) continues to operate, as the legislature intended, to protect equality of enjoyment of the rights recognised to be human rights and fundamental freedoms.

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286 The Declaration was adopted on 13 September 2007, with Australia voting against its adoption. On 3 April 2009, the Australian Government announced that Australia had reversed its position and gave its support to the Declaration.

287 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231 per Brennan CJ, 239-240 per Dawson J, 251-252 per McHugh J, 272 per Gummow J, 292 per Kirby J; [1997] HCA 4.

288 Vienna Convention on the Law of Treaties, Art 31 ("the Vienna Convention").

289 *Queensland v The Commonwealth* (1989) 167 CLR 232 at 240 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; [1989] HCA 36.

290 *Gerhardy v Brown* (1985) 159 CLR 70 at 126.

291 *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213 at 238-239 [65] per Gummow, Crennan, Kiefel and Bell JJ; [2012] HCA 28.

237 Advancement has as its object the enablement of the members of a disadvantaged racial group to live in full and equal dignity with other members of the community. Foisting a perceived benefit on a group that neither seeks nor wants the benefit does not sit well with respect for the autonomy and dignity of the members of the group. It was in this context that Brennan J observed that the wishes of the beneficiaries of a special measure "are of great importance (perhaps essential)"[292]. As the Commonwealth submits, there are difficulties in drawing a parallel between the consideration of special measures in the context in which the issue arose in *Gerhardy* and in the present appeal. The measure in *Gerhardy* conferred a benefit on one racial group over other racial groups taking into account the disadvantage of the former. The measure challenged in this appeal imposes a burden on members of a group for the protection of members of the same group. In this context, Western Australia challenges Ms Maloney's submissions respecting genuine consultation as patently vague. How, it asks, is the consent of adults who are addicted to alcohol to be obtained? The Commonwealth points to the obligation Australia has undertaken under the Convention to take special and concrete measures to ensure the adequate development and protection of racial groups, including the Aboriginal community of Palm Island, so that the members of those groups enjoy rights, including the protection of the State from violence, on an equal footing[293]. Is it to be prevented from discharging the obligation because the community is divided on the issue?

238 Ms Maloney acknowledges that some form of alcohol management plan is appropriate for Palm Island. The acknowledgement does not deny her contention that the imposition of discriminatory restrictions on a community for the community's protection in the absence of adequate consultation evinces the same outdated paternalism as in the *Aboriginals Protection and Restriction of the Sale of Opium Act* 1897 (Q). Her submissions proceed upon the footing that with more time and engagement with the Aboriginal community of Palm Island a consensus might have emerged respecting an alcohol management plan that would have commanded broad community support.

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292 *Gerhardy v Brown* (1985) 159 CLR 70 at 135.

293 Convention, Art 2(2): "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

239 The CERD Committee's recommendations are directed to the executive and legislative organs of States Parties. It may be assumed that they are taken into account when those organs give effect to the obligation to take special and concrete measures of the kind envisaged by Art 2(2). It is evident that a process of consultation with the community of Palm Island was undertaken before the liquor restrictions were imposed. A political judgment was made that the divisions within the Palm Island community were inhibiting agreement on an alcohol management plan and that the declaration of Palm Island as a restricted area was necessary to achieve the purpose of Pt 6A of the Liquor Act.

240 The validity of the liquor restrictions as special measures does not turn on the rightness of the judgment that the community was divided or the adequacy of the consultation which preceded the declaration. A measure is a special measure if it meets the indicia set out in Art 1(4). Nothing in Art 1(4) conditions a special measure on consultation with the affected group or on the community's consent.

241 Ms Maloney's submission that a criterion of validity is that the restrictions imposed by the measure are proportionate to the attainment of its end depends on the use of the word "necessary" in Art 1(4). The Article is awkwardly expressed. In my opinion, the respondent's and the Commonwealth's analysis of its grammatical construction should be accepted. The expression "special measures" is qualified by the adjectival clause "taken for the sole purpose of securing adequate advancement". The adequate advancement is of "certain racial or ethnic groups or individuals". The groups or individuals require "such protection as may be necessary in order to ensure [their] equal enjoyment or exercise of human rights and fundamental freedoms". The phrase "as may be necessary" forms part of the clause that qualifies the "groups or individuals". It does not qualify the measure.

242 Article 1(4) does not require that the special measure be necessary. It requires that the adequate advancement of the group or individuals is the sole purpose of the special measure. In this context, adequate advancement is to be understood as advancement directed to the attainment of substantive (as distinct from formal) equality in the enjoyment of human rights. The qualifier "adequate" makes clear that the advancement is to attain equality, as distinct from superiority, in the enjoyment or exercise of human rights and fundamental freedoms.

243 Ms Maloney's submission that a test of reasonable necessity applies to the determination of whether a measure is a special measure is suggested to have support in the statements of some Justices in *Gerhardy*. She notes that Mason J spoke of the measure as being one that was "appropriate and adapted to a regime of the kind which is necessary"[294]. Deane J asked whether the measure is

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294 *Gerhardy v Brown* (1985) 159 CLR 70 at 105.

"capable of being reasonably considered to be appropriate and adapted to achieving that purpose"[295]. Brennan J asked "could the political assessment inherent in the measure reasonably be made?"[296] She submits that each formulation is directed to considerations of proportionality of the kind later to be applied in *Castlemaine Tooheys Ltd v South Australia*[297] and *Betfair Pty Ltd v Western Australia*[298]. With the possible exception of Mason J, none of the members of the Court approached the characterisation of the impugned law by reference to a test of proportionality of the kind that Ms Maloney proposes. In my opinion, the determination of whether a law is within the statutory criteria of special measures does not import such a test.

244 Subject to the application of the two provisos in Art 1(4), a law is a special measure if: (i) it applies to a racial or ethnic group or individuals; (ii) who are in need of protection in order to ensure their equal enjoyment or exercise of human rights and fundamental freedoms; and (iii) the sole purpose of the measure is the attainment of the object stated in (ii). The question of the capacity of the measure to be reasonably considered as appropriate and adapted is directed to (iii). Deane J explained it in this way in *Gerhardy*[299]:

> "What is necessary for characterization of legislative provisions as having been 'taken' for a 'sole purpose' is that they can be seen, in the factual context, to be really and not colourably or fancifully referable to and explicable by the sole purpose which is said to provide their character. They will not be properly so characterized unless their provisions are capable of being reasonably considered to be appropriate and adapted to achieving that purpose."

245 As Deane J went on to say, the court is not concerned to determine whether the legislative provisions are *the* appropriate ones to achieve the purpose[300].

246 The use of the expression "reasonably appropriate and adapted" has been criticised as cumbersome and lacking in clarity. The criticism is in the context of

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295 *Gerhardy v Brown* (1985) 159 CLR 70 at 149.

296 *Gerhardy v Brown* (1985) 159 CLR 70 at 139.

297 (1990) 169 CLR 436.

298 (2008) 234 CLR 418.

299 (1985) 159 CLR 70 at 149.

300 *Gerhardy v Brown* (1985) 159 CLR 70 at 149.

its use when applied to the determination of the validity of a law which imposes a burden on a freedom for which the Constitution expressly or impliedly provides[301]. It is accepted doctrine in that context that the validity of the law depends upon a criterion of reasonable necessity[302]. The application of that criterion requires consideration of whether the law is proportionate to the legitimate end it seeks to serve. In the statutory context of this case, attention is upon the criteria stated in Art 1(4). Those criteria do not require the court to consider, as Ms Maloney submits, whether there are "reasonably available alternatives to respond to the problem which are less restrictive of the protected interest". Provided that a measure can be characterised as having as its sole purpose the adequate advancement of a racial group or individuals who are in need of protection in order to attain equality in the enjoyment of rights, the measure will qualify as a special measure (subject to the provisos in Art 1(4)). The determination of whether the measure can be characterised as having that sole purpose does not import a test of reasonable necessity.

247 The nature and extent of the burden imposed by the law and the adequacy of the consultation with those who are to be affected by it are matters that may be relevant to the determination of whether it is a special measure. This is because a law limiting the enjoyment of the rights of a group enacted without adequate consultation with the group may not be capable of being reasonably considered to be appropriate and adapted to the sole purpose of securing the group's adequate advancement.

248 To the extent that the characterisation of a measure as a special measure depends upon matters of fact the court is to ascertain the facts "as best it can"[303]. It may invite and receive assistance from the parties and, subject to the obligations of procedural fairness, is free to inform itself from other public, authoritative sources[304]. Ms Maloney submits that the Cape York Justice Study[305] is not relevant to the determination because the focus of the study was

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301 *Monis v The Queen* (2013) 87 ALJR 340 at 408 [345] per Crennan, Kiefel and Bell JJ; 295 ALR 259 at 345; [2013] HCA 4.

302 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 477 [102]-[103] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

303 *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292 per Dixon CJ; [1959] HCA 11; *Gerhardy v Brown* (1985) 159 CLR 70 at 141-143 per Brennan J.

304 *Gerhardy v Brown* (1985) 159 CLR 70 at 142; *Thomas v Mowbray* (2007) 233 CLR 307 at 512-522 [613]-[639] per Heydon J; [2007] HCA 33.

305 Fitzgerald, *Cape York Justice Study*, (2001).

not on the Aboriginal community of Palm Island. However, it is sufficient to observe that the Cape York Justice Study, when read with the Explanatory Notes to the Amendment Regulation, supports the conclusion that it was reasonably open to the Queensland legislature to find that the Aboriginal community of Palm Island is a group in need of protection to ensure its equal enjoyment of the human right to security of the person and protection by the State from violence. It is material which the court may take into account together with the Explanatory Notes and the affidavit evidence in determining whether the liquor restrictions are capable of being reasonably considered to be appropriate and adapted to the achievement of the adequate advancement of the Aboriginal community of Palm Island such that the attainment of that object may be accepted to be their sole purpose.

249 Are the liquor restrictions special measures? They apply to a racial group: the Aboriginal community of Palm Island. It is accepted that an alcohol management plan is appropriate for the Aboriginal community of Palm Island. That acceptance carries with it, to use the words of Art 1(4), acceptance that the community "requir[es] such protection as may be necessary in order to ensure [the community's] equal enjoyment or exercise of human rights", including, relevantly, the right to security of the person and State protection from violence. The violence of which members of the community of Palm Island are at risk is associated with excessive consumption of alcohol. Neither the absence of a more extensive process of consultation, nor the circumstance that the liquor restrictions criminalise personal conduct that is lawful elsewhere, leads to the conclusion that they are not capable of being reasonably considered to be appropriate and adapted to the achievement of their purpose.

250 The purpose of Pt 6A is stated to be the minimisation of alcohol related violence, disturbances and public disorder. Alcohol fuelled disturbances and public disorder are not unconnected to alcohol related violence. It is a judgment of excessive refinement to say, as Ms Maloney does, that because the liquor restrictions have as their purpose minimising alcohol related disturbances on Palm Island, they do not have the sole purpose of securing equality of enjoyment of security of the person and State protection from violence.

251 A special measure must not lead to the maintenance of separate rights for different racial groups and must not be continued after the objectives for which it was taken have been achieved. No submissions were directed to the first proviso and no occasion arises to consider its scope.

252 With respect to the second proviso, contrary to Ms Maloney's submission, a measure is not required to provide for its terminus to qualify as a special

measure[306]. As special measures are not to continue after their objectives have been achieved, it may be expected that some mechanism for review of the operation of the measure will be provided. Reports have been tabled in the Parliament recording what are considered to be the effects of the liquor restrictions by reference to key indicators. Amendments to the liquor restrictions and to similar restrictions in other restricted areas have been made that appear to take the findings of those reports into account[307].

253 The introduction of amendments to the liquor restrictions and other similar restrictions in 2008 weighs against the conclusion that the objectives of the liquor restrictions had been achieved as at 31 May 2008 when Ms Maloney was charged with the offence under s 168B. The liquor restrictions are within the indicia stated in Art 1(4) and are not excluded under either proviso. It follows that the Court of Appeal was correct to find that they are special measures for the purposes of s 8(1) to which Pt II of the RDA does not apply.

254 The appeal should be dismissed.

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306 *Gerhardy v Brown* (1985) 159 CLR 70 at 88-89 per Gibbs CJ, 106 per Mason J, 113 per Wilson J, 140-141 per Brennan J, 154 per Deane J.

307 See, for example, the Liquor Amendment Regulation (No 3) 2008 (Q).

GAGELER J.

Introduction

255 Palm Island comprises a group of ten islands forming part of Queensland situated about 70 kilometres north of Townsville. Palm Island was established as an Aboriginal reserve under Queensland legislation[308] in 1914 and retained that or a similar status under subsequent Queensland legislation[309] until 1986[310]. Title to Palm Island was then granted in trust under the *Land Act* 1962 (Q) to the Palm Island Aboriginal Council, an Aboriginal council under the *Community Services (Aborigines) Act* 1984 (Q) ("the Aboriginal Communities Act")[311], and Palm Island became a "trust area" (subsequently redesignated a "community area") within the jurisdiction of the Palm Island Aboriginal Council under the Aboriginal Communities Act[312]. In 2004, by force of the *Local Government (Community Government Areas) Act* 2004 (Q) ("the Community Government Areas Act"), as well as being continued as a community area within the meaning of the Aboriginal Communities Act as then amended, Palm Island was declared to be a "local government area" and by virtue of that also became a "community government area" to which provisions of the *Local Government Act* 1993 (Q) thereafter applied and the Palm Island Aboriginal Council was continued in existence as the Palm Island Shire Council[313].

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308 *The Aboriginals Protection and Restriction of the Sale of Opium Act* 1897 (Q).

309 *The Aboriginals Preservation and Protection Act* 1939 (Q); *The Aborigines' and Torres Strait Islanders' Affairs Act* 1965 (Q); *Aborigines Act* 1971 (Q).

310 See generally *Clumpoint v Director of Public Prosecutions (Qld)* [2005] QCA 43 at [1].

311 Renamed in 2004 as the *Aboriginal Communities (Justice and Land Matters) Act* 1984 (Q) and in 2007 as the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* 1984 (Q).

312 Sections 6(2) and 14 of the Aboriginal Communities Act as at 27 October 1986, the date of the grant.

313 Sections 3, 7 (read with Sched 2) and 11 (read with Sched 4 ("community government area")) and s 70(1) (read with Sched 3) of the Community Government Areas Act.

256 According to the results of the 2006 census as published by the Australian Bureau of Statistics, Palm Island then had about 2000 residents, of whom over 90 per cent were Aboriginal[314].

257 Ms Maloney is an Aboriginal woman who was born on Palm Island and who remains a resident of Palm Island. On 31 May 2008, she was an occupant of a motor vehicle intercepted by Queensland Police on a public road on Palm Island. She admitted to owning a 1.125 litre bottle of Jim Beam Bourbon and a three-quarter full 1.125 litre bottle of Bundaberg Rum found to be contained in a backpack in the boot of the vehicle.

258 Ms Maloney was charged with an offence against s 168B of the *Liquor Act* 1992 (Q) ("the Liquor Act"). The particulars of the charge were that "in a public place namely Palm Island within a restricted area declared under section 173H of the [Liquor Act] namely Palm Island" she "did have in her possession a quantity of liquor namely Rum and Bourbon being more than the prescribed quantity of liquor for the area other than under the authority of a restricted area permit".

259 Ms Maloney was convicted of that offence in the Magistrates Court at Palm Island. She was ordered to pay a $150 fine, and to spend one day in prison in default of payment. The liquor she owned was forfeited. She appealed unsuccessfully against her conviction to the Townsville District Court and was refused leave to appeal to the Court of Appeal of the Supreme Court of Queensland.

260 The argument of Ms Maloney, unsuccessful in the Townsville District Court and in the Queensland Court of Appeal, was that s 168B of the Liquor Act, in its application to Aboriginal persons on Palm Island, was inconsistent with s 10 of the *Racial Discrimination Act* 1975 (Cth) ("the RDA") and was to that extent invalid under s 109 of the Constitution.

261 Ms Maloney repeats and elaborates on that argument in her appeal, by special leave, to the High Court. She does so with the support of the National Congress of Australia's First Peoples Ltd ("the National Congress"), which was granted leave to appear in the appeal.

262 The Crown in right of the State of Queensland ("Queensland"), as respondent to the appeal, does not dispute that s 168B of the Liquor Act would be invalid under s 109 of the Constitution if and to the extent s 10 of the RDA has application. Queensland argues that s 10 of the RDA has no application. Queensland argues that is because s 10 is not engaged in its own terms and, in the

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314 Australian Bureau of Statistics, "Palm Island (Palm Island Shire), Basic Community Profile", in *2006 Census of Population and Housing*, (2007) B01.

alternative, because s 10 is excluded by s 8 of the RDA. Queensland argues with the support of the Attorneys-General of the Commonwealth, South Australia and Western Australia, who intervene as of right. The Australian Human Rights Commission, intervening by leave, makes submissions about ss 8 and 10 of the RDA without supporting either party.

263 The appeal gives rise to novel and important issues concerning the meaning and application of ss 8 and 10 of the RDA. The resolution of those issues requires close attention to underlying provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) ("the Convention") and to prior authority of the High Court and is assisted by a consideration of earlier decisions of the Queensland Court of Appeal and the Full Court of the Federal Court. They are best addressed after explaining first the scheme and relevant application of the Liquor Act.

The Liquor Act

264 The Liquor Act defines liquor to mean "a spiritous or fermented fluid of an intoxicating nature intended for human consumption"[315]. The principal focus of the Liquor Act is on the regulation of the liquor industry in Queensland. That regulation is achieved, for the most part, by restricting the sale and supply of liquor to sale or supply by licensed persons conducting businesses on licensed premises.

265 The Liquor Act also contains, within Pt 6, a number of general prohibitions. Those general prohibitions have long included a prohibition against the consumption of liquor in a public place that is a road or that is land owned or under the control of a local government[316]. One exception to that prohibition is if the consumption of liquor in the place is authorised or permitted under a licence or permit[317]. Another is if the place is at the relevant time designated by the local government to be a place where liquor may be consumed[318]. The Liquor Act has always empowered the Governor in Council to make regulations under the Liquor Act, including with respect to the consumption or possession of liquor in a public place and including by creating offences and fixing penalties for those offences[319].

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315 Section 4B(1).

316 Section 173B(1)(a), inserted by the *Liquor Amendment Act* 1992 (Q).

317 Section 173B(2)(a).

318 Sections 173B(2)(b) and 173C.

319 Sections 235(1), 235(2)(e) and 235(3).

266 Section 168B is an addition to these long-standing prohibitions within Pt 6 of the Liquor Act. Section 168B and associated provisions in Pt 6A and in Div 13B of Pt 4 were inserted into the Liquor Act as part of a range of amendments effected by the *Indigenous Communities Liquor Licences Act* 2002 (Q) ("the 2002 Act"). The legislatively expressed purpose of the 2002 Act was to "prevent harm in community areas caused by alcohol abuse and misuse and associated violence"[320]. The "community areas" that were the focus of the 2002 Act were defined to encompass community areas within the jurisdiction of Aboriginal councils under the Aboriginal Communities Act and community areas within the jurisdiction of Island councils under the similarly structured *Community Services (Torres Strait) Act* 1984 (Q)[321]. Those community areas later became local government areas and community government areas by operation of the Community Government Areas Act as well as community areas under the Aboriginal Communities Act as amended in 2004.

267 The 2002 Act was explained at the time of its enactment as a partial response to a report to the Queensland Government of an investigation into indigenous communities in Cape York published in 2001 ("the Cape York Justice Study")[322]. The Cape York Justice Study had found alcohol abuse and associated violence in indigenous communities in Cape York to be "so prevalent and damaging that they threaten the communities' existence and obstruct their development" and had recommended immediate intervention[323].

268 As inserted in 2002 and as in force as at 31 May 2008, s 168B of the Liquor Act provided in part[324]:

> "A person must not, in a public place in a restricted area to which this section applies because of a declaration under section 173H, have in possession more than the prescribed quantity of liquor for the area, other than under the authority of a restricted area permit."

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320 Section 3(1).

321 Section 4 and the Schedule ("community area" and "indigenous council").

322 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 6 August 2002 at 2631-2634; Queensland, Legislative Assembly, Indigenous Communities Liquor Licences Bill 2002, Explanatory Notes at 1-2, 8, referring to the Queensland Department of Premier and Cabinet, *Cape York Justice Study*, (2001).

323 Quoted in Queensland, Legislative Assembly, Indigenous Communities Liquor Licences Bill 2002, Explanatory Notes at 2.

324 Section 168B(1).

269 Section 173H, to which reference was made in s 168B, was within Pt 6A of the Liquor Act. As inserted in 2002 and as in force as at 31 May 2008, Pt 6A commenced with s 173F, which provided:

> "The purpose of this part is to provide for the declaration of areas for minimising—
>
> (a) harm caused by alcohol abuse and misuse and associated violence; and
>
> (b) alcohol related disturbances, or public disorder, in a locality."

270 Within Pt 6A of the Liquor Act, s 173G provided that "[a] regulation may declare an area to be a restricted area"[325], and that an area so declared to be a restricted area might be a community area or part of a community area under the Aboriginal Communities Act[326]. Section 173G provided that, in recommending the Governor in Council make the regulation, the Minister administering the Act "must be satisfied the declaration is necessary to achieve the purpose of this part"[327]. Section 173H went on to provide that "[a] regulation may declare that a restricted area is an area to which section 168B applies"[328] and that such a regulation must state the quantity of liquor (to be referred to as "the prescribed quantity") that a person may have in possession in a public place in the restricted area without a "restricted area permit"[329]. Section 173I applied if a community area or part of a community area was in an area to be declared under s 173G to be a restricted area or to be declared under s 173H to be an area to which s 168B applied[330]. Section 173I provided that the Minister could recommend that the Governor in Council make the regulation only if the Minister had consulted with, or considered any recommendation that had been made by, the "community

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325 Section 173G(1).

326 Section 173G(2).

327 Section 173G(3).

328 Section 173H(1).

329 Section 173H(2).

330 Section 173I(1).

justice group for the community area"[331], but went on to provide that failure to comply did not affect the validity of a regulation[332].

271 Regulations made under the Liquor Act for the purposes of ss 173G and 173H, like other subordinate legislation in Queensland, were required to be tabled in the Queensland Parliament, where they were subject to disallowance[333]. If the regulations were likely to impose appreciable costs on the community or part of the community, they were required to be accompanied as tabled by an explanatory note prepared under the authority of the responsible Minister[334]. An explanatory note was required to include, amongst other things, a brief statement of the policy objectives of the subordinate legislation, a brief statement of the reasons for those policy objectives, and a brief statement of "the way [those] policy objectives will be achieved by the legislation and why this way of achieving them is reasonable and appropriate"[335]. Where the subordinate legislation was preceded by consultation, an explanatory note was also required to include a brief statement of the way the consultation was carried out and of the results of the consultation together with a brief explanation of any changes made to the subordinate legislation because of the consultation[336].

272 A restricted area permit, to which reference was made in ss 168B and 173H of the Liquor Act, was a permit granted under Div 13B of Pt 4 of the Liquor Act. A restricted area permit could be granted, on application, by the chief executive of the department of the Minister administering the Liquor Act and could be subject to conditions imposed by the chief executive[337]. However, it could not be granted unless the chief executive was satisfied that the amount of liquor that the applicant had applied to have in possession was reasonable for the purpose stated in the application[338]. The permit authorised the permittee to have

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331 Section 173I(2).

332 Section 173I(4).

333 Sections 49 and 50 of the *Statutory Instruments Act* 1992 (Q).

334 Section 22(2) of the *Legislative Standards Act* 1992 (Q) ("the Legislative Standards Act"). See also s 2 ("significant subordinate legislation") of the Legislative Standards Act and s 43 of the *Statutory Instruments Act* 1992 (Q).

335 Sections 24(1)(c) and 24(1)(d) of the Legislative Standards Act.

336 Section 24(2) of the Legislative Standards Act.

337 Sections 97(f), 103L(2) and 105(1)(a) of the Liquor Act; ss 33(10) and 33(11) of the *Acts Interpretation Act* 1954 (Q).

338 Section 103M.

in possession in a public place in a restricted area more than the prescribed quantity of alcohol for the area only at the times or during the period, and only for the purpose, stated in the permit[339].

273 The community justice group for a community area, to which reference was made in s 173I of the Liquor Act, was a body established under regulations made under the Aboriginal Communities Act[340], as amended contemporaneously with the 2002 Act[341]. The community justice group for a community area was required to comprise, to the greatest practicable extent, representatives of the main indigenous social groupings in the area[342].

274 As amended shortly after being made under the Liquor Act in 2002[343], and as in force as at 31 May 2008, the Liquor Regulation 2002 (Q) ("the Liquor Regulation") declared for the purpose of s 173G of the Liquor Act that "[a]n area stated in a relevant schedule is a restricted area"[344]. It also declared that "[e]ach restricted area is an area to which section 168B of the Act applies"[345] and that "[t]he prescribed quantity for a restricted area is the quantity stated for the area in a relevant schedule"[346]. Schedule 1R, the last of 18 relevant schedules to the Liquor Regulation, was headed "Palm Island".

275 Schedule 1R to the Liquor Regulation was inserted by the Liquor Amendment Regulation (No 4) 2006 (Q) ("the Amendment Regulation"). As inserted by the Amendment Regulation in 2006 and as in force as at 31 May 2008, it stated that "the community area of the Palm Island Shire Council" was a restricted area, as was the foreshore of that community area and the Palm Island jetty[347]. It stated the prescribed quantity for each of those restricted areas to be 11.25 litres for beer with an alcohol concentration of less than 4 per cent and zero

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339 Section 103L(1).

340 Section 18(1).

341 Section 10 of the *Community Services Legislation Amendment Act* 2002 (Q).

342 Section 20(3).

343 Liquor Amendment Regulation (No 2) 2002 (Q).

344 Section 37A.

345 Section 37B(1).

346 Section 37B(2).

347 Section 1 of Sched 1R.

for any other liquor, save only that for particular licensed premises (identified as the "Palm Island Canteen") the prescribed quantity for beer with an alcohol concentration of less than 4 per cent was to be "any quantity"[348].

276 The explanatory note for the Amendment Regulation explained it to be "based on the recommendations of the Palm Island Community Justice Group (CJG) and Palm Island Shire Council (Council)", each of which had "recommended alcohol limits as part of their community alcohol management strategies"[349]. The explanatory note went on to explain[350]:

> "The proposed alcohol restrictions do differ from the recommendations of the CJG and Council. There is ongoing division within the CJG and between the CJG and the Council. This division has inhibited community agreement on an Alcohol Management Plan (AMP). Subsequently, the Government developed an AMP based on a compromise between the four separate AMPs that have previously been presented to Government by the CJG and the Council.
>
> On 19 January 2005, the Government presented a draft AMP to the Council and CJG for consideration and comment by 7 February 2005.
>
> On 3 February 2005, Government received correspondence from the Mayor of the Council accompanied by 22 completed survey forms. The Council feedback did not comment on the detail of the proposed AMP. However the Council did state that the AMP would not be successful without appropriate support structures. No other formal feedback has been received from the community. The restricted area for the community will comprise the whole of the Palm Island Shire including all ten islands, the Palm Island jetty located on Greater Palm Island and all the island foreshores. It is proposed that the possession of liquor in the community will be restricted to one carton (11.25 litres) of light or mid strength beer.
>
> Extensive consultation has been undertaken with the community. The final round of consultation occurred in February 2006. Across the community there was common agreement that unrestricted alcohol was a major concern that needed to be addressed.

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348 Section 2 of Sched 1R.

349 Queensland, Legislative Assembly, Liquor Amendment Regulation (No 4) 2006, Explanatory Notes at 1 [4] and 2 [8(a)].

350 Queensland, Legislative Assembly, Liquor Amendment Regulation (No 4) 2006, Explanatory Notes at 2-3 [9].

> The AMP is necessary for Palm Island to effectively address its alcohol related issues. It is the Government's experience that in other Indigenous communities where similar alcohol related issues were present and an AMP was implemented, the quality of life has generally improved."

277 A somewhat more extensive explanation of the history of the Liquor Regulation, and of the policy objectives underlying the Liquor Regulation, was set out in an explanatory note accompanying the Liquor Amendment Regulation (No 3) 2008 (Q) ("the Further Amendment Regulation"). The Further Amendment Regulation amended statements of prescribed quantity in a number of schedules to the Liquor Regulation with effect from 2 January 2009 but left the statement of prescribed quantity in Sched 1R substantially unchanged. The Further Amendment Regulation and its accompanying explanatory note were tabled in the Queensland Parliament on 11 November 2008[351], slightly less than six months after the events giving rise to the offence of which Ms Maloney was convicted. Under the heading "Reasons for the subordinate legislation", the explanatory note stated[352]:

> "Between 2002 and 2006, alcohol restrictions have been implemented in 18 Indigenous communities. Alcohol restrictions are declared under part 6A of the Liquor Act by way of regulation and prescribe the amount of alcohol that can be in a person's possession or in a vehicle (***carriage limit***).
>
> In 2007, the Office for Aboriginal and Torres Strait Islander Partnerships, Department of Communities conducted a whole-of-government review of alcohol restrictions, programs and services. The review showed that despite existing restrictions, in many remote Indigenous communities alcohol-related harm and violence remain significantly higher, and school attendance significantly below, average Queensland standards.
>
> In February 2008, the Premier met with Indigenous community mayors and announced an Indigenous alcohol reform package whereby communities were urged to go 'as dry as possible' with government to provide improved alcohol-related support services. Part of the reforms included a review of all carriage limits in the communities.
>
> The review of carriage limits assessed the levels of harm occurring in communities and consultation was undertaken with community and other

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351 Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 11 November 2008 at 3335.

352 Queensland, Legislative Assembly, Liquor Amendment Regulation (No 3) 2008, Explanatory Notes at 1-2.

> stakeholders. The Strong Indigenous Communities, Chief Executive Officers' Committee … has overseen the review. Where alcohol-related harm is high, tighter restrictions on the quantity and strength of alcohol are required.
>
> Harm levels in the communities subject to regulatory amendment range from 7.5 times to 13.6 times Queensland's expected number of hospital admissions for assault; and from 11.2 times to 24.6 times the expected number of reported offences against the person."

The Convention

278 The preamble to the RDA recites the purpose of the RDA as being "to make the provisions contained in [the RDA] for the prohibition of racial discrimination … and, in particular, to make provision for giving effect to the Convention". In light of that stated purpose, it is appropriate at the outset to note not only the relevant text of the Convention as set out in the Schedule to the RDA but also the context of the Convention, which includes its relationship to other international human rights instruments.

279 The Convention had its origin in the Charter of the United Nations (1945), which states amongst its purposes "[t]o achieve international cooperation … in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race …"[353], and in the Universal Declaration of Human Rights[354] ("the Universal Declaration"), adopted by resolution of the General Assembly of the United Nations in 1948, the first recital of which was that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". The Universal Declaration declared, amongst other things, by Art 1 that "[a]ll human beings are born free and equal in dignity and rights", by Art 2 that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race …", and by Art 7 that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law". Article 2 of the Universal Declaration, as distinct from Art 7, was soon after reflected in the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by members of the Council of Europe in 1950 ("the European Convention"), Art 14 of which provided that "[t]he enjoyment of the rights and freedoms set forth in [that] Convention shall be secured without discrimination on any ground such as … race …".

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353 Article 1(3) of the Charter of the United Nations.

354 Universal Declaration of Human Rights (1948).

280 In opening for signature in December 1965 and entering into force in 1969, the Convention pre-dated the International Covenant on Economic, Social and Cultural Rights (1966) ("the ICESCR"), under Art 2 of which States Parties "undertake to guarantee that the rights enunciated in the [ICESCR] will be exercised without discrimination of any kind as to race …", and the International Covenant on Civil and Political Rights (1966) ("the ICCPR"), under Art 2 of which each State Party similarly "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR], without distinction of any kind, such as race …" but which goes on to recognise rights which include those in Art 14, that "[a]ll persons shall be equal before the courts and tribunals", and in Art 26, that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law". Although the ICESCR and the ICCPR did not open for signature until December 1966 and did not enter into force until 1976, they had each existed in draft since 1954[355]. As explained in annotations to the texts of the 1954 drafts, Art 2 of the ICESCR and Art 2 of ICCPR reflected "the prevalence of the view that, whatever the level reached in the realization of rights in a country at any given time, the benefits thereof would be accorded to all equally"[356]. That was in contrast to Art 26 of the ICCPR, the underlying principle of which was explained in the same annotations as being to establish "freedom from discrimination" as a free-standing right and not merely as a general principle governing the enjoyment of other rights recognised in the ICCPR[357].

281 The Convention was preceded in 1963 by a resolution of the General Assembly of the United Nations known as the "United Nations Declaration on the Elimination of All Forms of Racial Discrimination"[358] ("the Racial Discrimination Declaration"). The Racial Discrimination Declaration affirmed both "the necessity of speedily eliminating racial discrimination throughout the world, in all its forms and manifestations, and of securing understanding of and respect for the dignity of the human person" and "the necessity of adopting national and international measures to that end" in order to secure the universal

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355 Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (1993) at xix-xxi.

356 Secretary-General, *Annotations on the text of the draft International Covenants on Human Rights*, UN GAOR, 10th sess, annexes, Agenda Item 28 (Pt II), UN Doc A/2929 (1 July 1955) at 20 [27].

357 At 61 [180].

358 United Nations Declaration on the Elimination of All Forms of Racial Discrimination, GA Res 1904 (XVIII), UN GAOR, 18th sess, 1261st plen mtg, Agenda Item 43, UN Doc A/RES/18/1904 (20 November 1963).

and effective recognition and observance of principles it went on to proclaim[359]. At the forefront of those principles were that "[d]iscrimination between human beings on the ground of race … is an offence to human dignity"[360] and that "[n]o State … shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons … on the ground of race …"[361]. For the purpose, as explained at the time, of achieving "true equality" for racial groups in positions of inferiority[362], the Racial Discrimination Declaration went on to proclaim by Art 2(3) that "[s]pecial concrete measures shall be taken in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups with the object of ensuring the full enjoyment by such individuals of human rights and fundamental freedoms" but that those measures "shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups". It proclaimed by Art 3 that "[p]articular efforts shall be made to prevent discrimination based on race … especially in the fields of civil rights, access to citizenship, education, religion, employment, occupation and housing" and that "[e]veryone shall have equal access to any place or facility intended for use by the general public, without distinction as to race …".

282 The preamble to the Convention records the consideration of States Parties, amongst other things, "that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings", that the Universal Declaration "proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race …" and that the Racial Discrimination Declaration "solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person". The preamble concludes by recording the desire of States Parties "to implement the principles embodied in the [Racial Discrimination Declaration] and to secure the earliest adoption of practical measures to that end".

283 Article 1 of the Convention is definitional. It provides in part:

> "1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race,

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359 Paragraphs 1-2.

360 Article 1.

361 Article 2(1).

362 McKean, *Equality and Discrimination Under International Law*, (1983) at 153.

colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

…

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

284 Article 2 of the Convention lays down what Art 5 goes on to refer to as "fundamental obligations". It provides in part:

"1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

…

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

…

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

285 Article 5 provides:

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;

(c) Political rights, in particular the rights to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks."

286 Article 5 has been explained to require adherence by States Parties to a single principle expressed in different ways: the requirement for a State Party "to guarantee the right of everyone, without distinction as to race … to equality before the law, notably in the enjoyment of the [listed] rights" is no more than an expression in different words of the requirement for a State Party "to eliminate racial discrimination" as defined in Art 1 "in all its forms"[363]. Consistent with that explanation, it appears always to have been accepted that the rights listed in Art 5 are non-exhaustive examples of "human rights and fundamental freedoms" within the meaning and scope of Art 1(1)[364].

287 The rights listed in Art 5 differ in some respects from those set out in the Universal Declaration and in the ICCPR and the ICESCR. Of those argued to be relevant in this case, only that referred to in Art 5(d)(v) ("to own property alone as well as in association with others") is identical to a right listed in the Universal

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363 Ramcharan, "Equality and Nondiscrimination", in Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights*, (1981) 246 at 252; McKean, *Equality and Discrimination Under International Law*, (1983) at 162.

364 Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", (1966) 15 *International and Comparative Law Quarterly* 996 at 1025-1026.

Declaration[365], although not reflected in either the ICCPR or the ICESCR. The right referred to in Art 5(a) ("to equal treatment before the tribunals and all other organs administering justice") is narrower in expression than the right to equality before the law and to equal protection of the law referred to in Art 7 of the Universal Declaration and in Art 26 of the ICCPR and is closer in expression to the right to equality before courts and tribunals referred to in Art 14 of the ICCPR. The right referred to in Art 5(f) ("access to any place or service intended for use by the general public") does not appear at all amongst the rights listed in the Universal Declaration, the ICCPR or the ICESCR and rather reflects the particular concern expressed in Art 3(2) of the Racial Discrimination Declaration that everyone should have equal access to any place or facility intended for use by the general public, without distinction as to race.

288 Article 8 of the Convention provides for the establishment of a Committee on the Elimination of Racial Discrimination ("the Racial Discrimination Committee"), consisting of experts elected to serve in a personal capacity. Article 9 confers functions on the Committee which include making "suggestions and general recommendations", based on the examination of the reports and information received from the States Parties, which are to be reported to the General Assembly of the United Nations.

289 The Racial Discrimination Committee has made "general recommendations" which are not binding on States Parties but which provide guidance to States Parties on the interpretation of the Convention[366]. General recommendations of the Committee over the last two decades have elaborated a coherent understanding of the meaning and interrelationship of Arts 1(1), 1(4), 2(2) and 5 of the Convention. They have contributed to, and are indicative of, a "normative development"[367]. No party or intervener suggested the understanding they reveal not generally to be accepted amongst States Parties.

290 The Racial Discrimination Committee addressed the definition of "discrimination" in Art 1(1) of the Convention in 1993 in its General Recommendation 14[368]. The Committee noted that "[n]on-discrimination,

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365 Article 17(1).

366 Boyle and Baldaccini, "A Critical Evaluation of International Human Rights Approaches to Racism", in Fredman (ed), *Discrimination and Human Rights: The Case of Racism*, (2001) 135 at 171-172.

367 Young, *Constituting Economic and Social Rights*, (2012) at 53.

368 Committee on the Elimination of Racial Discrimination, "General Recommendation XIV (42) on article 1, paragraph 1, of the Convention", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 48th sess, Supp No 18, UN Doc A/48/18 (1993) 115.

together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights". The Committee stated that "[a] distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms"[369]. The Committee went on to state that "a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of [Art 1(4)] of the Convention". The Committee added that "[i]n seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race …"[370]. The Committee continued in the same vein in General Recommendation 30 in 2004 where, in the context of addressing the topic of "differential treatment based on citizenship or immigration status", it stated that differential treatment "will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim"[371].

291 The Racial Discrimination Committee's suggestion that "discrimination" within the meaning of Art 1(1) of the Convention encompasses action that has "an unjustifiable disparate impact" on a racial group reflects the reference in Art 1(1) of the Convention to distinctions which have the "effect" of impairing the recognition, enjoyment or exercise of human rights or fundamental freedoms "on an equal footing". That suggestion, as well as the Committee's further suggestion that justification for different treatment requires demonstration of the proportional pursuit of a legitimate aim, is in keeping with accepted understandings of the undefined references to "discrimination" in Art 3 of the ICESCR and Art 2 of the ICCPR and to "equality before the law" in Art 26 of the ICCPR.

292 The Racial Discrimination Committee addressed the operation of Art 5 of the Convention in 1996 in its General Recommendation 20[372]. The Committee

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369 Paragraph 1.

370 Paragraph 2.

371 Paragraph 4 of the Committee on the Elimination of Racial Discrimination, "General recommendation XXX on discrimination against non-citizens", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 59th sess, Supp No 18, UN Doc A/59/18 (2004) 93.

372 Committee on the Elimination of Racial Discrimination, "General Recommendation XX (48)", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 51st sess, Supp No 18, UN Doc A/51/18 (1996) 124.

there noted that Art 5, "apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights" and that the Convention "obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights"[373]. The Committee added that "[w]henever a State imposes a restriction upon one of the rights listed in [Art 5] which applies ostensibly to all within its jurisdiction, it must ensure that neither in purpose nor effect is the restriction incompatible with [Art 1] as an integral part of international human rights standards"[374].

293 Much more recently, in its General Recommendation 32 in 2009, the Racial Discrimination Committee addressed the nature of "special measures" in Art 1(4) and "special and concrete measures" in Art 2(2) and their relationship with the definition of "racial discrimination" in Art 1(1)[375]. The Committee commenced by noting that the Convention "is based on the principles of the dignity and equality of all human beings", that "[t]he principle of equality underpinned by the Convention combines formal equality before the law with equal protection of the law" and that "substantive or de facto equality in the enjoyment and exercise of human rights [is] the aim to be achieved by the faithful implementation of its principles"[376]. The Committee reiterated that discrimination under the Convention "includes purposive or intentional discrimination" as well as "discrimination in effect"[377] and further reiterated that the "core notion", as articulated in General Recommendations 14 and 30, lay in differential treatment where the criteria for differentiation, judged in the light of the objectives and purposes of the Convention, are not applied in pursuit of a legitimate aim, and are not proportional to the achievement of that aim[378]. The Committee went on to explain the expression "special and concrete measures" in Art 2(2) as "synonymous" with "special measures" in Art 1(4)[379] and to explain

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373 Paragraph 1.

374 Paragraph 2.

375 Committee on the Elimination of Racial Discrimination, "General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 64th sess, Supp No 18, UN Doc A/64/18 (2009) 152.

376 Paragraph 6.

377 Paragraph 7.

378 Paragraph 8.

379 Paragraph 32.

Arts 1(4) and 2(2) as having an "essential unity of concept and purpose", Art 1(4) being essentially a clarification of the meaning of discrimination when applied to special measures and Art 2(2) carrying forward the same special measures concept into the realm of obligations of States Parties[380]. The Committee emphasised in particular that "special measures are not an exception to the principle of non-discrimination but are integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality"[381] and are not to be confused with specific and permanent rights pertaining to categories of person (an example of which is the rights of indigenous peoples to lands traditionally occupied by them)[382].

294 In relation to the content of the expressions used to define special measures in Art 1(4), the Racial Discrimination Committee relevantly stated: that the reference to "sole purpose" "limits the scope of acceptable motivations"[383]; that "adequate advancement" "implies goal-directed programmes which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals"[384]; that "protection" "indicates that special measures may have preventive (of human rights violations) as well as corrective functions"[385]; and that the limitation that "they shall not be continued after the objectives for which they have been taken have been achieved" "is essentially functional and goal-related: the measures should cease to be applied when the objectives for which they were employed – the equality goals – have been sustainably achieved"[386].

295 In relation to the conditions for the adoption and implementation of special measures, the Racial Discrimination Committee relevantly stated that special measures "should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary" and "should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current

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380 Paragraph 29.

381 Paragraph 20.

382 Paragraph 15.

383 Paragraph 21.

384 Paragraph 22.

385 Paragraph 23.

386 Paragraph 27.

situation of the individuals and communities concerned"[387]. The Committee added that States Parties "should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities"[388]. That statement as to consultation and participation with affected communities does not go quite as far as the more general and aspirational statement in a General Recommendation in 1997[389] by which the Committee called upon States Parties to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent"[390].

The RDA and its prior interpretation

296 Sections 8 and 10 are within Pt II of the RDA. Section 8(1) of the RDA provides:

> "This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3)."

297 Section 10(3) of the RDA is not relevant. The remainder of s 10 provides:

> "(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

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387 Paragraph 16.

388 Paragraph 18.

389 Committee on the Elimination of Racial Discrimination, "General Recommendation on the rights of indigenous peoples", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 52nd sess, Supp No 18, UN Doc A/52/18 (1997) 122.

390 Paragraph 4(d).

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention."

298 Section 10 of the RDA, alone or with s 8 of the RDA, has been the subject of close consideration by the High Court in a series of cases beginning with *Gerhardy v Brown* ("*Gerhardy*")[391] and including *Mabo v Queensland* ("*Mabo [No 1]*")[392], *Western Australia v The Commonwealth* (*Native Title Act Case*)[393] and *Western Australia v Ward* ("*Ward*")[394]. It is appropriate to review those cases with a view to identifying the propositions for which they are collectively authority.

299 It was uncontroversial in each of those cases, as it is uncontroversial in this case, that s 10 of the RDA gives effect to Australia's obligations under Arts 2(1)(c) and 5 of the Convention. It was, and is, equally uncontroversial that s 8 of the RDA gives effect to the limitation on the scope of "racial discrimination" that is expressed in Art 1(4) of the Convention and that also underlies the obligation in Art 2(2) of the Convention.

300 It was also uncontroversial in each of those cases, as it is uncontroversial in this case, that the reference to "rights" in s 10 of the RDA has the same meaning as "human rights and fundamental freedoms" in Art 1(1) of the Convention, of which the rights listed in Art 5 of the Convention are particular examples. They are conveniently referred to as "human rights". Human rights are distinct in concept from specific legal rights protected or enforced under domestic law. They are "moral entitlement[s]"[395].

301 At issue in *Gerhardy* was the consistency with s 10 of the RDA of a provision of a South Australian law which imposed a criminal prohibition on non-Pitjantjatjara persons entering Pitjantjatjara land without prior permission granted on application in writing[396]. The unanimous holding was that the provision was a special measure within Art 1(4) of the Convention in respect of which the application of s 10 was excluded by s 8 of the RDA. That was so

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391 (1985) 159 CLR 70; [1985] HCA 11.

392 (1988) 166 CLR 186; [1988] HCA 69.

393 (1995) 183 CLR 373; [1995] HCA 47.

394 (2002) 213 CLR 1; [2002] HCA 28.

395 *Mabo [No 1]* (1988) 166 CLR 186 at 229. See also *Gerhardy* (1985) 159 CLR 70 at 125-126.

396 Section 19 of the *Pitjantjatjara Land Rights Act* 1981 (SA).

notwithstanding that the provision resulted in the unequal enjoyment, as between Pitjantjatjara and non-Pitjantjatjara persons, of the human right "to freedom of movement" referred to in Art 5(d)(i) of the Convention.

302 The Court was unanimous in holding that it was not essential to the characterisation of a law as a special measure within Art 1(4) of the Convention that the law be temporally limited on its face: it was sufficient that the law meet the indicia of a special measure at the time its character is called into question[397]. As to the criteria by reference to which the existence of a special measure within Art 1(4) of the Convention was to be determined, Brennan J said[398]:

> "A special measure (1) confers a benefit on some or all members of a class, (2) the membership of which is based on race, colour, descent, or national or ethnic origin, (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms."

In the context of discussing the third of those criteria, his Honour said[399]:

> "'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them."

His Honour nevertheless went on to emphasise that both the third and the fourth criteria involved questions of fact and degree the determination of which was in the first instance for a political branch of government in performance of the obligation imposed by Art 2(2) of the Convention[400]. To conclude that a measure

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397 *Gerhardy* (1985) 159 CLR 70 at 88-89, 106, 108, 113, 140, 154, 161.

398 (1985) 159 CLR 70 at 133.

399 (1985) 159 CLR 70 at 135.

400 (1985) 159 CLR 70 at 137-138.

in fact taken by a political branch of government was a special measure within Art 1(4) of the Convention and s 8 of the RDA, it was enough that a court determine that the political assessment inherent in the measure could reasonably be made[401], ascertaining the facts relevant to the making of that judicial determination "as best it can"[402]. Gibbs CJ[403] and Mason J[404] adopted a similar approach, as did Deane J, who said that a finding that a provision embodying a measure was "taken" for a "sole purpose" of a kind referred to in Art 1(4) "will not be precluded unless it appears that the provision is not capable of being reasonably considered to be appropriate and adapted to achieving that purpose"[405].

303 As to the legal operation of s 10 of the RDA where the condition for its application is fulfilled, Mason J pointed out that s 10 implements Arts 2(1)(c) and 5 of the Convention by operating "to confer on the persons discriminated against the enjoyment of a relevant right to the same extent as it is enjoyed by persons of another race" and went on to distinguish the effect of s 10 under s 109 of the Constitution on two categories of State law[406]. Expressed at the level of generality with which his Honour's analysis came later to be endorsed and applied in the *Native Title Act Case*[407] and in *Ward*[408], those categories can be stated as follows. In the case of a State law which results in the unequal enjoyment of a human right by failing to confer a legal right on persons of a particular race, s 10 operates to give that legal right to persons of that race in a manner that is complementary to the State law. In the case of a State law which results in the unequal enjoyment of a human right by positively impeding the enjoyment of that right by persons of a particular race (for example, by imposing a legal prohibition or by extinguishing a legal right), s 10 operates to remove that impediment. In the first case, the State law is consistent with the operation of

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401 (1985) 159 CLR 70 at 138-139.

402 (1985) 159 CLR 70 at 142, quoting *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292; [1959] HCA 11.

403 (1985) 159 CLR 70 at 87-88.

404 (1985) 159 CLR 70 at 104-105.

405 (1985) 159 CLR 70 at 153.

406 (1985) 159 CLR 70 at 98-99.

407 (1995) 183 CLR 373 at 438.

408 (2002) 213 CLR 1 at 99-101 [106]-[109].

s 10 and is valid. In the second case, the State law is inconsistent with the operation of s 10 and is to that extent invalid under s 109 of the Constitution.

304 Members of the Court in *Gerhardy* variously expressed views to the effect that s 10 of the RDA would have been engaged either by the prohibition on non-Pitjantjatjara persons entering Pitjantjatjara land or by the conferral of title to Pitjantjatjara land on Pitjantjatjara persons had the application of s 10 not been excluded by s 8[409]. It was suggested in that context that special measures in Art 1(4) constitute an exception to discrimination as defined in Art 1(1) of the Convention[410] and that s 8 correspondingly operates to exclude a category of discriminatory laws to which s 10 of the RDA would otherwise apply. Those views were not necessary to the outcome in *Gerhardy* and ought not to be treated now as having the weight of authority. Academic criticism soon showed them to be out of step with the developing international understanding of the Convention[411]. The force of that criticism was subsequently acknowledged in the *Native Title Act Case* where it was said that the *Native Title Act* 1993 (Cth) "can be regarded either as a special measure under s 8 … or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the [RDA] or the [Convention]"[412].

305 At issue in *Mabo [No 1]* was the consistency with s 10 of the RDA of a Queensland law which, in providing retrospectively that the Murray Islands were vested in the Crown in right of Queensland freed from all other rights, purported in its substantive practical operation uniquely to extinguish without compensation the native title of the Miriam people[413]. In a similar vein, amongst the issues in the *Native Title Act Case* was the consistency with s 10 of the RDA of a Western Australian law, which purported without compensation prospectively to extinguish native title and to replace it with statutory rights inferior to those of the holders of interests arising from Crown grants[414]. Each of those State laws was held to be inconsistent with s 10 of the RDA so as to be

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409 (1985) 159 CLR 70 at 87, 103-104, 107, 132.

410 See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 262; [1982] HCA 27.

411 Brownlie, "The Rights of Peoples in Modern International Law", in Crawford (ed), *The Rights of Peoples*, (1988) 1 at 9-10; Sadurski, "Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case That Wasn't", (1986) 11 *Sydney Law Review* 5.

412 (1995) 183 CLR 373 at 483-484.

413 (1988) 166 CLR 186 at 212.

414 (1995) 183 CLR 373 at 434-435.

invalid under s 109 of the Constitution. In so holding, the Court in the *Native Title Act Case* unanimously endorsed the explanation of the meaning and application of s 10 given by Deane J in *Mabo [No 1]*[415]:

> "As its opening words ('If, *by reason of* …') make clear, it is concerned with the operation and effect of laws. In the context of the nature of the rights which it protects and of the provisions of the … Convention which it exists to implement, the section is to be construed as concerned not merely with matters of form but with matters of substance, that is to say, with the practical operation and effect of an impugned law." (emphasis in original)

Having identified the rights protected by s 10 of the RDA to include (by reference to Art 5(d)(v) and Art 5(d)(vi) of the Convention) a "right to own or to inherit property", and having identified "'[p]roperty' in the context of [those] human rights" to include land and chattels as well as interests in land and chattels[416], the joint judgment in the *Native Title Act Case* went on to identify the "security of enjoyment" of interests arising from a Crown grant as "the benchmark by which to determine whether … the Aborigines who hold native title enjoy their human rights in relation to land to a more limited extent than do persons of other races"[417].

306 The joint judgment of four members of the Court in *Ward* built on the reasoning in *Mabo [No 1]* and the *Native Title Act Case* in emphasising that s 10 of the RDA is not confined to laws whose purpose can be identified as discriminatory nor to laws that can be said to be aimed at a racial characteristic or to make a distinction based on race and that fulfilment of the condition for the application of s 10 turns rather on the effect of a law on the relative "enjoyment" of a "right" by persons of different races[418]. It was said[419]:

> "That to which [s 10(1)] in terms is directed is the *enjoyment* of rights by some but not by others or to a more limited extent by others; there is an unequal enjoyment of rights that are or should be conferred irrespective of race, colour or national or ethnic origin. 'Enjoyment' of rights directs

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415 (1988) 166 CLR 186 at 230, quoted in *Native Title Act Case* (1995) 183 CLR 373 at 437.

416 (1995) 183 CLR 373 at 437.

417 (1995) 183 CLR 373 at 438.

418 (2002) 213 CLR 1 at 103 [115].

419 (2002) 213 CLR 1 at 99 [105].

> attention to much more than what might be thought to be the purpose of the law in question. Given the terms of the Convention … that is not surprising. The Convention's definition of racial discrimination refers to any distinction, exclusion, restriction or preference based (among other things) on race which has the purpose *or effect* of nullifying or impairing (again among other things) the enjoyment of certain rights. Further, the basic obligations undertaken by States party to the Convention include taking effective measures to nullify laws which have *the effect* of creating or perpetuating racial discrimination". (emphasis in original)

After pointing out that "care is required in identifying and making the comparison between the respective 'rights' involved"[420], the joint judgment went on to emphasise that the holdings in *Mabo [No 1]* and the *Native Title Act Case* both involved the rejection of the argument that native title can "legitimately be treated differently from … other forms of title"[421] for the purposes of s 10. The joint judgment suggested that the rejection of that argument was best seen as being for the reason that to deprive people of a particular race of a particular species of property not enjoyed by persons of another race finds "no basis" in the Convention or the RDA and involves differential treatment by reference to a characteristic implicitly declared by the RDA to be "irrelevant"[422].

307 Despite the emphasis given in *Mabo [No 1]*, the *Native Title Act Case* and *Ward* to s 10 of the RDA being directed to the practical operation and effect of laws on the enjoyment of human rights, the laws impugned in those cases each had a legal operation that uniquely extinguished or impaired legal rights (to native title as recognised at common law) essential to the continuing enjoyment by persons of a particular race (Aboriginal persons) of human rights (to own or to inherit property). The law earlier impugned in *Gerhardy* drew a racial distinction on its face.

308 No previous case in the High Court has addressed whether, and if so how, s 10 of the RDA might apply to an impugned law that operates to impose the same legal burden on persons of all races but that so operates practically to burden the enjoyment of a human right by persons of a particular race to a greater extent than it burdens the enjoyment of a human right by persons of other races. That is to say, no previous case in the High Court has addressed the application of s 10 to what the Racial Discrimination Committee has referred to as "an

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420 (2002) 213 CLR 1 at 103 [116].

421 (2002) 213 CLR 1 at 104 [117].

422 (2002) 213 CLR 1 at 104-106 [117]-[122].

unjustifiable disparate impact upon a group distinguished by race"[423], encompassing what is sometimes referred to as "adverse impact discrimination": where "treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable"[424].

309 Prior to three cases recently to have come before the Queensland Court of Appeal, of which this case is one, an issue of that kind had been addressed at the level of an intermediate appellate court only obliquely by the Full Court of the Federal Court in *Bropho v Western Australia*[425] ("*Bropho*"). The Full Court in that case held s 10 of the RDA not to be engaged by an exercise of statutory discretion under a Western Australian statute which had the effect of excluding certain persons from an Aboriginal reserve in order to obviate risks to the safety and welfare of women and children residing on the reserve. The excluded persons were all Aboriginal. The Full Court noted[426]:

> "It has long been recognised in human rights jurisprudence that all rights in a democratic society must be balanced against other competing rights and values, and the precise content of the relevant right or freedom must accommodate legitimate laws of, and rights recognised by, the society in which the human right is said to arise."

The reasoning of the Full Court was then expressed in the following passage[427]:

> "In the present case it is undesirable to explore, to the point of conclusion, what might be the content of the rights or freedoms asserted by the appellant concerning the occupation and management of the reserve land having regard to legitimate laws and rights recognised in Australia. To the extent that the rights in question (which were derived from a mix of statutory instruments) were property rights, such rights were not absolute in nature given the general recognition that a State has a right to enforce such laws as it deems necessary to control the use of property in

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423 Paragraph 2 of the Committee on the Elimination of Racial Discrimination, "General Recommendation XIV (42) on article 1, paragraph 1, of the Convention", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 48th sess, Supp No 18, UN Doc A/48/18 (1993) 115.

424 *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 392; [1991] HCA 49.

425 (2008) 169 FCR 59.

426 (2008) 169 FCR 59 at 83 [81].

427 (2008) 169 FCR 59 at 83-84 [83].

> accordance with the general interest. It follows that any interference with the enjoyment of the right, provided that such interference is effected in accordance with the legitimate public interest (in this case to protect the safety and welfare of inhabitants [of the reserve]), will not be inconsistent with s 10 of the [RDA]. Indeed, although the authorities on s 10 of the [RDA] recognise that there is no basis for distinguishing between different species of ownership of property, no property right, regardless of its source or genesis, is absolute in nature, and no invalid diminution of property rights occurs where the State acts in order to achieve a legitimate and non-discriminatory public goal."

310 It will be seen that the proposition for which *Bropho* is appropriately to be treated as authority later divided the Queensland Court of Appeal. A narrow understanding (favoured by McMurdo P) is that a legal limit on a legal right to own property imposed in pursuit of a legitimate public interest will not affect the enjoyment of the human right to own property referred to in Art 5(d)(v) of the Convention so as to engage s 10 of the RDA. A wider understanding (favoured by Keane JA and by Chesterman JA) is that pursuit of any legitimate public interest is a sufficient answer to any claim that a law results in the unequal enjoyment of any human right protected by s 10 of the RDA provided only that the means adopted by the law are not demonstrably unreasonable. For reasons which will appear, I cannot accept either of those understandings.

The earlier Queensland cases

311 The Queensland Court of Appeal grappled with whether, and if so how, s 10 of the RDA might apply to a case of adverse impact discrimination in two earlier cases. In both cases, it rejected an argument that s 10 was engaged by provisions of the Liquor Act or of the Liquor Regulation operating to impose a disparate practical burden on the enjoyment of human rights by Aboriginal persons living in community areas. In each case, it was unanimous in finding the provisions to be special measures excluded from the application of s 10 by s 8 of the RDA. In each case, it was divided as to whether the condition for the application of s 10 would otherwise have been fulfilled. Its reasoning in those cases provides the immediate context for its reasoning in this case.

312 The first case, *Aurukun Shire Council v Chief Executive Officer, Office of Liquor Gaming and Racing in the Department of Treasury*[428] ("*Aurukun*"), involved a challenge to amendments to the Liquor Act by which all local government authorities in Queensland were prohibited from applying for or holding a liquor licence. The State-wide prohibition was designed to give effect to a principal recommendation of the Cape York Justice Study, that local

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428 [2012] 1 Qd R 1.

councils no longer operate canteens in community areas, and was introduced only in 2008 after legislative amendments in 2002 aimed at facilitating divestiture had proved ineffective. The Queensland Court of Appeal (McMurdo P, Keane JA and Philippides J) unanimously found the prohibition to constitute a special measure directed to securing the advancement of women and children in Aboriginal communities, by protecting them from alcohol-fuelled violence and abuse. In so holding, it unanimously rejected an argument that it is essential to the existence of a special measure that the intended beneficiaries be consulted and have given informed consent[429].

313 McMurdo P would otherwise have held that the amendments fulfilled the condition for the application of s 10 by stopping Aboriginal persons in indigenous communities from enjoying the same access as non-indigenous Queenslanders to equal protection of the law or "equal treatment before the law". She identified that right as being recognised in Art 5(a) of the Convention (referring to "equal treatment before the tribunals … administering justice") as well as in Art 26 of the ICCPR[430]. *Bropho*, she said, was to be confined to property rights[431]. Philippides J would also have accepted s 10 to encompass a right to equal protection of the law but considered that the State-wide prohibition did not "in substance or practical effect impose a different liquor licensing regime in indigenous communities" with the consequence that *Bropho* had no relevance[432].

314 Keane JA took a different approach. He said that equal protection of the law in this context is no more than a paraphrase of the purpose of s 10. It does not identify the content of a right protected by s 10[433]. His primary position was that there was no unequal enjoyment of rights. While he was prepared to accept that the liberties of adult persons to drink alcohol and to buy alcohol from licensed premises were human rights within the protection of s 10[434], those rights were unaffected by the amending legislation. The mere opportunity to buy alcohol from a local council was not a human right[435]. His secondary position,

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429 [2012] 1 Qd R 1 at 51 [81], 79-80 [193]-[194], 100 [249].

430 [2012] 1 Qd R 1 at 40 [44], 48 [70]-[71].

431 [2012] 1 Qd R 1 at 48 [70].

432 [2012] 1 Qd R 1 at 102-103 [259]-[263].

433 [2012] 1 Qd R 1 at 67 [147].

434 [2012] 1 Qd R 1 at 65 [141].

435 [2012] 1 Qd R 1 at 68-69 [155].

for which he invoked *Bropho*, was that the case was at most one of competing human rights because the amendments gave legislative expression to the right "to security of person and protection … against violence or bodily harm" referred to in Art 5(b) of the Convention[436]. He said that the striking of a legislative balance between competing human rights was incapable of engaging s 10 unless the balance struck was demonstrably unreasonable[437].

315 The second case was *Morton v Queensland Police Service* ("*Morton*")[438]. Like this case, *Morton* was a challenge to the application of the criminal prohibition in s 168B of the Liquor Act to the possession of alcohol by Aboriginal persons on Palm Island brought about by insertion of Sched 1R into the Liquor Regulation by the Amendment Regulation. Finding Sched 1R to be a special measure, the Queensland Court of Appeal (McMurdo P, Holmes and Chesterman JJA) relied on the explanatory note to the Amendment Regulation to demonstrate satisfaction of each of the criteria identified by Brennan J in *Gerhardy*, including, in relation to the third criterion, the existence of consultation.

316 McMurdo P would otherwise have applied her reasoning in *Aurukun* to hold s 10 to be engaged, if not excluded by s 8, on the basis that Sched 1R had the practical effect of denying to Aboriginal persons on Palm Island the same access as non-indigenous Queenslanders to equal protection of the law[439]. Chesterman JA (with whose reasons Holmes JA agreed) accepted Sched 1R to be "discriminatory on the ground of race" in that its "legal and practical effect" was to "restrict the possession of alcohol by the members of a group which are identified, by the fact of their residence [on Palm Island], as Aboriginal"[440]. With similar effect to Keane JA in *Aurukun*, he said that the right to equality before the law was outside the protection of s 10[441]. He said that the right to possess liquor was not a human right[442], and that the right of access to a public place referred to in Art 5(f) of the Convention was not "infringed" by a restriction on the amount

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436 [2012] 1 Qd R 1 at 70 [160].

437 [2012] 1 Qd R 1 at 70-73 [162]-[169].

438 (2010) 271 ALR 112.

439 (2010) 271 ALR 112 at 120-121 [24].

440 (2010) 271 ALR 112 at 129 [54].

441 (2010) 271 ALR 112 at 135-137 [84]-[93].

442 (2010) 271 ALR 112 at 137 [94].

of alcohol able to be taken to that public place[443]. His position was that the absence of infringement of a human right meant that s 10 was not engaged.

317 For reasons which will appear, I would reject for the purpose of s 10 of the RDA the utility of equality of enjoyment of a right to equal protection of the law. To that extent, I prefer the approach of Keane JA and of Chesterman JA to that of McMurdo P and Philippides J. I would also accept the primary position of Keane JA in *Aurukun* (that there was no unequal enjoyment of human rights in that case). However, I cannot accept the secondary position of Keane JA in *Aurukun* (that s 10 cannot be engaged by the striking of a not-unreasonable legislative balance between competing human rights). Nor can I accept the position of Chesterman JA in *Morton* (that s 10 cannot be engaged without infringement of a human right).

This case

318 It was against the immediate background of the fate of the challenge in *Morton* that Ms Maloney mounted her challenge to Sched 1R to the Liquor Regulation in this case. Her argument to the Queensland Court of Appeal was put on a wider basis than the argument that had been put in *Morton*. She argued that Sched 1R resulted in her unequal enjoyment, as an Aboriginal person living on Palm Island, relative to non-indigenous persons living elsewhere in Queensland, of the human rights referred to in Art 5(a), Art 5(d)(v) and Art 5(f) of the Convention. She relied on affidavits of 14 senior members of the Palm Island community read in the Townsville District Court to argue for a finding that, contrary to what was said in the explanatory note for the Amendment Regulation, there had been no real consultation and that the prohibition on the possession of alcohol had been forced on the Palm Island community. She argued that, contrary to *Aurukun*, consent of an affected community is essential to the existence of a special measure.

319 The Queensland Court of Appeal (McMurdo P, Chesterman JA and Daubney J), as in *Morton*, was unanimous in finding Sched 1R to constitute a special measure. As to the effect of the affidavits, the Court of Appeal in essence adopted the finding of the District Court that it was "open to infer that there was a consultation process that did take into account the views [of] the community despite the personal experience or expectation of the deponents"[444]. Chesterman JA (with whose reasons Daubney J agreed) stated the short point to be drawn from the evidence in this way: there had been consultation; the community was divided as to whether alcohol restrictions should be imposed and

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443 (2010) 271 ALR 112 at 138 [99].

444 *Maloney v Queensland Police Service* [2011] QDC 139 at [45]; *R v Maloney* [2013] 1 Qd R 32 at 49-50 [47].

as to what form any restrictions should take; and there was no prospect of agreement. As to the argument about consent, Chesterman JA said[445]:

> "The short answer … is that nothing in Arts 1(4) or 2(2) makes consent necessary to the validity of a special measure although consent, or its lack, may be relevant in determining whether a provision is a special measure. If consent were an essential pre-condition to the validity of a special measure the utility of s 8 of the [RDA] and Art 1(4) would be denied to communities, such as Palm Island, which were divided in opinion about the measures. A small minority could deprive the majority of a valuable protective measure."

320 As in *Morton*, McMurdo P would otherwise have applied her reasoning in *Aurukun* to hold s 10 engaged, if not excluded by s 8, on the basis that Sched 1R had the practical effect of denying to Aboriginal persons on Palm Island the same access as non-indigenous Queenslanders to equal protection of the law referred to in Art 5(a) of the Convention[446]. She would also have held, in respect of the right referred to in Art 5(f), that Ms Maloney was denied "the same access to the service of liquor in licensed premises in her community on Palm Island which is enjoyed by non-Indigenous Queenslanders in their communities", pointing out that "[t]he relevant provisions do not apply to dysfunctional non-Indigenous communities with problems of alcohol-related violence"[447]. However, she felt compelled by *Bropho* to hold that the pursuit by Sched 1R of a legitimate public interest was sufficient to exclude the engagement of s 10 in respect of the right to own property listed in Art 5(d)(v)[448]. Chesterman JA said that Art 5(a) did not refer to a right not to be prosecuted under a discriminatory law and therefore could have no application[449]. Consistent with the position he had taken in *Morton*, he would have held s 10 not to be engaged in respect of the human rights referred to in Art 5(d)(v) or Art 5(f) for the reason that the pursuit by Sched 1R of a legitimate public interest prevented either of those rights being "infringed"[450].

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445 [2013] 1 Qd R 32 at 69 [118].

446 [2013] 1 Qd R 32 at 36-37 [9]-[15].

447 [2013] 1 Qd R 32 at 41 [28].

448 [2013] 1 Qd R 32 at 38-40 [20]-[26].

449 [2013] 1 Qd R 32 at 60 [90].

450 [2013] 1 Qd R 32 at 62-63 [99]-[102].

321 In her appeal to the High Court, Ms Maloney essentially repeats the argument she made to the Court of Appeal as to the engagement of s 10 of the RDA. But the argument she now puts about s 8 is more nuanced. She says that Queensland has the burden of proving that Sched 1R has the character of a special measure. She says that, in the absence of consultation being shown to have led to informed consent, a law criminalising conduct of members of a racial group can be justified as a special measure only where there is evidence that shows a compelling need for the measure in order to advance the enjoyment of rights by members of that group. She says that evidence is lacking. The National Congress alone argues that the informed consent of an affected community is essential to the existence of a special measure. The National Congress goes further to argue that a law criminalising the conduct of members of a group identified as the beneficiaries of the measure is not capable of being characterised as a special measure at all.

322 For its part, Queensland says that the appeal should be dismissed on the basis that the condition for the application of s 10 was not fulfilled, without this Court needing to address whether Sched 1R constituted a special measure. It argues that Ms Maloney's choice of comparator is wrong: the appropriate comparison is between indigenous and non-indigenous persons on Palm Island, all of whom are subject to the prohibition in s 168B of the Liquor Act brought about by Sched 1R to the Liquor Regulation in exactly the same way to exactly the same degree. If it is necessary to reach s 8, says Queensland, the compliance of Sched 1R with Pt 6A of the Liquor Act, unchallenged by Ms Maloney, is enough to show Sched 1R to be a special measure. In the final alternative, argues Queensland, a sufficient factual basis is established by the Cape York Justice Study and the explanatory note for the Amendment Regulation.

323 For reasons which follow, I consider that the final alternative argument of Queensland alone should be accepted: at the time of the offence of which Ms Maloney was convicted, s 10 had no application to Sched 1R only because Sched 1R was then a special measure.

Section 10 of the RDA: equality before the law

324 Whether or not the condition for the application of s 10 of the RDA is fulfilled turns on the construction of s 10. The construction of a statutory provision begins and ends with its text – read always in context. The context of s 10 critically includes its legislative purpose.

325 The purpose of the RDA, as has already been noted, is to give effect to the Convention. The more particular purpose of s 10 of the RDA, as has also already been noted, is to give effect to Australia's obligations under Arts 2(1)(c) and 5 of the Convention. The first of those obligations is to "take effective measures … to amend, rescind or nullify any laws … which have the effect of creating or perpetuating racial discrimination wherever it exists". The second is expressed

compositely and by reference to the first. It is, in pursuit of the first, "to eliminate racial discrimination in all its forms" and "to guarantee the right of everyone, without distinction as to race … to equality before the law" in the "enjoyment" of human rights including but not limited to those listed in Art 5(a)-(f) of the Convention.

326 Section 10 of the RDA is to be construed to give effect to those obligations under Arts 2(1)(c) and 5 of the Convention to the maximum extent that its terms permit. What is required by those obligations turns on the content attributed to them by the community of nations[451].

327 The Convention is, and always has been, firmly understood to be based on the principles of the dignity and equality of all human beings and to have as its objective the securing of equality in fact in the enjoyment of human rights by persons of all races. The international understanding of its content has nevertheless evolved. Whatever uncertainty may have existed at the time *Gerhardy* was decided, the repeated pronouncements of the Racial Discrimination Committee in its recommendations to the General Assembly of the United Nations can be taken to reflect what is now a clear and consistent international understanding of what is required to eliminate racial discrimination and to guarantee racial equality before the law in the enjoyment of human rights. What is required is the removal of all differential treatment that impacts on the equality of enjoyment of a human right by persons of different races save for differential treatment that can be judged, in light of the Convention principles of dignity and equality and in light of the Convention objective of securing substantive racial equality in the enjoyment of human rights, to result from the application of criteria that are both applied in pursuit of a legitimate aim and proportionate to the achievement of that aim. The Committee's characterisation of special measures not as an exception to the principle of non-discrimination but as "integral to its meaning" and "essential to the … project of eliminating racial discrimination and advancing human dignity and effective equality" underlines an international understanding that the range of differential treatment that is capable of justification is closely circumscribed.

328 The purpose of s 10 would not be achieved were constructional choices now presented by its text not to be made consistently with that contemporary international understanding.

329 Section 10 of the RDA expresses a condition for its application that can be seen to have two textual components. The first is that there exists (or would exist but for s 10) a state of affairs in which persons of one race either do not enjoy a human right that is enjoyed by persons of another race or enjoy a human right "to

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451 *Queensland v The Commonwealth* (1989) 167 CLR 232 at 240; [1989] HCA 36.

a more limited extent" than persons of another race. The second is that that state of affairs is (or would be but for s 10) "by reason of" a Commonwealth, State or Territory law.

330 The first textual component is expressed to require no more than that "persons" of one race enjoy a human right "to a more limited extent" than "persons" of another race.

331 The word "persons" connotes groups not individuals. The reference to persons of one or another race does not, however, connote a group that comprises all persons of one or another race. It is not necessary to the application of s 10 of the RDA that all persons of one race enjoy a human right to a more limited extent than all persons of another race. Nor is it necessary that all persons of all other races enjoy the human right to the same extent.

332 The words "to a more limited extent" reflect the point that[452]:

> "discrimination and non-discrimination are relational terms, so that whether we speak of disadvantage, equality, or advantage, we are speaking of treatment of one person or group as measured by the treatment, or the standard of treatment, of another person or group".

333 Persons of one race can enjoy a human right "to a more limited extent" than persons of another race without suffering impairment or infringement of that human right. That proposition can be illustrated by an example adapted from one given by the European Court of Human Rights concerning the requirement of Art 14 of the European Convention that "enjoyment" of the rights and freedoms set forth in that Convention be secured "without discrimination"[453]. A State may well not infringe the human right "to education and training" referred to in Art 5(e)(v) of the Convention by failing to establish a particular kind of educational institution. But if a State establishes an educational institution of a particular kind, the State must ensure that the education the institution provides is available equally to persons of all races. A State law cannot, consistently with s 10 of the RDA, arbitrarily bar the admission of persons of a particular race.

334 The extent of enjoyment of a human right is a question of degree. The mere limitation of a legal right created or recognised by the common law or statute does not necessarily impact on the extent of enjoyment of a human right. *Bropho*, which concerned an exercise of statutory discretion to limit statutory

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452 Fawcett, *The Application of the European Convention on Human Rights*, 2nd ed (1987) at 299 (footnote omitted).

453 *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Merits)* (1968) 1 EHRR 252.

rights to enter a particular area of land where that area was not generally open to the public and where those statutory rights were qualified from their inception by the contingency of being so limited, decided no more. *Bropho* should not be treated as authority for any broader proposition.

335 A difference in the extent of enjoyment of a human right is similarly a question of degree. In the context of s 10 of the RDA, it is a question of degree to be answered in light of the principles and objectives of the Convention. Construed against the background of those principles and objectives, persons of one race will enjoy a human right "to a more limited extent" than persons of another race where a difference in their relative enjoyment of a human right is of such a degree as to be inconsistent with persons of those two races being afforded equal dignity and respect. The relevant indignity or want of respect lies in the difference in the levels of enjoyment of a human right by persons of the two races rather than in the absolute level of enjoyment by persons of the disadvantaged race. The significance of a difference can be affected by contextual factors, which may include racial targeting or presumptions about the characteristics of racial groups just as they may include ignorance or lack of consideration of the characteristics of racial groups.

336 Human rights within the scope of s 10 of the RDA, not being limited to those listed in Art 5 of the Convention, may be accepted to encompass the full gamut of the civil, political, economic and social rights recognised in the Universal Declaration and in the ICESCR and the ICCPR. However, the analysis required to determine whether or not the first component of the condition for the application of s 10 is satisfied is not readily assisted by focussing on the free-standing right to equality before the law or equal protection of the law expressed in Art 7 of the Universal Declaration and Art 26 of the ICCPR. That is because it is in the nature of such a right that a question about its enjoyment requires the undertaking of an analysis that mirrors the very analysis that s 10 requires to be undertaken with respect to the human rights to which it refers. To inquire for the purposes of s 10 into whether there is by reason of a law unequal enjoyment of a human right to equality before the law or equal protection of the law is to become mired in unproductive circularity. The right referred to in Art 5(a) of the Convention ("to equal treatment before the tribunals and all other organs administering justice") is not properly equated to a right to equal protection of the law in Art 7 of the Universal Declaration and Art 26 of the ICCPR. Like Art 14 of the ICCPR, Art 5(a) of the Convention is more narrowly focussed: on the administration and enforcement of laws by courts and tribunals rather than on the content of laws more generally.

337 The second textual component of the condition for the application of s 10 of the RDA is expressed to require that the difference in the relative enjoyment of a human right be "by reason of" a relevant law. The words "by reason of" in s 10 connote a causal nexus. The nature of that causal nexus is to reflect the principles and objectives of the Convention. That is because "notions of 'cause'

as involved in a particular statutory regime are to be understood by reference to the statutory subject, scope and purpose"[454].

338 One aspect of the causal nexus is captured in the observation of Deane J in *Mabo [No 1]*, endorsed in the *Native Title Act Case*, that s 10 is to be construed as concerned with the practical operation and effect of the relevant law. That focus on practical operation and effect is inconsistent with the drawing of a distinction between the law itself and the facts in relation to which the law operates. The focus on practical operation is not, however, inconsistent with recognition that causation in fact is itself a question of degree. What is required is a direct relationship between the practical operation of the law and the differential enjoyment of human rights. Differential enjoyment of human rights that is the direct result of the practical operation of a law fulfils the first of the two conditions for the existence of discrimination within the meaning of the Convention: different treatment.

339 Another aspect of the causal nexus connoted by the words "by reason of" accommodates the second of the two conditions for the existence of discrimination within the meaning of the Convention: absence of justification for different treatment. Acknowledgement of that further aspect is consistent with the suggestion in the joint judgment in *Ward* that, where s 10 has operated to protect native title, the section has applied to redress differential treatment that has occurred by reference to a characteristic implicitly declared by the RDA to be irrelevant.

340 In his famous dissenting judgment in the International Court of Justice in the *South West Africa Cases (Second Phase)*[455], quoted in relevant part by Brennan J in *Gerhardy*[456], Judge Tanaka expressed the concept of equality before the law or absence of discrimination as then understood in international law in terms that "a different treatment is permitted [only] when it can be justified by the criterion of justice", to which he added that "[o]ne may replace justice by the concept of reasonableness generally referred to by the Anglo-American school of law". Usage has moved on. It is now common in international law to express the same concept in terms of a difference in treatment that can be justified by a criterion of proportionality. Proportionality cannot readily be replaced by reasonableness unless reasonableness is acknowledged to permit of gradations and is not limited to mere rationality. The concept of proportionality is now equated for some purposes in Australian law to the narrower and more focussed

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454 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 597 [99]; [2005] HCA 26.

455 [1966] ICJ Reports 6 at 306.

456 (1985) 159 CLR 70 at 129.

concept of "reasonable necessity"[457]. Equation of proportionality to reasonable necessity should be acknowledged to be similarly appropriate for the particular purpose of Australia's implementation of the Convention.

341 The Convention principles of dignity and equality and the Convention objective of securing substantive racial equality in the enjoyment of human rights necessarily inform the application of the criterion for determining whether differential treatment of racial groups is justified for the purpose of the implementation of the Convention irrespective of the form in which the criterion is expressed. Those principles and that objective also dictate that any justification for different treatment of racial groups be affirmatively established. It is not enough that different treatment of racial groups could or might be justified. It must be shown to be justified.

342 Accordingly, s 10 of the RDA is properly construed to admit of circumstances in which persons of one race enjoy a human right to a more limited extent than persons of another race as a result of the direct practical operation of a law without that different enjoyment of rights being "by reason of" the law. But those circumstances are closely confined. It is not enough that the law be shown to strike a reasonable balance between human rights. The principles and objective of the Convention demand proportionality. The law must be shown, in light of the Convention principles of dignity and equality and in light of the Convention objective of securing substantive racial equality in the enjoyment of human rights, to adopt criteria that are both (i) applied in pursuit of a legitimate aim and (ii) reasonably necessary to the achievement of that aim.

343 The features of a law that meets the condition for the application of s 10 of the RDA can now be stated with as much precision as fidelity to the purpose of s 10 permits. The condition is satisfied by a law that:

(a) gives rise to different treatment of racial groups, in that the law has the direct practical effect that the enjoyment of a human right by persons of one race is more limited than the enjoyment of that human right by persons of another race to a degree that is inconsistent with persons of those two races being afforded equal dignity and respect; and

(b) is not justified in so far as it gives rise to that different treatment of racial groups, in that the law is not shown, in light of the Convention principles of dignity and equality and in light of the Convention objective of securing substantive racial equality in the enjoyment of human rights, to

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457 *Thomas v Mowbray* (2007) 233 CLR 307 at 331 [19]; [2007] HCA 33; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 477 [102]; [2008] HCA 11.

adopt criteria that are both (i) applied in pursuit of a legitimate aim and (ii) reasonably necessary to the achievement of that aim.

344 Where that condition is satisfied, s 10 operates to bridge the gap in the enjoyment of the human right that occurs (or would occur) as the direct practical effect of the law in question by adjusting the legal rights of persons of the disadvantaged race to the point where those persons enjoy the human right in question "to the same extent" as persons of the other race. The measure of the differential enjoyment of human rights, by reference to which s 10 is triggered, in this way provides the measure of the adjustment of legal rights that s 10 produces.

345 The nature of the factual inquiry to be undertaken by a court in determining the legitimacy of a legislative aim and proportionality of the legislative criteria adopted in pursuit of that aim is best left to be addressed in the context of special measures.

346 The critical point for present purposes is that consistency with the principles and objective of the Convention limits those legislative aims that can be regarded as legitimate and limits those legislative criteria that can be regarded as proportionate. In particular, the range of legitimate aims and the range of proportionate criteria are limited by the integration of the concept of special measures within the broader concept of equality in the enjoyment of human rights.

347 Within the scheme of the Convention, a measure that operates in fact to result in persons of one race enjoying a human right to a more limited extent than persons of another race may be justified as adopting proportionate criteria in pursuit of an aim of redressing some other imbalance in the enjoyment of human rights by persons of a particular race. But such a measure can only be so justified if it meets the requirements of a special measure as expressed in Arts 1(4) and 2(2) of the Convention. If justified as a special measure, it is not discrimination within the meaning of the Convention. If not justified as a special measure, it is discrimination and a denial of equal protection.

348 Within the scheme of Pt II of the RDA, a law that operates directly in fact to result in persons of one race enjoying a human right to a more limited extent than persons of another race, and that meets the requirements of a special measure, is excluded from the application of s 10 by s 8 of the RDA. The application of s 10 to a law that operates directly in fact to result in persons of one race enjoying a human right to a more limited extent than persons of another race, but that does not meet the requirements of a special measure, cannot be avoided by showing that the criteria the law adopts are nevertheless proportionate or reasonably necessary to the pursuit of a legitimate aim where the substance of the aim is redressing some other imbalance in the enjoyment of human rights by persons of a particular race. Otherwise, the carefully tailored regime for

permissible special measures would be undermined. Unless it is a special measure excluded by s 8, the law is one to which s 10 applies.

Section 8 of the RDA: special measures

349 In providing that Pt II "does not apply to, or in relation to the application of, special measures", s 8 of the RDA might well be argued to express a "justification" or "ground of defeasance or exclusion" which in at least some of its application "assumes the existence of the general or primary grounds" on which a right or liability might arise under another provision of Pt II but which "denies the right or liability in a particular case by reason of additional or special facts"[458]. The text of s 8, and its context within the scheme of Pt II, might be argued thereby to supply "considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter"[459]. The broader context of the place of special measures within the scheme of the Convention might be said to reinforce those textual and contextual considerations.

350 Were facts relevant to the existence of a special measure of the same nature as ordinary facts in issue between parties, there would be little difficulty in accepting such an argument so as to construe s 8 of the RDA as placing a burden of proof on a party arguing that an impugned law is a special measure. But they are not.

351 A distinction has long been drawn between "ordinary questions of fact", which arise between parties and which are determined in accordance with the ordinary rules of evidence, and "matters of fact upon which … the constitutional validity of some general law may depend", which "cannot and do not form issues between parties to be tried like the former questions" and which fall to be ascertained by a court "as best it can"[460]. A court finding constitutional facts is not constrained by the rules of evidence. The court "reaches the necessary conclusions of fact largely on the basis of its knowledge of the society of which it is a part", "supplementing … that knowledge [by processes] which [do] not readily lend [themselves] to the normal procedures for the reception of evidence"[461].

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458 *Vines v Djordjevitch* (1955) 91 CLR 512 at 519; [1955] HCA 19.

459 (1955) 91 CLR 512 at 519-520.

460 *Breen v Sneddon* (1961) 106 CLR 406 at 411-412; [1961] HCA 67, quoting *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292.

461 *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 622; [1975] HCA 45.

352 *Gerhardy* illustrates that "constitutional facts" form part of a larger genus. That larger genus has long been referred to in the United States as "legislative facts"[462]. It is appropriate to adopt that terminology in Australia.

353 The nature of legislative facts and the nature of the duty of a court to ascertain them tell against any a priori constraint on the sources from which the court may inform itself[463]. The sources may, but need not, be "official"[464]. It is desirable, but not inevitable, that they be "public or authoritative"[465]. They can include "inferences … drawn from the regulations and statutes themselves" and "statements made at the bar"[466]. Subject to the requirements of procedural fairness inherent in the judicial process, the ultimate criterion governing the use of information from any source is that a court is able to consider the material sufficiently probative of the legislative fact to be found[467].

354 Facts relevant to the characterisation of an impugned law as a special measure are legislative facts, as are facts relevant to fulfilment of the condition for the application of s 10. The nature of those legislative facts, and the nature of the duty of a court to ascertain them, tell against a construction of s 8 of the RDA that places a burden of proof on a party arguing that an impugned law is a special measure.

355 That is not to say that a party arguing that an impugned law is a special measure may not assume what is in practical terms a persuasive burden. It just does not bear a legal burden of proof. The same is true of a party arguing for the purpose of s 10 that an impugned law adopts reasonably necessary criteria in pursuit of a legitimate aim.

356 To conclude that a law is a special measure, a court – informing itself as best it can with the assistance of the parties and on material it finds sufficiently convincing – must be satisfied of the existence of the four criteria of a special

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462 Davis, "An Approach to Problems of Evidence in the Administrative Process", (1942) 55 *Harvard Law Review* 364 at 402-403; Davis, "Judicial Notice", (1955) 55 *Columbia Law Review* 945 at 952-953.

463 *Gerhardy* (1985) 159 CLR 70 at 142.

464 *Thomas v Mowbray* (2007) 233 CLR 307 at 482-483 [526].

465 *Gerhardy* (1985) 159 CLR 70 at 142.

466 *Wilcox Mofflin Ltd v State of NSW* (1952) 85 CLR 488 at 507; [1952] HCA 17.

467 *Thomas v Mowbray* (2007) 233 CLR 307 at 482-483 [526], 512-522 [613]-[639].

measure identified by Brennan J in *Gerhardy*. It is necessary to revisit aspects of his Honour's explanations of the third and fourth of those criteria.

357 The third criterion identified by Brennan J is about the aim of the law. Shortly stated, it is that the law have the *sole purpose* of securing adequate advancement of its beneficiaries in order for them to enjoy and exercise human rights equally with others. His Honour's reference to the "wishes" of the beneficiaries being "of great importance (perhaps essential)" was in the context only of discussing the curial determination of the existence of a purpose of that nature. His Honour cannot be taken to have implied that a special measure cannot exist without the informed consent of the beneficiaries or without some measure of consultation with them. Nor can the Racial Discrimination Committee be taken to have adopted such a rigid approach in relation to Art 1(4) of the Convention. Its statement in General Recommendation 32 that States Parties "should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities"[468], assuming it to go beyond exhortation, is to be read in context with its subsequent statement that "special measures may have preventive (of human rights violations) as well as corrective functions"[469]. In light of the Convention principles of dignity and equality and the Convention objective of securing substantive racial equality in the enjoyment of human rights, the inherent complexity of human relations, the infinite variety of human need and the beneficial objective of the obligation in Art 2(2) to take special measures "when the circumstances so warrant" all tell strongly against the taking of special measures being the subject of a priori procedural constraint. That is especially so in relation to those measures that might need to be taken to prevent human rights violations. The same considerations tell strongly against the argument that a special measure can never criminalise conduct of beneficiaries.

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468 Paragraph 18 of the Committee on the Elimination of Racial Discrimination, "General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 64th sess, Supp No 18, UN Doc A/64/18 (2009) 152.

469 Paragraph 23 of the Committee on the Elimination of Racial Discrimination, "General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination", recorded in the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 64th sess, Supp No 18, UN Doc A/64/18 (2009) 152.

358 The fourth criterion identified by Brennan J is about the necessity for the criteria adopted by the law in pursuit of its aim. Shortly stated, it is that the protection the law gives to the beneficiaries be *necessary* in order that they may enjoy and exercise a human right equally with persons of other races. Consistent with the general concept of absence of discrimination or equality before the law as understood in international law, the Racial Discrimination Committee explains special measures in terms of proportionality. The explanation by members of the Court in *Gerhardy* in terms of reasonableness reflected the then prevailing usage within what Judge Tanaka in the *South West Africa Cases (Second Phase)* had referred to as "the Anglo-American school of law". Special measures are now better explained for the purposes of Australian law in terms of reasonable necessity.

Different treatment in this case

359 Once it is recognised that satisfaction of the first element of the condition for the application of s 10 of the RDA requires no more than that persons of one race enjoy a human right "to a more limited extent" than persons of another race, many of the conceptual impediments to the condition being fulfilled put in argument by Queensland can be seen to fall away.

360 The simple fact was that, on 31 May 2008, Aboriginal persons living within the community government area of Palm Island were wholly prohibited from possessing alcohol in any public place within the community government area in which they lived unless they had applied in writing for a permit to do so and, having been granted that permit, possessed the alcohol only for a purpose authorised by the permit. Non-indigenous persons living in local government areas elsewhere in Queensland ordinarily had unrestricted freedom to possess alcohol in public places within the local government areas in which they lived.

361 The enjoyment by Aboriginal persons living on Palm Island of the human rights "to own property" (listed in Art 5(d)(v) of the Convention) and "of access to any place … intended for use by the general public" (listed in Art 5(f) of the Convention) was thereby more limited than the enjoyment of those same human rights by non-indigenous persons living in local government areas elsewhere in Queensland. That disparity in the enjoyment of human rights was inconsistent with persons of those two races being afforded equal dignity and respect. It is not necessary to the analysis to consider whether Aboriginal persons living on Palm Island thereby also suffered a diminution in their relative enjoyment of the human right to equal protection of the law and it is unnecessary to the analysis to consider whether Aboriginal persons living on Palm Island were thereby subjected also to a diminution in their relative enjoyment of some other human right. Nor is it necessary to inquire whether the differential enjoyment of the identified human rights by Aboriginal persons living within the community government area of Palm Island was so extreme as to amount to an impairment or infringement of those human rights.

362 The direct cause of that differential enjoyment of human rights by Aboriginal persons living on Palm Island on 31 May 2008 was the existence in force on that date of Sched 1R to the Liquor Regulation. The Schedule was geographically targeted to affect only a single community government area, the population of which was overwhelmingly Aboriginal. Its practical impact on that population was neither accidental nor incidental. The Liquor Regulation was brought into existence in an attempt to prevent harm arising from alcohol-related conditions and behaviours perceived generally to exist within indigenous communities but not perceived generally to exist elsewhere in Queensland. Schedule 1R was inserted and tailored specifically to address conditions and behaviours perceived to exist within the indigenous community on Palm Island. Geography was used as a proxy for race.

363 It is not to the point that the small percentage of non-Aboriginal persons living within the community government area of Palm Island were subjected by Sched 1R to the same restriction and were therefore subjected to the same diminution in their enjoyment of human rights relative to non-indigenous persons living in local government areas elsewhere in Queensland. Racial targeting is not negated by some persons of other races being caught in the net.

364 The real issue is whether the differential treatment of Aboriginal persons living on Palm Island brought about by Sched 1R was, as at 31 May 2008, justified in light of the underlying principles and objectives of the Convention. The resolution of that issue turns wholly on whether Sched 1R was, at the time, a special measure.

Justification in this case

365 To ask whether Sched 1R to the Liquor Regulation was, as at 31 May 2008, a special measure within the meaning of Art 1(4) of the Convention is to ask a different question from whether the Amendment Regulation inserting Sched 1R two years earlier was within the powers conferred by Pt 6A of the Liquor Act. The questions have a different temporal focus. Their determination requires reference to different legal criteria.

366 Part 6A was not framed in terms of the Convention. The purpose of Pt 6A, as set out in s 173F, did not correspond exactly with the purpose of a special measure. The requirement of s 173G that the Minister be "satisfied" that declaration of a restricted area was "necessary" to achieve the purpose of Pt 6A when recommending making the Amendment Regulation to insert Sched 1R required the Minister to act reasonably in reaching that satisfaction[470]. But it did

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470 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 150 [34]; [2000] HCA 5.

not correspond to a requirement that the alcohol limits prescribed by Sched 1R satisfy a test of reasonable necessity as a condition of validity under Pt 6A. Moreover, nothing in Pt 6A made the continuing operation of Sched 1R contingent on the Minister's continuing satisfaction that its declaration of Palm Island as a restricted area was "necessary" to achieve the purpose of Pt 6A.

367 Ms Maloney's failure to challenge the compliance of Sched 1R with Pt 6A of the Liquor Act therefore cannot be decisive. Compliance of Sched 1R with Pt 6A of the Liquor Act at the time it was inserted by the Amendment Regulation would not alone show Sched 1R to have been a special measure as at 31 May 2008.

368 That is not to say that the unchallenged compliance of Sched 1R with Pt 6A of the Liquor Act is irrelevant. To ask whether Sched 1R to the Liquor Regulation was, as at 31 May 2008, a special measure within the meaning of Art 1(4) of the Convention is necessarily to engage in an inquiry of legislative fact. In the absence of challenge, a court engaging in such an inquiry is entitled to assume the validity of Sched 1R and to draw inferences from the fact of the making of the Liquor Regulation and of amendments to the Liquor Regulation, including the Amendment Regulation and the Further Amendment Regulation. Those inferences include, but are not limited to, compliance with Pt 6A of the Liquor Act.

369 Beyond inferences of that nature, no party or intervener put to the Queensland Court of Appeal or to this Court that the inquiry of legislative fact in this case might be assisted by reference to material beyond that to be found in the affidavits tendered to the Townsville District Court, in the Cape York Justice Study and in the explanatory notes to the Amendment Regulation and the Further Amendment Regulation.

370 The Cape York Justice Study (as a published report to the Executive Government of Queensland) and the explanatory notes for the Amendment Regulation and the Further Amendment Regulation (as material placed before the Queensland Parliament by a responsible Minister in the exercise of a statutory duty) constitute material of the kind on which a court may feel justified basing a conclusion of legislative fact. The Queensland Court of Appeal was correct to find that material not to be contradicted by anything in the affidavits tendered to the Townsville District Court.

371 The material reveals a pattern of alcohol abuse and associated violence in the indigenous communities targeted by the Liquor Regulation that has existed historically and that existed in 2008 at a level that can readily be characterised as impairing the equal enjoyment of members of those communities of the human right "to security of person and protection … against violence or bodily harm" listed in Art 5(b) of the Convention as well as the human right "to public health" recognised in Art 5(e)(iv) of the Convention. The material reveals a considered

judgment by the Queensland Parliament and the Queensland Executive, re-examined by the Queensland Executive in 2008, that the management of alcohol consumption within those communities was critical to the reduction of alcohol abuse and associated violence, and that imposition of restrictions on the possession of alcohol in those communities in consultation with their members was necessary to manage that consumption where other means had failed. In relation to Palm Island, in particular, it reveals a community divided as to the appropriate form of management of alcohol consumption without apparent prospect of agreement. The extent of that division is only reinforced by the affidavits tendered to the Townsville District Court.

372 The material readily supports the conclusion that the *sole purpose* of Sched 1R was the adequate advancement of the indigenous members of the Palm Island community in order for them to enjoy human rights to security of person and protection against violence or bodily harm and to public health equally with other Queenslanders.

373 Was the protection Sched 1R gave to members of the Palm Island community *necessary* to ensure their enjoyment and exercise of their human rights to security of person and protection against violence or bodily harm and to public health equally with other Queenslanders? Was the total prohibition on the possession of alcohol without a permit in any public place on Palm Island that Sched 1R operated to impose as at 31 May 2008 proportionate or reasonably necessary to redress that imbalance? Answering that question is not assisted by the brevity of the explanatory notes or by the lack of any real explanation in the explanatory notes of the alternatives considered.

374 It is at this point that, in the absence of challenge to its validity under the Liquor Act and in the absence of material indicative of the contrary, inferences drawn from the making and maintenance of Sched 1R itself assume some significance. The inference to be drawn from the making of the Amendment Regulation to insert Sched 1R is that, barely two years before 31 May 2008, the Minister as the responsible member of the Queensland Executive considered on reasonable grounds that the imposition of alcohol restrictions on Palm Island was necessary to minimise harm caused by alcohol abuse and misuse and associated violence on Palm Island. A further inference is to be drawn from the making of the Further Amendment Regulation, which left Sched 1R substantially unchanged while adjusting other schedules of the Liquor Regulation as a result of what is described in the explanatory note to the Further Amendment Regulation as "a whole-of-government review of alcohol restrictions, programs and services". The inference is that, not long after 31 May 2008, the Minister gave consideration both to the imposition of alcohol restrictions and to the particular level of alcohol restrictions imposed by Sched 1R, and considered on reasonable grounds that those restrictions, at that time, continued to be necessary to minimise harm caused by alcohol abuse and misuse and associated violence on Palm Island. Implicit in the Minister having considered on reasonable grounds

that the particular restrictions were necessary to achieve that purpose is that the Minister took less restrictive means of achieving the same purpose into account and rejected them on reasonable grounds as either not practically available or unlikely to be efficacious.

375 The inference therefore to be drawn is that the total prohibition of the possession of alcohol without a permit in any public place on Palm Island that Sched 1R operated to impose as at 31 May 2008 was a measure considered by the responsible member of the Queensland Executive, on reasonable grounds, then to remain necessary for the advancement of the indigenous members of the Palm Island community in order for them to enjoy human rights to security of person and protection against violence or bodily harm and to public health equally with other Queenslanders. That is sufficient in the circumstances of this case to establish reasonable necessity.

376 On the basis of those inferences of legislative fact, it can and should be concluded that Sched 1R was, as at 31 May 2008, a special measure within the meaning of Art 1(4) of the Convention.

Conclusion

377 Schedule 1R to the Liquor Regulation operated to produce the result that Ms Maloney committed an offence against s 168B of the Liquor Act on 31 May 2008 by reason only of being the owner of a bottle of bourbon and a partly full bottle of rum contained in a backpack in the boot of a vehicle on a public road in the local government area in which she lived.

378 Schedule 1R was at that date properly characterised as a special measure within the meaning of Art 1(4) of the Convention because its sole purpose was the adequate advancement of the indigenous members of the Palm Island community and because the prohibition it brought into effect remained reasonably necessary in order for them to enjoy human rights to security of person and protection against violence or bodily harm and to public health equally with other Queenslanders. The application of s 10 of the RDA to Sched 1R was for that reason excluded by s 8 of the RDA. For that reason alone, s 10 of the RDA had no application to Sched 1R.

379 The Queensland Court of Appeal was therefore correct to conclude that Sched 1R was valid and that Ms Maloney was validly convicted of the offence against s 168B of the Liquor Act.

380 The appeal must be dismissed.