IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B57 OF 2012**

On appeal from
the Queensland Court of Appeal

10

BETWEEN: **JOAN MONICA MALONEY**
Appellant

AND: **THE QUEEN**
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (Intervening) by:

Australian Government Solicitor
50 Blackall Street, Barton, ACT 2600
DX5678 Canberra

Date of this document: 23 November 2012

Contact: Andrew Yuile / Louise Rafferty

File ref: 12071588
Telephone: 02 6253 7237 / 02 6253 7005
Facsimile: 02 6253 7303
E-mail: andrew.yuile@ags.gov.au /
louise.rafferty@ags.gov.au

PART I FORM OF SUBMISSIONS

1. These submissions are in a form that is suitable for publication on the internet.

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (Commonwealth) intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the respondent.

PART III LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the appellant's statement of legislative provisions.

PART IV ISSUES PRESENTED BY THE APPEAL AND ARGUMENT

Issues

4. This appeal raises an issue as to the proper approach under Part II of the *Racial Discrimination Act 1975* (Cth) (RDA) to a legislative measure that may be characterised as directed to the objective purpose of enhancing the enjoyment of rights of persons of a particular race, but which arguably restricts the enjoyment of other rights of that group as compared to persons of another race.

5. The Commonwealth's central proposition is that it is an error to approach such a case on the basis that s 10(1) of the RDA will apply unless s 8(1) operates to prevent it from doing so. Rather, the concept of equality for which s 10(1) provides gives rise to important anterior questions as to the selection of comparable cases and the permissibility of the criteria adopted by legislation which results in the differential enjoyment of rights by particular racial groups.

6. However, the need to determine those issues in the appeal are contingent upon the answer to a preliminary question, which is whether the appellant can point to any relevant right which is enjoyed on a differential basis so as to engage s 10(1). It is convenient to deal with that issue first.

No relevant 'right' which is enjoyed differentially

7. The rights to which s 10(1) directs attention are those enumerated in art 5 of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and other human rights and fundamental freedoms in the field of public life which are of a like kind. It does not more broadly extend to 'rights' per se.[1] Correctly accepting that limitation, the appellant relies on three broad categories of rights, being those specified in arts 5(a), 5(d)(v) and 5(f) of CERD or rights akin to

---

[1] See *Gerhardy v Brown* (1985) 159 CLR 70 (*Gerhardy*) at 86 (Gibbs CJ) and 101 (Mason J) and *Mabo v Queensland* (1988) 166 CLR 186 (*Mabo No 1*) at 216-7 (Brennan, Toohey and Gaudron JJ) and 229-230 (Deane J). See also *Aurukun Shire Council v Chief Executive Officer of Liquor Gaming and Racing* [2012] 1 Qd R 1 (*Aurukun*) at 59 [115], 63 [136], 65 [139] and 68 [153]-[154] (Keane JA).

those rights. The submissions in answer of the respondent are adopted, to which is added:

(a) as to art 5(a), Professor Nowak, in his authoritative work on the *International Covenant on Civil and Political Rights* (ICCPR) suggests that art 5(a) in fact reflects art 14(1) of the ICCPR (rather than art 26).[2] Article 14(1) guarantees procedural equality and enshrines, amongst other things, the principle of equality in legal proceedings. Perhaps bearing out that observation, where it has considered art 5(a), the Committee on the Elimination of Racial Discrimination (CERD Committee) has consistently done so in terms which suggest that it operates primarily in relation to procedural safeguards in judicial proceedings.[3]

(b) as to art 5(d)(v), any right to own property in the form of liquor is regulated by different legal systems in many different ways, all reflecting local rather than universal values. Indeed, even within the Queensland legal system (for reasons developed below), the regulatory scheme is a geographically diverse patchwork where the proprietary rights one can exercise in respect of that species of property vary from place to place and time to time. Accordingly, the appellant was not deprived of any relevant right to own property (contra Appellant's Submissions (AS) [30]). At the time of the offence, she could own whatever liquor she chose, but could not have it in her possession in a public place whilst on Palm Island. Nor could she drink it in any public place throughout Queensland to which s 173B(1) of the *Liquor Act* 1992 (Qld) (Liquor Act) applied. Nor could any other person, by reason of the scheme of regulation applied in the public interest.

(c) Accordingly, although the appellant's submissions do not acknowledge this, the appellant is driven to an analysis that the relevant right which it is claimed Indigenous people enjoy in less amplitude than non-Indigenous people in Queensland is the right to determine the type and amount of alcohol that one can possess in a public place. As with the asserted right to acquire alcohol from one's local government dealt with by Keane JA in *Aurukun*, that is not a human right or fundamental freedom of a kind which attracts the protection of s 10(1).[4] The appellant's submissions proceed from the false assumption that her rights in respect of that property are of a different nature and amplitude than in fact they are.[5]

8. If that be correct, no further issue regarding s 10(1) arises.

Section 10(1) - propositions of construction

9. To the extent the appellant can overcome the threshold question of a relevant

---

2 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed) 2005, p307.

3 *Narrainen v Norway* (Communication No 3/1991), at 10; UN Doc. CERD/C/304/Add.69, para 17 (Peru); UN Doc. CERD/C/304/Add.30, paras 11 and 25 (Mexico).

4 *Aurukun* at 67-68 [148]-[154]. See also *Morton v Queensland Police Service* (2010) 240 FLR 269 (*Morton*) at 295 [94] (Chesterman JA, Holmes JA agreeing).

5 *Telstra v Commonwealth* (2008) 234 CLR 210 at 233-234 [52].

right, further attention is required to the proper construction of s 10(1). The Commonwealth advances six propositions.

10. *First*, s 10(1) is concerned not merely with matters of form, but with matters of substance.[6] The words, 'by reason of' and the fact that the section is in terms directed to the 'enjoyment' of rights by some but not at all or only to a lesser extent by others, make clear that the focus extends to the practical effect of the relevant law.[7] In that regard, the RDA may be seen to reflect the terms of the CERD which it implements – see particularly the term 'effect' in arts 1(1) and 2(1)(c).[8]

11. Accordingly, it has been held that it would be incorrect to confine the operation of the RDA to laws whose purpose can be identified as discriminatory.[9] Nevertheless, for reasons developed below, legislative purpose (in the sense of the objective purpose identified in *APLA v Legal Services Commissioner*[10] (*APLA*) and *Zheng v Cai*[11]) is not irrelevant to the analysis required by s 10 and is necessarily an aspect of the analysis required by s 8 - albeit for different reasons and in different ways.

12. *Second*, while s 10 does not employ expressly the terms 'discrimination' or 'discriminatory', those terms have been used throughout the authorities.[12] That may be explained by the fact that, like other domestic discrimination legislation, the subsection requires a comparison – the enjoyment of certain rights by persons of a particular race, colour, or national or ethnic origin are to be compared to the enjoyment of those same rights by persons of another race, colour, or national or ethnic origin. It also traces to the use of the defined term 'racial discrimination' in the CERD.

13. *Third*, as was said in *Ward* at 103 [116], some care is required in identifying and making the comparison between the respective rights whose enjoyment is in issue. The comparison required by s 10(1) should, unless such matters are required to be treated as irrelevant, encompass all of the objectively different characteristics that surround (and may explain) the allegedly differential enjoyment of rights.[13] In that regard, it has a similar operation to the provisions of the *Disability Discrimination Act 1992* (Cth) considered in *Purvis v New South Wales* (*Purvis*).[14] Differential treatment or enjoyment of rights is not in itself

---

6 *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*) at 103 [115] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Mabo No 1* at 230 (Deane J).

7 *Mabo No 1* at 230 (Deane J) and *Ward* at 99 [105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

8 *Ward* at 99 [105].

9 *Ward* at 99 [105].

10 (2005) 224 CLR 322 at 462 [423] (Hayne J).

11 (2009) 239 CLR 446 at 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ)

12 As was noted in *Ward* at 99 [105]. See also *Gerhardy* at 99 (Mason J).

13 See particularly at 105 [118].

14 (2003) 217 CLR 92 – see particularly at 101 [12] (Gleeson CJ) and 161 [224] (Gummow, Hayne and Heydon JJ).

sufficient for the purposes of s 10(1) – it must rather be a difference that *matters* to the concept of equality to which s 10(1) draws attention.[15]

14. *Fourth*, a further important proposition that emerges from *Purvis* is that the nature of the required comparison will depend upon whether the object of the legislation is limited to equality of treatment or some broader notion of 'substantive equality'.[16]

15. Here, given that s 10 is directed to the substance and practical effect of laws, the relevant object may be seen to be the achievement of substantive equality. That conception of equality rejects the notion that all people are to be regarded as fundamentally alike and deserving of the same treatment, such that any distinction based upon innate personal characteristics is discriminatory. The focus is rather upon the reasonableness of distinctions in their context.[17] As such, a measure that results in differential treatment or differential enjoyment of rights is nevertheless permissible if it serves a purpose which may be regarded as legitimate in the context of the overarching or 'overriding' equality norm, that being a matter to be determined by reference to the scheme of the RDA and the terms and context of s 10(1).[18] The term legitimate means no more than that which is permissible, having regard to that norm.[19]

16. Those concepts are, in part, accommodated by the exclusion from Part II of the RDA of special measures to which para 4 of art 1 of CERD applies: see s 8 (addressed further below). However, they also arise in the context of s 10(1).[20]

17. Indeed, were it otherwise, the consequences would be both far-reaching and productive of serious anomalies. Take for example the case of zoning laws directed to orderly development and matters such as the protection of the environment. In so far as those laws place particular restrictions on areas in which people of a particular race reside, that might be argued at a level of generality to create a differential enjoyment of the right to own property (art 5(d)(v) of CERD). Assume, to refine the example further, that the unique environmental features of Palm Island led the Queensland Government or the Palm Island Shire Council to impose restrictions which prohibited the development of buildings exceeding a single story or a particular height. Such a law would be difficult to characterise as being for the 'sole purpose of securing adequate advancement of a particular racial or ethnic group'. Indeed, it may not be regarded as being for the purpose of securing any form of advancement for

---

15 *Bayside City Council v Telstra Corporation Limited* (2004) 216 CLR 595 (*Bayside*) at 630-631 [40] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ). See also, as an example of an earlier statement to that effect, *Conroy v Carter* (1968) 118 CLR 90 at 98-101 (Taylor J)

16 *Purvis* at 154 [201].

17 See the examples collected in *Purvis* at 155-6 [203]-[205].

18 *Bayside* at 630 [40] and 631-632 [46] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ); and *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436 (*Castlemaine*) at 478 (Gaudron and McHugh JJ).

19 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (*Mulholland*) at 197 [33] (Gleeson CJ).

20 Contra AS at [33].

a group so defined. If so, it would fall outside s 8(1) of the RDA read with art 1(4). Does it therefore follow from the fact that it falls exclusively on the residents of Palm Island that s 10(1) is engaged? Surely not.

18. More generally, almost every law or governmental measure will have different practical effects upon the enjoyment of rights by different members of society.[21] The notoriously disproportionate incarceration rate of Indigenous people effected by the criminal law provides an obvious example.[22] Does that then engage s 10(1) unless s 8(1) in some fashion applies? Surely not.

19. *Fifth*, something more should be said of the limits of s 8(1) in that regard: even the legislation held to be a special measure in *Gerhardy* does not sit entirely comfortably within that provision. In particular, the vesting of title to land in order to convert traditional ownership into a modern legal framework[23] implies a degree of permanence of the measure;[24] yet, members of the Court in *Gerhardy* cautioned that if exclusion from the land was maintained indefinitely, the legislation might cease to engage s 8(1).[25] A majority of the Court also held that, if s 8(1) had not applied, then s 10(1) would have been engaged.[26]

20. A different approach is evident in the *Native Title Act Case.*[27] Dealing with a submission that there was an inconsistency or discrepancy between the operation of the *Native Title Act 1993* (Cth) (especially s 7(1)) and s 10(1) of the RDA,[28] six members of this Court (including three members of the Court in *Gerhardy*) said this:

> ...the Native Title Act can be regarded either as a special measure under s 8 of the *Racial Discrimination Act* [citing *Gerhardy*] or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the *Racial Discrimination Act* or the International Convention on the Elimination of All Forms of Racial Discrimination.[29] (Emphasis added.)

21. Their Honours did not elaborate upon the second possibility (which was either not considered or rejected in *Gerhardy*[30]). But they referred to a body of material (see footnote 373) which suggests that they had in mind the notion that s 10(1) would not be infringed by a measure that was for a legitimate end where the

---

21 See eg Heydon J's discussion of the position of individual traders in the context of s 92 in *Betfair Pty Limited v Racing New South Wales* (2012) 286 ALR 221 (*Betfair No 2*) at 237 [61].

22 See *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 184 [36].

23 See the underlying purpose identified by Mason J at 103.

24 A point made by the Committee on the Elimination of Racial Discrimination in Committee in *General Recommendation No 32*, 24 September 2009, (CERD/C/GC/32) at [15]: 'Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, for example....the rights of indigenous people, including rights to lands traditionally owned by them...'.

25 See at 88-89 (Gibbs CJ), 108 (Murphy J), 113 (Wilson J), 140 (Brennan J) and 154 (Deane J) (cf the somewhat different approach of Mason J at 106).

26 See Gibbs CJ at 87, Mason J at 103-4, Murphy J at 107 and Brennan J at 123 - cf Deane J who relied on s 9 (at 146-7) and Wilson J at 112 and Dawson J at 162 (each not deciding the issue)

27 *Western Australia v Commonwealth* (Native Title Act Case) (1995) 183 CLR 373.

28 See the argument recorded at 391.

29 At 483-484.

30 Note, in particular Wilson J at 113-4 and Brennan J at 127.

means adopted bore some form of 'proportionate' relationship to that end. For example, in the passage from Dr McKean's book to which their Honours referred, it was said that the principle of equality of individuals under international law does not require 'mere formal or mathematical equality' but 'a substantial and genuine equality in fact'.[31] Earlier, in that same work, McKean explained that conception of equality as follows:

> The [equality] principle does not require absolute equality or identity of treatment but recognizes relative equality, ie different treatment proportionate to concrete individual circumstances. In order to be legitimate, different treatment must be reasonable and not arbitrary ... Distinctions are reasonable if they pursue a legitimate aim and have an objective justification, and a reasonable relationship of proportionality exists between the aim sought to be realized and the means employed.[32]

22. A materially identical approach may be seen in a number of 'General Recommendations' made by the CERD Committee. While those statements are not determinative of the meaning of the CERD (nor binding upon this Court), aspects of their reasoning may be instructive. The Committee's views on that issue are usefully collected and summarised in *General Recommendation No 32*, where it was said:

> ... The term "non-discrimination" does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment.[33]

23. That suggests an inquiry which resembles that discussed by Gaudron and McHugh JJ in *Castlemaine*.[34] It is true that that approach (which drew upon Gaudron J's earlier reasons in *Street v Queensland Bar Association*[35] (*Street*)) was developed in the context of considering constitutional constraints upon legislative power. However, in seeking to identify the 'general features of a discriminatory law', their Honours seemingly had in mind a more widely applicable proposition, which can be applied to s 10(1) of the RDA. Their Honours' approach has been applied to other constitutional constraints involving notions of discrimination or preference[36] and more broadly to the 'legal usage'[37] of discrimination.[38] Indeed, in *IW v City of Perth*,[39] Gummow J observed

---

31 Warwick McKean, *Equality and Discrimination Under International Law* (Oxford, 1983) p288 (the reference to the year of publication in the *Native Title Act Case* appears to be erroneous). See also, applying that analysis to the facts of *Gerhardy*, Ian Brownlie, 'The Rights of Peoples in Modern International Law' in James Crawford (Ed), *The Rights of Peoples* (Oxford, 1988), 1 at 9 (again the reference to the year of publication in the *Native Title Act Case* appears to be erroneous).

32 At 286-7.

33 *General Recommendation No 32* at [8].

34 At 478-9. Cf Keane JA in *Aurukun* at 73, [168].

35 (1989) 168 CLR 461 at 570-4.

36 *Austin v The Commonwealth* (2003) 215 CLR 185 (*Austin*) at 247 [118]; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 (*Permanent Trustee*) at 424-5 [91].

37 See *Street* at 570-1 (Gaudron J).

38 Eg *Cameron v R* (2002) 209 CLR 339 at 343-4 [15] and *Bayside* at 629-632 [40]-[46].

39 (1996) 191 CLR 1 at 37.

that *Street* and *Castlemaine* encapsulated in 'succinct terms' the 'fundamental precepts' of discrimination.[40]

24. Those similarly formulated municipal and international conceptions of discrimination and equality may be seen as taking into account a common concern – being the avoidance of legislative stultification.[41] For example, in the seminal decision in which such legitimate differential treatment was recognised as an exception to discrimination norms in the context of art 14 of the *European Convention on Human Right*s, the European Court of Human Rights said this in the *Belgian Linguistics Case*[42]:

> The Convention ... implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.

25. The Court went on to hold (at 284) that art 14 'does not forbid every difference in treatment in the exercise of the rights and freedoms recognised'. To find otherwise was said to give rise to absurd results, especially as 'competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions'. A like concern may be seen in the passage from *State of West Bengal v Anwar Ali*[43] extracted by Gaudron J in *Street* at 572.

26. To summarise the fifth point, s 10(1) should not be construed as engaged merely by proof of differential enjoyment of rights where the relevant law serves a legitimate or permissible end in the sense identified above.

27. *Sixth*, not only is the construction for which the Commonwealth contends required by consideration of the notion of equality to which s 10(1) refers and the absurdities that would otherwise result, it also follows from the nature of the rights to which s 10(1) refers. As submitted above, that includes all the human rights and fundamental freedoms with which CERD is concerned. Accordingly, the comparison required by s 10(1) must accommodate the fact that many of those rights (including those in issue here) are not absolute in nature and may need to be balanced against other competing rights and interests – that being quintessentially a matter for the legislative branch.[44] Those matters are inherent features of a 'liberal democracy founded on the principles and traditions of the common law' and therefore directly relevant to the attribution of legislative intention in construing s 10(1).[45] So, for example, as the Full Federal Court

---

40 It has been correctly described as the 'universal conception' of discrimination - see Amelia Simpson 'The High Court's Conception of Discrimination: Origins, Applications and Implications' (2007) 29 *Sydney Law Review* 263, 269.

41 See, as regards constitutional constraints, *SOS Mowbray Pty Limited v Mead* (1972) 124 CLR 529 at 574-5 (Windeyer J).

42 *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Merits)* (1979-1980) 1 EHRR 252 at 282.

43 (1952) 39 AIR(SC) 75 at 93.

44 See eg *Aurukun* at 70-71 [161]-[163] (Keane JA).

45 *Momcilovic v R* (2011) 245 CLR 1 (*Momcilovic*) at 46 [42] (French CJ), referring to *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587 (Lord Steyn).

correctly observed in *Bropho v Western Australia* (2008) 169 FCR 59 (*Bropho*) at 83 [83], s 10(1) (properly construed) does not displace the right of a State to enforce such laws as it deems necessary to control the use of property in the general interest. Nor, as may be suggested by some aspects of the reasoning in the Court below in the current matter,[46] is that approach to be confined to the right to own property.

28. As the Court in *Bropho* also said, that does not mean that the rights protected by the RDA can be compromised by laws that have an 'ostensible public purpose but which are, in truth, discriminatory'.[47] In considering that possibility, the Court does not sit in judgment on the legislative decision (thereby engaging in matters that are properly for the political process). Rather, it seeks to determine whether the differential treatment and unequal outcome is appropriate and adapted to the propounded permissible purpose in the manner suggested in *Castlemaine* and in *Street*. The inquiry is, in that regard, directed to determining whether those arrangements are truly for the permissible object advanced[48] rather than one that is 'in truth discriminatory'. Put another way, the inquiry seeks to determine whether the measure is founded upon a 'real distinction'.[49]

29. The last mentioned explanation points to the fact that the permissible differentiation concept is related to the need to compare like with like (identified above by reference to *Purvis*). Indeed, Lord Hoffman has suggested that those concepts may be telescoped and that the notion of discrimination effectively reduces to but one question: 'is there enough of a relevant difference between X and Y to justify differential treatment?'[50] In the submissions that follow, the Commonwealth applies those principles in support of the draft notice of contention that the respondent seeks leave to file.

The comparison required by s 10(1) of the RDA

30. The primary submission on the application of s 10(1) of the RDA to the circumstances of this case is that the objective characteristics surrounding the exercise of any relevant rights in issue here may be seen as different between the appellant (and other inhabitants of Palm Island) and other people in Queensland. Accordingly, there can be no meaningful comparison between those groups of people so as to find that s 10(1) is engaged. At a minimum, the Court below did not have before it sufficient material that would have permitted it to make such a comparison.

31. That conclusion proceeds from consideration of the terms and practical operation of the Liquor Act and *Liquor Regulation 2002* (Qld) (Liquor Regulations). It is wrong to seek to divorce Schedule 1R of the Liquor

---

46 See particularly the reasons of McMurdo P at [23] and [26]

47 *Bropho* at 83 [82].

48 *Castlemaine* at 473-4.

49 *Castlemaine* at 479.

50 *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 (*Carson*) at 186 [31].

Regulations from that broader scheme.[51] Indeed, by reason of the fact that the appellant seeks to invoke s 109 of the Constitution, one must necessarily start with the statute. For, while s 109 is capable of applying to inconsistencies which involve a regulation,[52] that can only be where those regulations are validly made within any applicable statutory constraints. An unauthorised regulation can give rise to no inconsistency for the purposes of s 109.[53]

32. At the time of the offence,[54] the objects of the Liquor Act relevantly included regulating the liquor industry in a way compatible with minimising harm from misuse of liquor and regulating the sale and supply of liquor in particular areas to minimise harm caused by alcohol abuse and misuse and associated violence: see s 3.

33. The Liquor Act sought to achieve those objects by regulating, in various ways, the manner in which alcohol was sold, consumed and dealt with.[55] In short, and before coming to s 168B and Part 6A, the Act applied extensive constraints to the manner in which a person could exercise any proprietary interest they held in liquor. Some of those restrictions were not geographically uniform – for example, taken together, ss 173B and 173C envisaged that drinking in public places would be lawful in public places in some parts of Queensland, and not in others. Other restrictions depended upon the particular conditions of the licence or permit and so would also vary from place to place.

34. Consistent with the broader objects of the Act, the purpose of Part 6A was to provide for the declaration of areas for minimising the harm caused by alcohol abuse and misuse and associated violence and alcohol related disturbances, or public disorder in a locality: s 173F. A declaration that an 'area' was to be a restricted area was to be made by regulation: s 173G(1). In recommending to the Governor in Council, the Minister was required to reach the state of satisfaction in s 173G(3) – that is that the declaration is 'necessary' to achieve the purpose of the Part. The regulation could also declare that the restricted area is one to which s 168B applies and if it did so it was required to state the quantity of a type of liquor that a person may have in possession in a restricted area without a permit: s 173H. In turn, s 168B prohibited a person having more than the prescribed quantity of a type of liquor in a restricted area to which it had been declared that provision applied.

35. So understood, s 168B and Part 6A are properly regarded as elements in a spectrum of available restrictive measures applied to a particular species of property, with the object of reducing or preventing social harms associated with

---

51 See similarly Mason J in *Gerhardy* at 103.

52 See *Jemena Asset Management (3) Pty Limited v Coinvest* (2011) 244 CLR 508 at 523 [38] and 516 [11].

53 See, by way of analogy, *Bayside* at 628-9 [37].

54 31 May 2008.

55 See the provisions providing for licenses and permits in Parts 4 and 5 (and the correlative offence provisions in Part 6, Division 3), the obligations and offence provisions that applied to people holding licences and permits and their associates in Part 6, Division 1 and the more generally applicable offence provisions in Part 6, Divisions 2 and 4.

its misuse. Another element in the spectrum is the operation of s 173B on the owner of liquor in a public place, not the subject of a designation in s 173C. That person would be deprived of one of the obvious rights in the bundle, being the capacity to consume their property.

36. None of those provisions adopt as a criterion race, colour, or national or ethnic origin. Nor do they select the property of people of a particular race, colour, or national or ethnic origin for disparate treatment. There is nothing about liquor to suggest that it is characteristically held by persons of a particular race. The Act and the Liquor Regulations rather apply restrictions to all persons in public places in particular localities. Those restrictions are not geographically uniform, but then neither are many other restrictions applied by the legislative scheme.

37. It is true that s 173G(2) provides that a 'community area' may be declared to be a restricted area – which term is in turn defined in s 4 to be a community area under the *Aboriginal and Torres Strait Islander Communities (Justice Land and Other Matters) Act 1984* (Qld). While the 18 restricted areas which the Liquor Regulations declared at the time of the offence are not confined to 'community areas' it appears, from the extrinsic materials, that the restrictions were implemented in respect of 'Indigenous communities'. [56]

38. However, there is no requirement in the Liquor Act that regulations apply only to Indigenous communities. Nor is that possibility suggested by the subject matter, scope or objective purpose of the Act – the statutory purpose is rather to minimise harm caused by alcohol abuse and associated violence and alcohol related disturbances: s 173F.[57] Were the Minister to, for example, adopt a policy of never recommending that the Governor in Council make a declaration in respect of an 'area' occupied by a non-Indigenous community, that would necessarily involve an attempt to widen those purposes.[58] The regulation-making power (s 235(1) read with s 173G(1)) could not authorise such matters.[59] Nor could it authorise the making of a declaration in respect of an area occupied by an Indigenous community in circumstances where the Minister could not be satisfied that the declaration was 'necessary' to achieve the purposes in s 173F: see s 173G(3).[60] However, each of those matters would give rise to questions of whether the regulation is *ultra vires* the State Act, a

---

56 See Explanatory Notes for *Liquor Amendment Regulation (No 3)* 2008 (Qld), SL 2008 No 364 (in force at the time of the appellant's offence), 1–2.

57 In that regard, it differs from the purpose identified in s 3(1) of the *Indigenous Communities Liquor Licences Act* 2002 (Qld) (ICLL Act), which added s 168B and Part 6A to the Liquor Act. That may be explained by the fact that the purpose in s 3(1) of the ICLL Act is to be principally achieved by the matters in s 3(2) (which does not specifically refer to the declaration of restricted areas).

58 *Shanahan v Scott* (1957) 96 CLR 245 at 250 and *Utah Construction and Engineering Pty Limited v Janos Pataky* [1966] AC 629 at 639-40. See also *M47/2012 v Director General of Security* (2012) 292 ALR 243 at 344 [382] (Crennan J) and 356 [434] (Kiefel J); and *Harrington v Lowe* (1996) 190 CLR 311 at 324-5 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

59 If such a regulation were authorised by the Act, the possibility would arise that either s 109 would be engaged at the level of the Act or that the regulation making power would be required to be read down.

60 The state of satisfaction is a jurisdictional fact in the sense identified by Gummow J in *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 651 [130]-[131].

matter not in issue in these proceedings. They could not give rise to any question regarding s 109 which (as submitted above) could only operate upon a regulation authorised by the statute.

39. It necessarily follows that the appellant's claim must take as its starting point that the Minister:

    (a) validly determined that the declaration of the area the subject of the declaration in Schedule 1R was necessary to minimise the harm, disturbances and public disorder referred to in s 173F;

    (b) did not, in making that determination, apply some blanket rule or policy limiting declarations to areas occupied by Indigenous communities;[61] and

    (c) therefore, by definition, identified an objective characteristic of the declared 'area' (unrelated to race, colour, or national or ethnic origin) which differentiated it from other areas in Queensland.

40. That is fatal to the argument of the appellant that relevant inequality is revealed by comparing the position of the appellant and the other members of the Palm Island community with 'other persons in Queensland' (see AS [38], see also [26], [30], [31] and [36]). That argument appears to proceed as follows: first, people in a particular locality are largely of one race and face burden X; second, people outside that locality are largely not of that race and largely do not face burden X; third, locality thus becomes a surrogate for race; and fourth, the law may thus be seen to create relevant inequality between the first and second groups in their enjoyment of rights, being groups who largely represent a difference in race.

41. But, given the objectively different characteristics surrounding the enjoyment of any relevant rights, there can be no meaningful comparison between those groups of people as required by s 10(1). Unless such a comparison may be made, it cannot be said that any relevant rights are enjoyed by Indigenous people to a more limited extent than non-Indigenous people by reason of Schedule 1R of the Liquor Regulations or any other provisions of the Liquor Regulations or the Liquor Act. The appellant's analysis therefore fails at step 4.

42. The submission that the Commonwealth puts may differ a little from the primary submission of the respondent, which is to the effect that s 10(1) could not here be relevantly engaged unless the criteria the law selects for its operation are irrelevant to its subject matter (assuming such a law has a disparate impact upon those persons who cannot meet those criteria): see at Respondent's Submissions (RS) [43], [44]. Those matters are perhaps better analysed in

---

[61] The material in the record indicates a basis for the Minister forming a view that the declaration was necessary for these areas in a way not so for non-declared areas: the Explanatory Notes to the Liquor Regulation record that, as at 2007, 'in many remote Indigenous communities alcohol-related harm and violence remain significantly higher, and school attendance significantly below, average Queensland standards': Explanatory Notes for SL 2008 No 364, 1–4.

terms of whether any differential enjoyment of rights created by the relevant law was nevertheless permissible (see further below). The submission the Commonwealth seeks to make relates to the anterior question as to whether there in fact is any differential enjoyment of rights to which s 10(1) could attach when regard is had to the inability of the appellant to point to any truly 'comparable cases'.[62]

43. There is also a further related point – that is, whether (quite apart from the difficulties identified above) the material before the courts below was sufficient to permit the comparison required by s 10(1) of the RDA. Of course, the Court is not, in that regard, bound to reach its decision in the same way as it does when it tries an issue between parties[63] and may also rely upon other 'rational considerations' that are sufficiently convincing to support the conclusion drawn.[64] It may also be the case that the unequal practical effect of a law upon rights for the purposes of s 10(1) will be obvious. However, where it is not obvious, some sufficiently probative material must be provided. If it is not, the Court will be unable to make the orders sought by the party challenging validity.[65] That is the current case for two reasons.

44. First, no attempt was made to prove there was some other part of Queensland with a similar alcohol problem where a similar regulation was not made. Secondly, the record does not indicate what proportion of Indigenous and non-Indigenous people live in each of the restricted areas in schedules 1A to 1R to the Liquor Regulations - apart from the fact that the reasons of the Courts below record that Palm Island is 'overwhelmingly', but not exclusively, inhabited by Indigenous people. Neither of those matters, but particularly the first, is obvious.[66] Indeed, even if there was material before the Court addressed to the first matter, that would not be decisive for the purposes of s 10(1). The fact that the legislature or the executive determines to trial a regulatory scheme addressed to social harm associated with alcohol in a particular community or communities does not in itself reveal a relevant comparative unequal enjoyment of rights. It rather suggests, as an attendant circumstance to be considered in the required comparison, an approach of prudent caution. Absent sufficiently probative material addressed to each of those matters, one could not conclude that the practical operation of the restrictions 'imposed a differential and discriminatory burden on a particular racial group': cf AS [38].

---

62 See *Bayside* at 629-30 [40]; *Permanent Trustee* at 424-5 [91] and *Austin* at 247 [119].

63 See *Gerhardy* at 141-142 (Brennan J).

64 *Thomas v Mowbray* (2007) 233 CLR 307 at 519 [630], 522 [639] (Heydon J).

65 Note *Betfair No 2* at 236 [56] (French CJ, Gummow, Hayne, Crennan and Bell JJ) and 253 [127], 254 [132], [133] (Kiefel J).

66 Particularly given that the Explanatory Notes to the Liquor Regulations record that, as at 2007, 'in many remote Indigenous communities alcohol-related harm and violence remain significantly higher, and school attendance significantly below, average Queensland standards' (see Explanatory Notes for SL 2008 No 364, 2).

Permissible differential treatment

45. Further, even if there is some differential enjoyment of relevant rights, the Liquor Act and Liquor Regulations do not engage s 10(1) because they constitute permissible differential treatment.

46. The purposes in s 173F are plainly permissible or legitimate objectives in the sense identified above. However, that does not mean that the Court is bound to conclude that any measure directed to those ends will fall outside s 10(1). To the extent the respondent suggests otherwise at [47], that proposition should not be accepted. Rather, for the reasons given above, some relationship between the legitimate objective and the means adopted to achieve it is required (expressed by the formulation 'reasonably appropriate and adapted'). The word 'necessary' in s 173G(3) is apt to ensure that any regulations made are reasonably appropriate and adapted to that permissible end.[67]

47. It is also important that those permissible objects may be seen to concern the prevention of alcohol related violence and adverse public health impacts, each of those being matters dealt with in the rights in art 5 of CERD: see paras (b) and (e)(iv). In particular, that requires attention to the position of Indigenous women and children, who may be seen to have enjoyed the right conferred by para (b) to a comparatively lesser extent than other members of the Queensland community by reason of the notorious issues regarding alcohol-fuelled domestic violence in some Indigenous communities.[68] The fact that the measure thereby serves objectives that are closely allied to the objects of the RDA in so far as it seeks to implement CERD bears upon the appropriateness of the distinction or differentiation and the questions of degree that arise in relation to that issue.[69] A measure that promotes the very matters that are the central concern of the RDA and CERD is more readily regarded as justified than one that serves another (nevertheless permissible) end.[70] Indeed, as Keane JA observed in *Aurukun*, questions regarding the limitations of judicial power arise particularly acutely in that context because (absent any statement of priority in either the RDA or CERD) a decision maker is left to make a 'value judgment between incommensurable values'.[71] That may, as his Honour suggested, indicate that the Court is to approach a situation where such rights are in tension with particular caution.[72]

---

67 See, in that regard, in another context, *Wotton v Queensland* (2012) 86 ALJR 246 at 254 [32] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

68 See *Aurukun* at 70-71 [162]-[163] (Keane JA) and *Morton* at 282-3 [36] (McMurdo P). See also the Cape York Justice Study Report (2001) by Justice Fitzgerald and the *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).

69 *Bayside* at 629-630 [40].

70 See, by way of analogy, *Coleman v Power* (2004) 220 CLR 1 at 52, [98] (McHugh J).

71 At 70-1, [162].

72 His Honour there held that the application of s 10(1) of the RDA is limited to cases where the balance struck by the legislature is manifestly unreasonable: at 71 [163].

Special Measures

48. On the Commonwealth's contention, the entirety of this case can be fully decided within the limits of s 10. In particular, the balance involved between promoting the right to safety and security of many members of the Palm Island community, and the necessary restrictions on the possession of alcohol in order to promote those primary rights, can be fully carried out to reach a result that s 10 has no application.

49. In the alternative, and particularly if s 10 permits of no balancing exercise where there is a conflict between rights that must in some way be reconciled, it is necessary to ascertain the scope of s 8.

50. On the particular facts of *Gerhardy*, s 8 was employed to justify a measure which conferred a benefit on one racial group over other racial groups by reason of the prior disadvantage suffered by the first group. It may be difficult to draw a close parallel between the concept of special measures employed in *Gerhardy* and the present type of case, where the real issue involves a balancing exercise concerning a measure which, for the one group, has elements of benefit and burden.

51. Nevertheless, the Commonwealth submits that if its position on s 10 is wrong, it is open to deal with a case like the present under s 8.

52. On that basis, if the text of art 1(4) is broken down, characterisation of action as a 'special measure' requires the identification of five matters.

    (a) *First*, a racial or ethnic group; alternatively individuals identified by race or ethnicity.

    (b) *Second,* a deficiency, as compared with the general position, in that group's, or those individuals' enjoyment or exercise of human rights or fundamental freedoms (or any of them).

    (c) *Third*, the measure.

    (d) *Fourth*, that the measure was taken for the sole purpose of securing adequate advancement of the relevant group or individuals.

    (e) *Fifth*, that the measure is not, at the present time, continuing to operate after its objectives have been achieved.

53. The fourth and fifth matters require elaboration.

54. As to the fourth matter – *purpose*: purpose is to be objectively ascertained and collected from the terms of the legislation in question, the facts to which it applies and the circumstances that called it forth.[73] The Court does not merely accept a purpose asserted by the legislature. The inquiry for the Court is (as Deane J suggested in *Gerhardy* at 148-9) essentially a question of characterisation. The Court approaches that question by asking whether the

---

[73] See also *Thomas v Mowbray* (2007) 233 CLR 307 at 453 [425] (Hayne J).

relevant legislative provisions 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. As Deane J indicated, that inquiry looks to whether the provisions are capable of being reasonably considered to be appropriate and adapted to achieving that purpose.

55. The only purpose permitted for a special measure is that of 'securing adequate advancement' of the relevant group or individuals. 'Advancement' is not a concept at large; it is correlative with the deficit identified as the second matter in para [52] above. That construction flows from the text of art 1(4) in which the permitted purpose is the advancement of persons 'requiring such protection as may be necessary in order to ensure [to them] ... equal enjoyment or exercise of human rights and fundamental freedoms'.

56. As to the fifth matter – continuation of a measure after its objectives have been achieved – it is a matter of relevance only after a point in time is reached when the purpose has been exhausted. As held by five members of the Court in *Gerhardy*, this is a matter for the future.[74] There is no basis in the text to require, as the appellant would, that in 'contestable' cases[75] a measure must incorporate a temporal limitation, such as a sunset clause, in order to constitute a 'special measure'.

The legal assessment differentiated from matters of legislative judgment

57. In *Gerhardy*, it was a central concern to the Court to differentiate between on the one hand political assessments that are for the legislature to make in deciding whether to take a measure, and on the other, the nature and extent of the legal inquiry as to validity. The decision in *Gerhardy* did not involve a majority of the Court concurring on the exact nature of the legal characterisation task for the purposes of s 8.[76]

58. The Commonwealth's primary submission is that the legal characterisation of a measure is directed to the matters identified in para [52] above. Questions of proportionality – or put another way, inquiries as to whether a measure is reasonably appropriate or adapted – are engaged, but only as part of the characterisation of the objective purpose of the measure taken. As Deane J identified in *Gerhardy*, the legal task of characterisation does not also require the Court to consider whether the measures 'are *the* appropriate ones, or whether they will in fact achieve, the particular purpose'.[77]

59. The use of the word 'necessary' in art 1(4) does not engage or require a broader inquiry by the Court as to the proportionality of the measure taken.

---

74 *Gerhardy* at 89 (Gibbs CJ), 106 (Mason J), 113 (Wilson J), 140 (Brennan J), and 154 (Deane J). Murphy J dealt briefly with the point (at 108); Dawson J did not express a view either way.

75 AS at [67] – [69].

76 Compare the approaches of Mason J (at 105), Wilson J (at 113), Brennan J (at 138), Deane J (at 149) and Dawson J (at 161-162).

77 At 149, original emphasis.

'Necessary' in art 1(4) forms part of an adjectival phrase ('requiring such protection as may be necessary...') that qualifies the group or individual for whose benefit a measure may be directed. Hence it conditions the *occasion* on which measures may be taken. It does not attach some form of 'proportionality' or 'least restrictive means' test to the measure itself. This point does not appear to have been raised in *Gerhardy.*

60. Attention on the language of the instrument, viewed as a whole,[78] confirms the nature, and limits, of the characterisation task. Whereas art 1(4) provides that the taking of special measures does not constitute racial discrimination, art 2(2) imposes a positive obligation for the taking of special measures. Albeit differently expressed, the two provisions are complementary and are to be construed together.[79] As in art 1(4), there is no requirement in art 2(2) that measures taken be '*necessary* to ensure the adequate development and protection'. The concept of 'necessity' is absent from art 2(2) entirely.

61. That is not to say that more general questions of proportionality are irrelevant to the taking of a special measure. To the contrary, they are, and should be, of profound significance in the exercise of legislative and political judgment. In this regard, the Commonwealth would understand the matters of 'fact and opinion' identified by Brennan J in *Gerhardy* at 137 to be a succinct statement of matters fundamental to the political assessment of the proper design and implementation of special measures. The precise tailoring of a matter to an identified need is in this respect left to the legislature; the review of the Court is directed to the matters identified at para [52] of these submissions.

62. If (contrary to the Commonwealth's primary submission above) the word 'necessary' in art 1(4) bears upon the legal task of characterisation, or that task otherwise requires consideration of the relationship between means and ends, it is not to be understood as meaning 'essential' or 'unavoidable', especially where the court is here evaluating a decision made by someone else who has the primary responsibility for setting policy.[80]

'Consultation' and 'consent' are not legal criteria of 'special measures'

63. The appellant seeks to supplement the text of s 8 of the RDA and art 1(4) with a 'general requirement for genuine consultations in order to obtain the consent of those affected by the measures and of their representative institutions'.[81] It is said that such a requirement is appropriate to accommodate the 'competing imperatives at play' in characterising a measure as a 'special measure', namely 'proportionality between the means and ends' and 'the degree of deference –

---

78 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

79 *Gerhardy* at 96 and 105 (Mason J), 112 (Wilson J), 133 (Brennan J), 147 (Deane J), and 160 (Dawson J).

80 *Mulholland* at 199 [39] per Gleeson CJ; referred to with approval in *Hogan v Hinch* (2011) 243 CLR 506 at 549 [72]; (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). See also, in the context of the races power, the *Native Title Act Case* at 460.

81 AS at [50].

the margin of appreciation – to be accorded to the political decision-makers in making that assessment'.[82] There are a number of deficiencies in the analysis.

64. *First*, that analysis overstates the role of proportionality for the reasons given above.

65. *Second*, the appellant's submission draws upon the comments of Brennan J in *Gerhardy* (at 137) that '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'.

66. To the extent it is suggested that, matters of consultation or consent are criteria relevant to assessment of legislative *purpose,* the proposition may be doubted. Absence of any consultation in a particular case, or the cursory nature of consultation in fact conducted, may be a matter of some relevance to determining whether a purpose asserted by a legislature or regulator was in fact the purpose of the measure taken, but it cannot properly determine or subsume that inquiry. Nor is there necessarily a nexus between objective purpose and the consent of some or all of the intended beneficiaries. The importation of criteria of consent and/or consultation is as inappropriate as the criteria are unworkable.

67. To the extent the comments of Brennan J suggest that what is capable of being accepted as '*advancement*' of the beneficiaries depends on their consent to such purported advancement, that too misdirects the inquiry. The text of arts 1(4) and 2(2) give content to what is 'advancement', ie the progress towards the equal enjoyment and exercise by the group of human rights and fundamental freedoms. The State's positive obligation in art 2(2) to take steps to guarantee that equality for a group cannot be predicated on consent for equality or the nature and extent of consultation undertaken: equality is a state to which persons are entitled as of right, not by wish.

68. To the extent a requirement of consent or absolute requirement of consultation is sought to be imported by the appellant as a necessary procedural safeguard for the taking of special measures, no such procedural requirements arise from the text of either the RDA or art 1(4). Indeed, there are sound practical reasons for *not* imposing such matters as legal criteria.

69. *First*, as to consent: if full consent of all is a legal requirement of validity, it would prevent action wherever opinion is divided, even where the opponents constitute only a minority of persons who are the intended beneficiaries. If the requirement is for a measure of consent, insoluble questions arise as to what proportion of the intended beneficiaries must consent, and how the extent of consent is to be ascertained. For example, particular disadvantages suffered by some of the intended beneficiaries, be they disadvantages resulting from age, infirmity, gender, fear or otherwise, may realistically prevent or hinder the giving by them of fully informed consent to any specific measure(s) taken. At a

---

[82] AS at [48], see also at [47].

minimum, requirements of consent would prevent the taking of timely and efficient measures in response to circumstances of disproportional enjoyment and exercise of human rights and freedoms. The reasoning of Chesterman JA below at [118] - [119] illustrates by reference to the circumstances of Palm Island in particular the inappropriateness of consent as a legal requirement.

70. *Second,* as to consultation: as a legal requirement of validity, consultation may be counterproductive to the taking of special measures. At a policy level, the decisions involved in the taking of special measures require the government to have an understanding of the position of the intended beneficiaries such that special measures are designed and implemented on the basis of evidence or other compelling rationale. Consultation may generally be desirable; indeed it is an obvious means of identifying needs and designing responses. However, not only will the nature and extent of consultation need to vary depending on the circumstances, but evidence might also come from a range of sources, including independent expert reports. There is no 'one size fits all' approach to this area of policy: the policy approach should, indeed must, be able to vary according to the practical reality of each situation.

71. International materials and jurisprudence do not compel a different conclusion. The appellant relies upon non-binding international materials created subsequent to both Australia's ratification of the CERD and the enactment of the RDA.[83] Analogously with the Court's recent decision in *Minister for Home Affairs (Cth) v Zentai*,[84] the meaning of art 1(4) as incorporated into s 8 of the RDA is not susceptible of change to reflect the non-binding recommendations and guideline aspiration statements referred to by the appellant.[85] Nor is the meaning of 'special measures' affected by a decision of the Grand Chamber of the European Court of Human Rights which concerned a separate treaty to which Australia is not a party and which treaty does not contain an equivalent to the 'special measures' provisions in the CERD and s 8 of the RDA.[86]

72. To the limited extent that such materials might provide a form of guidance to a court embarking on its own exercise of construction, on analysis the materials prove peripheral in the present case. *General Recommendations No 23 and 32* by the CERD Committee provide, in their relevant parts on which the appellant relies, guidelines for State practice couched in terms of aspiration as opposed to the language of mandatory obligation.[87] The *United Nations Declaration on*

---

83 The materials are identified below at para [72].

84 (2012) 289 ALR 644 (*Zentai*) at 663-664 [65] (Gummow, Crennan, Kiefel and Bell JJ), 656 [36] (French CJ).

85 The 'ordinary principles of statutory interpretation' (*Zentai* at 665 [65]) where a domestic statute incorporates a provision or provisions of a treaty (such as art 1(4) in the case of s 8 of the RDA) are those as set out in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, see especially at 251-256 (McHugh J).

86 The appellant refers to *DH v Czech Republic* (2008) 47 EHRR 3, a case concerned with art 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms and art 2 of Protocol No 1 to that Convention.

87 See Committee on the Elimination of Racial Discrimination, 18 August 1997, *General Recommendation No 23* at [4(d)], and at [5], and Committee on the Elimination of Racial Discrimination, 24 September 2009, *General Recommendation No 32* at p. 1 (CERD/C/GC/32).

the Rights of Indigenous People is a resolution of the UN General Assembly and as such, not legally binding on states and does not affect existing Australian law.[88] Its relevance is in any case precluded by a lack of international consensus as to the meaning of 'free, prior and informed consent' – a matter noted by Australia in announcing its support for the Declaration.[89] Further, pursuant to art 46(2) of the Declaration, the rights set forth in the Declaration remain subject to such limitations as are determined by law. Finally the *Advice adopted by the Expert Mechanism on the Rights of Indigenous People* is a commentary upon the text of the Declaration made by a group (the Expert Mechanism) which was established by a subsidiary organ of the General Assembly.[90] It also is not binding on Australia nor evidence of consensus as to states parties' obligations under the CERD.

Onus of establishing a special measure

73. The appellant asserts, citing *Betfair Pty Ltd v State of Western Australia*,[91] that a party asserting the application of s 8 in respect of an impugned provision bears a 'burden of proof and persuasion'.[92] Whether *Betfair* in fact imposes even in s 92 cases the type of burden for which the appellant contends may be put to one side. The Court in *Gerhardy* specifically addressed questions of onus, with Mason J holding (at 99-100) that it is for a party impugning a measure as contrary to the RDA to establish that 'it is not a special measure within the meaning of art 1(4)'. The remainder of the Court did not specifically allocate a burden to either party, though there appears to have been consensus that the court is concerned not with whether one party has discharged a burden to a requisite standard, but rather with doing the best it can in the circumstances in which it finds itself to characterise the measure for the purposes of s 8.[93]

74. As *Gerhardy* itself indicates, in characterising a measure the Court may have regard to a wide range of information, including the text of the relevant instrument, matters of notoriety concerning the surrounding circumstances, and various extrinsic sources. That is consistent with conventional means by which courts determine the purpose of a law or measure.[94]

75. In the present case, the relevant material as regards purpose include: the ICLL Act by which s 168B and Part 6A was inserted into the Liquor Act; the

---

88 UN General Assembly, *61/295 – United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007 (A/RES/61/295).

89 The Hon Jenny Macklin MP, Statement on United Nations Declaration on the Rights of Indigenous Peoples, 3 April 2009 at http://jennymacklin.fahcsia.gov.au/node/1711 accessed 18 November 2012.

90 UN General Assembly, *60/251 – Human Rights Council*, 3 April 2006 (A/RES/60/251) at [1].

91 (2008) 234 CLR 418 at [102]-[103].

92 AS at [62]-[66].

93 *Gerhardy* at 87-88 (Gibbs CJ), 113 (Wilson J), 142 (Brennan J). Wilson J (at 113) and Deane J (at 153) both assessed the measure on the basis that their Honours could see no proper grounds for doubting the purpose for which the measures were taken. Murphy J (at 108) relied upon a presumption of validity. Dawson J did not consider the point.

94 *APLA* at 462 [423] (Hayne J).

Explanatory Notes to that Bill; and the *Cape York Justice Study* (2001) by Justice Fitzgerald. As is stated in the Explanatory Notes, the ICLL Act formed:

> part of the Government's response to the Cape York Justice Study report ... The Cape York Justice Study report highlighted the seriousness of the alcohol problem in Indigenous communities in clear and unequivocal terms:
>
> > *Alcohol abuse and associated violence are so prevalent and damaging that they threaten the communities' existence and obstruct their development.*[95]

Characterisation of the measure

76. The necessary assumption for consideration of s 8 is that the legislative measure in issue here engaged s 10(1) (that is, that it had the effect of causing Indigenous persons to not enjoy, on a relevantly equal basis, a right enjoyed by persons of another race). If that is the practical operation of the measure then, having regard to the material identified above, it can be concluded (as an objective characterisation exercise) that the measure was taken for the sole purpose of advancing the exercise or enjoyment of rights by Indigenous persons in circumstances where there was a deficit in their enjoyment of those rights relative to non-Indigenous persons. This characterisation of the measure as a 'special measure' is not precluded by the fact that the measure is expressed in terms of general application.

Orders

77. By reason of the matters above, the appeal should be dismissed. As an intervener, the Commonwealth does not seek costs and submits that an order for costs should not be made against it.

PART V ESTIMATED HOURS

78. It is estimated that no more than 1 hour will be required for the presentation of the oral argument of the Commonwealth.

Date of filing: 23 November 2012

Justin Gleeson SC
Acting Solicitor-General
of the Commonwealth
Ph: (02) 6141 4145
Fax: (02) 6141 4149
justin.gleeson@ag.gov.au

Craig Lenehan
Ph: (02) 9376 0671
Fax: (02) 9335 3520
craig.lenehan@banco.net.au

Fiona Roughley
Ph: (02) 9376 0652
Fax: (02) 8239 0299
f.roughley@banco.net.au

Counsel for the Attorney-General of the Commonwealth (Intervening)

---

95 Indigenous Communities Liquor Licenses Bill 2002 (Qld), *Explanatory Notes* at pp.1-2.