IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **No B57 of 2012**

BETWEEN: **Joan Monica MALONEY**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification for publication

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

Part II: Statement of issues

2. The appellant contends that the appeal presents the following issues:

   (a) whether Schedule 1R of the *Liquor Regulation 2002* (Qld) (**the Liquor Restrictions**) contravene all or any the appellant's rights under articles 5(a), (d)(v) and 5(f) of the United Nations *Convention on the Elimination of All Forms of Racial Discrimination* (**CERD**);

   (b) whether, in that light or in any event, the Liquor Restrictions are inconsistent with s 10 of the *Racial Discrimination Act 1975* (Cth) (**RDA**), such as to be invalid by reason of s 109 of the Constitution unless falling within s 8 of the RDA;

   (c) whether in order for the Liquor Restrictions to have the character of "*special measures*", there needed in general to be:

      (i) evidence of genuine consultations in order to obtain the consent of those affected by the purported benefit, and whether there was any evidence of such; and

      (ii) a manifest intention that the measures be temporary in nature;

   (d) which party bears the onus of establishing that a measure to which s 10 of the RDA applies is a "*special measure*" falling within s 8 of the RDA;

   (e) whether in all the circumstances the Liquor Restrictions are "*special measures*" within the meaning of s 8 of the RDA.

3. The appellant does not contend that there is a universal human right to possess or consume alcohol. Nor does she dispute that some form of alcohol management plan is appropriate for Palm Island. Indeed, in the past, Aboriginal people have encountered considerable resistance in their attempts to restrict the availability of alcohol in their

Filed on behalf of the Appellant on 26 October 2012
Aboriginal & Torres Strait Islander Legal Service (Qld)
Level 2, 143 Walker St
TOWNSVILLE QLD 4810

Telephone: (07) 4722 5111
Fax: (07) 4772 1340
Contact: Peter Coombe

communities.[1] Rather, the appellant's contention is that the Liquor Restrictions impose a discriminatory burden or prohibition directed towards persons of a particular race, and hence breach s 10 of the RDA. The respondent has failed to establish that the Liquor Restrictions have the character of "*special measures*" within the meaning of s 8 and article 1(4) of CERD. In order to establish that characterisation, there would need in general (and specifically here) to be evidence of, inter alia, a process of consultation directed to obtaining the consent of those affected by the purported benefit, evidence of the purpose for which the Liquor Restrictions were imposed, and a process for keeping them under review in order to ascertain when the objectives for which they were taken have been achieved.[2] In this case, there was no such evidence.

Part III: Section 78B notices

4. Notices have been given in compliance with s 78B of the *Judiciary Act 1903*.

Part IV: Citations

5. The judgment of the Court of Appeal is reported at *R v Maloney* (2012) 262 FLR 172. The judgment of the District Court, *Maloney v Queensland Police Service* [2011] QDC, is not reported.

Part V: Facts

6. The appellant is an Aboriginal woman who was born on 1 June 1953 on Palm Island[3], and who resides on Palm Island.[4]

7. On 31 May 2008, the appellant was charged with an offence under s 168B(1) of the *Liquor Act 1992* (Qld) of being in possession of an amount of liquor in excess of the prescribed quantity in a "*public place namely Palm Island within a restricted area declared under section 173H of the Liquor Act 1992, namely Palm Island*".

8. In a Schedule of Agreed Facts provided to the Magistrates Court of Queensland sitting in Townsville, the appellant and respondent agreed that (a) the events in question occurred on 31 May 2008; (b) police intercepted a motor vehicle on Park Road, Palm Island; (c) police located *"1 x 1125ml of Jim Beam and 1 x 1125ml of Bundaberg Rum (¾ full)"* in *"a black backpack in the boot of the vehicle"*; and (d) the appellant *"was an occupant of the vehicle and admitted to owning the liquor"*.[5]

9. As at 31 May 2008, s 168B(1) of the *Liquor Act 1992* (Qld) provided as follows:

> "(1) 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 a type of liquor for the area, other than under the authority of a restricted area permit."

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[1] Race Discrimination Commissioner, *Alcohol Report: Racial Discrimination Act 1975: Race Discrimination, Human Rights and the Distribution of Alcohol*, AGPS Canberra 1995.
[2] *Gerhardy v Brown* (1985) 159 CLR 70 (**Gerhardy**) at 88 per Gibbs CJ at 98-99, Mason J at 106-6, Wilson J at 11 and Brennan J at 139.
[3] Bench Charge Sheet.
[4] DC at [1].
[5] Schedule of Agreed Facts; also CA at [68].

10. Section 168(2) provided a maximum penalty (a) for a first offence of 500 penalty units; (b) for a second offence of 700 penalty units or 6 months imprisonment; or (c) for a third or later offence of 1,000 penalty units or 18 months imprisonment. Part 6A of the *Liquor Act* contained various provisions in relation to restricted areas.

11. Section 173G(1) of the *Liquor Act 1992* (Qld) authorised regulations declaring "*an area to be a restricted area*". Subsection (2) of that section stated that "*Without limiting subsection (1), a community area, or part of a community area, may be declared to be a restricted area*". Section 173H(1) provided that a regulation may declare that a restricted area is an area to which s 168B applies. These provisions were and are in Part 6A of the *Liquor Act.* Section 173F provided that the purpose of Part 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.*"

12. The term "*community area*" – as referred to in s 173G(2) – is defined in s 4 of the *Liquor Act* to mean a community area under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld). Section 4 of that Act provided relevantly that "*community area means a community government area*", which concept was defined in turn by reference to the definition of that phrase in Schedule 4 (being the Dictionary) of the *Local Government (Community Government Areas) Act 2004* (Qld). That Dictionary defines "*community government area*" to include certain local government areas under the *Local Government Act 1993* (Qld), including relevantly "*Palm Island*".

13. The residents of Palm Island are "*overwhelmingly*" Aboriginal people.[6]

14. The Liquor Restrictions were introduced by the *Liquor Amendment Regulation (No 4) 2006* (SL 2006 No 79), made on 6 June 2006 (with effect from 19 June 2006), in reliance on ss 173G and 173H of the *Liquor Act 1992* (Qld)[7]. That regulation inserted a new Schedule 1R into the *Liquor Regulation 2002* which was specifically directed to Palm Island. Clause *1 of the Liquor Amendment Regulation (No 4) 2006* provided that each of the following areas was *a restricted area: (a)* "the community area of the Palm Island Shire Council"; (b) any foreshore of the community area of the Palm Island Shire Council; and (c) the jetty on Greater Palm Island known as Palm Island jetty.

15. The "*prescribed quantity*" for the restricted area (other than "*the canteen*") was declared to be 11.25L for beer in which the concentration of alcohol is less than 4%, and zero for any other liquor. For the canteen, the prescribed quantity for beer in which the concentration of alcohol is less than 4% was declared to be "*any quantity*", and for any other liquor to be zero.[8]

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[6] CA at [18] and [84].

[7] Section 173G(1) of the *Liquor Act* provided that a regulation may declare an area to be a restricted area. Section 173G(2) provided that a community area, or part of a community area, may be declared to be a restricted area. Section 173H(1) provided that a regulation may declare that a restricted area is an area to which s 168B applies. Section 173H(2) provided that a regulation under subsection (1) must state the quantity of a type of liquor that a person may have in possession in the restricted area (the prescribed quantity) without a restricted area permit.

[8] Schedule 1R clause 1 defined "*canteen*" as "*the licensed premises known as the Palm Island Canteen at Beach Road, Palm Island*".

16. The effect was to make it an offence to possess more than one case of mid-strength or light beer in any public place on Palm Island (other than the canteen), and to prohibit the possession of any other form of alcohol (including in the canteen).

17. The Explanatory Notes for the *Liquor Amendment Regulation (No 4) 2006* stated that the objective of Part 6A of the *Liquor Act is "to minimise harm caused by alcohol abuse and misuse and associated violence and alcohol related disturbances or public disorder **in Indigenous communities**"* (emphasis added). In fact, neither Part 6A nor s 173F is so limited, save that (as explained) it is specifically recognised in s 173G(2) that community areas in Indigenous communities may be declared to be restricted areas.

10 18. Under the heading "*4 Reasons for the subordinate legislation*", the Explanatory Notes asserted that the Amendment Regulation was "*based on the recommendations of the Palm Island Community Justice Group (CJG) and Palm Island Shire Council*". Under the heading "*9 Results of Consultation*", the Explanatory Notes record that on 19 January 2005 the Government presented a draft alcohol management plan (**AMP**) to the Council and CJG "***for consideration and comment***" by 7 February 2005. The Explanatory Notes go went on to assert that "*[e]xtensive consultation*" had been undertaken "*with the community*" and that the AMP was "*necessary for Palm Island to effectively address its alcohol related issues*".

19. On 27 October 2010, the Magistrate convicted the appellant of unlawful possession of
20 liquor in a restricted area, fined her $150, and the liquor was forfeited.[9]

20. By Notice of Appeal filed on 22 November 2010, the appellant appealed her conviction to the District Court of Queensland at Townsville. In that hearing, pursuant to leave, the appellant relied upon 14 affidavits relating to whether and what consultation had occurred on Palm Island prior to the introduction of the Liquor Restrictions. None of the deponents of those affidavits was required for cross-examination, and no responsive evidence was sought to be read or tendered by the respondent. The Explanatory Notes were referred to in submissions.

21. On 27 July 2011 the appeal to the District Court was dismissed.

22. By Notice of Application for Leave to Appeal filed on 26 August 2011, the appellant sought
30 leave to appeal to the Court of Appeal of the Supreme Court of Queensland. On 20 April 2012, the application for leave to appeal to the Court of Appeal was dismissed with costs. The appellant appeals from that dismissal.

Part VI: Argument

23. The appellant contends as follows:

(a) The Court of Appeal erred in adopting an unduly narrow construction of the rights protected by s 10(1) of the RDA, and thus erred in finding that s 10(1) did not apply to the Liquor Restrictions. Specifically, the majority erred in rejecting the argument that the Liquor Restrictions contravened the appellant's rights under articles 5(a) and 5(f) of CERD (the right to equality before the tribunals and organs administering justice, and
40 the right to access to goods and services).[10] Further, the whole of the Court erred in

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[9] CA at [1].
[10] Chesterman JA at [89]-[90] (with whom Daubney J agreed at [127]), cf McMurdo P disagreeing at [26], [28]-[30].

rejecting the argument that the Liquor Restrictions contravened the appellant's rights under article 5(d)(v) of CERD (the right to own property).[11]

(b) The Liquor Restrictions were inconsistent with s 10 of the RDA, such as to be invalid by reason of s 109 of the Constitution, unless falling within s 8 of the RDA.

(c) The Court of Appeal erred in concluding that the Liquor Restrictions were "*special measures*" within the meaning of s 8. For a provision to be characterised as special measures in the relevant sense, it must be reasonably appropriate and adapted – that is to say, proportionate – to achieving the requisite end. The Liquor Restrictions do not satisfy that requirement. In particular, that requirement generally requires evidence of genuine consultations with the affected community in order to obtain the consent of those affected by the purported benefit. The majority of the Court of Appeal erred in holding to the contrary.[12] The Court of Appeal further erred in failing to find that the evidence did not establish such consultation.[13]

(d) Further, the absence of a manifest intention that an impugned provision be temporary in nature is a factor against characterisation of the provision as a special measure, and the Court of Appeal erred in suggesting to the contrary.[14] Here there was no such manifest intention in respect of the Liquor Restrictions.

(e) The respondent – as the party seeking to characterise the Liquor Restrictions as special measures falling within s 8 of the RDA – bore the onus of establishing that claim. This onus was not discharged and, in any event, on the facts the Liquor Restrictions cannot properly be characterised as special measures.

Section 10(1) of the RDA applied here

24. In *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***), Gleeson CJ, Gaudron, Gummow and Hayne JJ at [106]-[107] referred to the identification by Mason J in *Gerhardy* of two ways in which s 10(1) of the RDA modifies the effect of a State law by conferring on persons of the first-mentioned race the enjoyment of a right to the same extent as persons of the other race:

(a) where the State law omits to make enjoyment of the right universal (ie by failing to confer it on persons of a particular race), in which case s 10(1) extends the operation of the State law but without (necessarily) raising any issue of inconsistency; and

(b) where the State law imposes a discriminatory burden or prohibition (i.e. where a prohibition in a State law is directed to persons of a particular race, forbidding them from enjoying a human right or fundamental freedom enjoyed by persons of another race), in which case, as Mason J explained in *Gerhardy* at 98-99, this necessarily results in a s 109 inconsistency between s 10 and the prohibition contained in the State law.

25. As the plurality observed in *Ward* at [115], to determine whether a law is in breach of s 10(1), it is necessary to bear in mind that the sub-section is directed at the enjoyment of a

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[11] McMurdo P at [9], [30], Chesterman JA at [99].
[12] Chesterman JA at [105]-[113], cf McMurdo P at [40]-[43].
[13] See McMurdo P at [44]-[52], Chesterman JA at [111]-[113].
[14] McMurdo P at [56]-[60], Chesterman JA at [120]-123].

right. It does not require that the relevant law makes a distinction based on race. Section 10(1) is directed at "*the practical operation and effect*" of the impugned legislation and is "*concerned not merely with matters of form but with matters of substance*".[15]

26. Here, Chesterman JA acknowledged at [84], by reference to an earlier decision dealing with the same Palm Island Liquor Restrictions, that "*the impugned provisions were discriminatory on the ground of race*". Yet his Honour did not consider that the Liquor Restrictions contravened s 10(1). The conclusion that the Restrictions discriminated on the ground of race itself clearly pointed to the application of s 10, because it indicated that members of a particular race (etc) were subject to a discriminatory burden, such as to deprive them of the enjoyment of the personal liberty available to others. In any event, the Court of Appeal erred in adopting an unduly narrow construction and application of s 10 of the RDA and article 5 of CERD.

27. Section 10(1) of the RDA provides as follows:

> "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."

28. Pursuant to s 10(2), a reference in s 10(1) to a right includes a reference to a right of a kind referred to in article 5 of CERD. The rights referred to in article 5 of CERD include relevantly the rights to equality before the tribunals and organs administering justice, the right to access to goods and services, and the right to own property – all of which are relied upon here.

29. Consistent with orthodox principles concerning the beneficial construction of human rights legislation, and construction consistent with Australia's international obligations (to the extent the enacted text permits)[16], an expansive approach should be adopted in determining whether a right is within s 10(1).[17] The rights referred to in s 10 are expressly not limited to those in article 5 of CERD. They may also be taken to include those enumerated in the *Universal Declaration of Human Rights* (**UDHR**), as well as those enumerated in international treaties to which Australia is party such as the *International Covenant on Civil and Political Rights* (**ICCPR**). Thus, for example, the plurality in *Mabo*

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[15] See also *Gerhardy* per Mason J at 97, 99; *Mabo [No 1]* (1988) 166 CLR 186 per Mason CJ at 198-199 (dissenting), per Brennan, Toohey and Gaudron JJ at 216-219, per Deane J at 231-232.

[16] *Leroux v Brown* (1852) 12 C.B. 801; *The Zollverein* (1856) Swab. 96; *The Annapolis* (1861) Lush. 295; *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309; *Zachariassen v Commonwealth* (1917) 24 CLR 166; *Polites v The Commonwealth* (1945) 70 CLR 60 per Latham CJ at 68-69, Dixon J at 77, Williams J at 81; Minister *for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 per Mason CJ and Deane J at 287-288; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 per Gummow & Hayne JJ at [97]-[101]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 per Gleeson CJ at 492 [29]; *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 per Kiefel J at [246]-[247].

[17] See, for example, *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1, 265 ALR 536 (***Aurukun***) per McMurdo P at [32]-[35] and Phillipides J at [234]-[242]; *Morton v Queensland Police Service* (2010) 240 FLR 269 (***Morton***) per McMurdo P at [18].

[No.1] (1988) 166 CLR 186 at 216-217 referred to the rights of property recognised in the UDHR.[18]

30. As to the right to own property, not only is this recognised in the UDHR, but it is also enumerated in article 5(d)(v) of CERD. Here, the Liquor Restrictions impose a discriminatory burden or prohibition which is directed to Aboriginal persons, and which forbids Aboriginal persons from enjoying the right to own a certain type of property enjoyed by other than Aboriginal persons. In *Mabo [No 1]*, Brennan, Toohey and Gaudron JJ observed at 217 that the "*right*" referred to was "*the human right to own and inherit property (including a human right to be immune from arbitrary deprivation of property)*".[19] In *Ward* the joint judgment observed at [116] that the right to own property encompasses an immunity from arbitrary deprivation of property and that property includes "*land and chattels, as well as interests therein*", and at [119] that CERD rights are identified in terms of "*complete generality*". A higher degree of specificity is unwarranted by the text of article 5(d)(v).

31. Yet Chesterman JA made just such an error at [96]-[97] in characterising the right at stake as merely a claimed right "*to ownership or possession of a particular kind of liquor in a particular location*". The significance of many property rights – or rights generally – can be downplayed by identifying the right in a highly specific way. The core fact remains that the enjoyment of a right of property was denied to a group of persons by reference to their race. That was contrary to s 10. The practical operation and effect of the Liquor Restrictions was contrary to the dignity, autonomy and equality of the Indigenous people on Palm Island. Deprivation of rights in respect of personal (and other forms of) property has long been part of discriminatory historical regimes imposed directed on Indigenous peoples. So much is recognised by the specific provision made in s 10(3) of the RDA.

32. Although McMurdo P did find that s 10 applied because of the other rights involved, her Honour reluctantly concluded at [16]-[26] that she was bound to find no deprivation of property rights under article 5(d)(v) of CERD in light of the Full Federal Court's decision in *Bropho v Western Australia* (2008) 169 FCR 59 (***Bropho***). That case is distinguishable. It which did not concern the criminalisation of the possession of alcohol, but rather provisions of the *Reserves (Reserves 43131) Act 2003* (WA) pursuant to which an administrator was appointed to a reserve that had been designated for the use and benefit of Aboriginal persons, and directions made by the administrator which effectively prevented entry to the reserve by former inhabitants without the administrator's express authority.

33. The substance of the Court's analysis in *Bropho* at [80]-[83] was to the effect that the relevant property rights – *for all* – were not absolute, but subject to certain public interest limitations. So understood, there was simply no discriminatory burden imposed, merely a particular exercise of general restraints. If the Full Court meant to go further and hold that it is necessary to engage in some proportionality-type analysis at the stage of considering whether the rights in article 5 were breached, then it erred. The task set by s 10 is a *comparative* one, seeking to identify discriminatory treatment relating to the practical enjoyment of rights. Here, there was no serious dispute that a discriminatory burden was

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[18] See also *Gerhardy* per Mason J at 101.

[19] See also *Mabo [No.1]* per Deane J at 229-230; *Native Title Act case* (1995) 183 CLR 373 at 436-437.

imposed. The issue of whether or not such a burden may still be justified by reference to some overriding benefit falls to be considered under s 8.[20]

34. Turning to rights of equality under the law, article 5(a) of CERD refers to the "*right to equal treatment before the tribunals and all other organs administering justice*". Similarly, article 26 of the ICCPR contains a general guarantee of equality before the law in the following terms:

> "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 ... ."[21]

35. Article 7 of the UDHR is in similar terms, though it does not specifically mention race. Here, the impugned provisions criminalise the conduct of the overwhelmingly Aboriginal residents of Palm Island. They have the practical operation and effect of preventing those residents from being equal before the law and from enjoying without discrimination the equal protection of the law. As confirmed by the Human Rights Committee (the expert committee established under article 28 of the ICCPR) in its General Comment No 18 *Non-Discrimination* (1989), article 26 prohibits discrimination in law or in fact in any field regulated and protected by public authorities: "*Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory.*"

36. As to article 5(a) of CERD, it follows as a matter of ordinary language and "*the application of orthodox principles*"[22] that the field of operation of article 5(a) includes those tribunals with jurisdiction to hear and determine a complaint for a criminal offence, including in relation to an appeal from a conviction, and an appeal from a decision dismissing any such appeal. This extends relevantly to the Magistrates Court of Queensland sitting in Townsville, the District Court of Queensland at Townsville, and the Court of Appeal of the Supreme Court of Queensland. The appellant does not complain that she was treated differently in matters of procedure from an accused person who is not an Aboriginal person (note Chesterman JA at [90]). However, contrary to the apparent view of Chesterman JA, article 5(a) is not concerned only with matters of procedural as opposed to substantive law.[23] The appellant's complaint is that she was charged with and convicted of an offence against a law which in its practical operation and effect is directed to persons of a particular race.

37. Article 5(f) of CERD refers to 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*". The Liquor Restrictions deny the appellant the right of access to a service at the Island's 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. Chesterman JA held at [101] that this right "*does not dictate what services must be supplied by a hotel,*

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[20] See *Gerhardy* per Wilson J at 113-114; note discussion by Brennan J at 127.

[21] Article 7 of the UDHR provides in relevantly similar terms: "*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 ...*"

[22] Also *Morton* per McMurdo P at [19]-[24].

[23] Also *Morton* per McMurdo P at [20].

restaurant or cafe". Yet, as McMurdo P stated at [28], "[t]*he practical purpose and effect of the relevant provisions is unquestionably to deny Ms Maloney 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*". A law which provided that members of a particular race in a particular town could be served no (or limited) alcohol in the local hotel, whilst non-members of that race were not so restricted, would infringe the right identified in article 5(f). That is the substance of the law here.

38. The Liquor Restrictions deprived the appellant, and the Indigenous community of Palm Island, of the enjoyment of rights relating to property, equality and access to services. They did so in a manner not applied to other persons in Queensland (leaving aside the various similar restrictions applied to other Indigenous communities). The Liquor Restrictions imposed a differential and discriminatory burden on a particular racial group, and thus fell within the second category of law identified by Mason J in *Gerhardy*. Those restrictions were and are inconsistent with s 10 of the RDA[24] such as to be invalid by reason of s 109 of the Constitution, unless they can be shown to fall within s 8 of the RDA.

Construing and applying section 8 and article 1(4)

39. The Court of Appeal took an unduly permissive approach in characterising the Liquor Restrictions as "*special measures*" pursuant to section 8 of the RDA, and one at odds with the approach to the concept in contemporary international jurisprudence.

40. Section 8 provides that s 10 has no application "*to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies ...*". Article 1(4) of CERD relevantly provides (emphasis added):

> "Special measures taken for the **sole purpose** of securing **adequate advancement** of certain racial ... groups ... **requiring** such protection as **may be necessary** in order to **ensure such groups ... 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**."

41. In *Gerhardy*, at 133, Brennan J identified the indicia of a special measure:

> "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."

42. There are a number of imperatives which are relevant in considering and applying s 8 and article 1(4) so as to characterise a law as a special measure. First, the purpose of these provisions is to be given effect. Brennan J stated in *Gerhardy* at 131 that laws denying formal equality before the law "*fall into two radically different classes: which have the*

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[24] For example, *Aurukun* per McMurdo P at [32]-[34], Phillipides J at [240] to [242]; *Morton* per McMurdo P at [24].

purpose of achieving effective and genuine equality by alleviating the conditions of a disadvantaged class and those which do not". Article 2(3) of CERD imposes a duty on State parties to implement measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them. The requirements for establishing special measures should not be construed so narrowly as to impede achievement of this aim and duty.

43. Secondly, however, it is self-evident that to allow too-ready an acceptance of purported special measures would be to undermine the fundamental objectives of the RDA and CERD of eliminating racial discrimination. Merely because a government asserts that discriminatory provisions are special measures does not make them so. The exception must not be permitted to devour or undermine the rule.

44. Thirdly, as Brennan J noted in *Gerhardy* at 137, the third and fourth indicia of special measures "*involve questions of fact and opinion*". Further, the rights protected by the RDA are unusually open-ended. The issues to be judged are matters on which reasonable people may sometimes disagree. They are also matters on which it can sometimes be difficult for courts to make the requisite judgments. However, the Commonwealth has enacted the RDA in the broad terms that it has. And it falls to the courts to apply the Act as best it can. To fail to do so effectively would undermine the RDA, as identified in the second imperative. That evaluative judgments arise, involving issues of fact and degree, is by no means unique to this area. It is a not uncommon feature of applying constitutional or statutory criteria.[25]

45. Greater certainty in the construction and application of the relevant provisions of the RDA and CERD can be provided by referring to developing international jurisprudence on the Convention. Brennan J appropriately recognised in *Gerhardy* at 126 that "[i]*n time, international law may spell out with more precision the contents of human rights and fundamental freedoms, but for the present it must be accepted that the term is imprecise in its meaning*". The Parliament's protection of those rights cannot have been intended to take place divorced from the evolution and understanding of those rights.

46. The concept of "*special measures*" in s 8 of the RDA should be given a meaning that is consistent with principles of international law. Such an approach is consistent with the principle that "*a statute of the Commonwealth or of a State is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law*".[26] This is particularly so whether the legislation refers in terms to, and reproduces in a Schedule, a relevant international treaty provision. Article 31(3)(c) of the *Vienna Convention* provides that the interpretation of treaty provisions shall take into account "*any relevant rules of international law*", especially accepted norms of customary international law.[27] The "*rules of international law are dynamic*".[28] Likewise, as Sir Ian Sinclair has noted, the "*evolution and development of international law may exercise a decisive influence on the meaning to be given to*

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[25] For a notable example of such a statutory provision, see *Taikato v The Queen* (1996) 186 CLR 454, esp at 464-6.

[26] *Kartinyeri v Commonwealth* (1998) 195 CLR 337 per Gummow and Hayne JJ at 384; also *Chu Kheng Lim v Minster for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ; *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 per Kiefel J at [247].

[27] See United Nations International Law Commission Report (2006) A/61/10, chapter XII, 407 at 415.

[28] *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 1 at [31] (Full Court).

expressions incorporated in a treaty".[29] In its *South West Africa Advisory Opinion*, the International Court of Justice observed that some concepts (such as that of a "*sacred trust*") are by definition evolutionary and their "*interpretation cannot remain unaffected by the subsequent development of law*".[30] Much the same point may be made of the provisions at issue here.

47. The third and fourth indicia of a special measure identified by Brennan J raise issues of whether the provision is for the sole purpose of securing adequate advancement of the relevant group, in circumstances where the protection given is necessary in order to achieve equality. These issues involve characterisation of the measure as judged against the need and purported end. In *Gerhardy*, Mason J, at 105, spoke of the measure being "*appropriate and adapted*" to achieving the necessary purpose. Deane J, at 149, used slightly more deferential language in speaking of whether the provisions are "*are capable of being reasonably considered to be appropriate and adapted to achieving*" the requisite purpose. However, his Honour's application of that test at 149-153 did not suggest a very high degree of deference. Brennan J at 139 asked "*could the political assessment inherent in the measure reasonably be made?*"

48. Such formulations raise much the same type of characterisation question as has arisen in Australia with respect to the imposition of legitimate burdens of interstate trade and on freedom of communication on political and government matters. In substance, what is involved is an assessment of proportionality between the means and ends.[31] Also raised is the degree of deference – the margin of appreciation – to be accorded to the political decision-makers in making that assessment. Adopting a proportionality method of analysis is harmonious with the international approach to the guarantees in CERD (as to which, see below). Allowing some margin of appreciation can be facilitated within that approach.

49. However, the margin cannot be so wide as to undermine the prime objective of the RDA and CERD of ending racial discrimination. To suggest that there is an important and meaningful role for the courts in assessing whether or not laws are "*special measures*" within the meaning of s 8 is not to "*stray from an orthodox understanding of the relationship between the courts and the other branches of government*".[32] Nor is it to fail to appreciate that in the first instance the political branch of government determines whether an occasion exists for taking a particular measure.[33] Rather, it is to contend, conformably with established authority, that there are "*limits within which a political assessment might be made*"[34] and that there is 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.

50. Further, in this context there is a means available by which the competing imperatives at play can readily be accommodated: by recognising a general requirement for genuine

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[29] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed, Manchester University Press, 1984, at 139-140; also United Nations International Law Commission Report (2006) A/61/10, chapter XII, 407 at 415.

[30] *Advisory Opinion* [1971] ICJ Rep 56 at [53].

[31] Note *Lange v ABC* (1997) 189 CLR 520 at 562 and 567 fn 272; *Wotton v State of Queensland* (2012) 285 ALR 1 at [77]; see also *Betfair Pty Ltd v State of Western Australia* (2008) 234 CLR 418 at [101]-[102].

[32] Cf *Aurukun* per Keane J at [210].

[33] *Gerhardy* per Brennan J at 138-139.

[34] *Gerhardy* per Brennan J at 137-138. See discussion of the role of national courts in affording effective protection to rights guaranteed by the *European Convention for the Protection of Fundamental Freedoms and Human Rights* by examining the proportionality of measures taken by the United Kingdom Government in relation to national security in *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the home Department v* [2005] 2 AC 68 especially Lord Bingham of Cornhill at [29]-[43].

consultations in order to obtain the consent of those affected by the measures and of their representative institutions. If such consultation has taken place, then it could more readily be accepted that the discriminatory measure was properly characterised as a special measure (although, even then, the Court would still need to be persuaded that the provision in question was appropriately characterised as a special measure). If it had not, then it would require evidence of compelling justification for the measure to be so characterised.[35]

The general requirement for consultation

51. The challenge in *Gerhardy* was to a provision of the *Pitjantjatjara Land Rights Act 1981* (SA) which made it an offence for a person (not being a Pitjantjatjara) to enter Pitjantjatjara lands without the permission of Anangu Pitjantjatjaraku. The challenge was not by the beneficiaries of the impugned provision, who supported the prohibition of entry by other persons. Nonetheless, the Court's decision in *Gerhardy* raised the importance of the wishes of the beneficiaries in characterising measures as "*special measures*" for the purposes of s 8 of the RDA. As Brennan J observed at 135:

> "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. An Aboriginal community without a home is advanced by granting them title to the land they wish to have as a home. Such a grant may satisfy a demand for land rights. But an Aboriginal community would not be advanced by granting them title to land to which they would be confined against their wishes. Such a grant would be a step towards apartheid. Even if the promoters of the measure had the purpose of promoting the interests of the residents of that land, the measure would deny the residents' human rights and fundamental freedoms."[36]

52. Similarly, at 139 his Honour stated that in considering the reasonableness of the political assessment "*it is necessary to apply any relevant legal criteria, for example, that the wishes of the beneficiaries for the measure are of great importance in satisfying the element of advancement*" (and see also at 130, referring to McKean). Deane J, at 153, referred to the State Act emerging "*from long discussions and negotiations between representatives of the Government ... and representatives of the Pitjantjatjaras on the subject of the Pitjantjatjaras' claim to the lands*".

53. Since *Gerhardy* was decided in 1985 there have been considerable developments in international jurisprudence and international standard-setting in relation to the concept of "*special measures*" and the rights of Indigenous peoples. Those developments confirm the Court's recognition that "*advancement*" is not necessarily what the person who takes the

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[35] Cf by analogy *Hogan v Hinch* (2011) 243 CLR 506 at [95]-[99], and authority there cited; also *ACTV v Commonwealth* (1992) 177 CLR 106 at 143 per Mason CJ.

[36] Citing *Namibia (SW Africa) Advisory Opinion* of the International Court of Justice [1971] ICJ Reports 16 [128]-[131] at 56-57.

measures regards as a benefit for the beneficiaries and, in particular, the importance of the wishes of the purported beneficiaries in determining whether measures are taken for the purpose of securing their advancement. Central to that jurisprudence and those standards are the concepts of consultation with affected communities and their representative institutions in order to obtain their free, prior and informed consent.

54. Pursuant to article 8(1) of CERD, there is established a Committee on the Elimination of Racial Discrimination. On 18 August 1997, the Committee on the Elimination of Racial Discrimination adopted General Recommendation No 23 on "*Indigenous Peoples*" which calls on States parties to CERD to, inter alia:

> "(d) 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".

55. On 24 September 2009, the Committee on the Elimination of Racial Discrimination adopted General Recommendation No 32 on "*The meaning and scope of special measures in the Convention on the Elimination of All Forms of Racial Discrimination*", with the objective "*of providing overall interpretive guidance on the meaning of* [articles 1(4) and 2(2)] *in light of the provisions of the Convention as a whole*". The General Recommendation provides inter alia as follows:

> "16. 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. The measures 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. ...
>
> 18. 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."

56. On 13 September 2007, the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).[37] Article 19 of the UNDRIP provides as follows in relation to consultation with indigenous peoples:

> "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[38]

57. The appellant does not (and could not) contend that any enforceable rights or obligations under Australian municipal law arise as a result of Australia's expression of support in 2009 for the UNDRIP.[39] However, she contends that Australia's acceptance of the UNDRIP and

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[37] On 13 September 2007, Australia voted against the UNDRIP in the General Assembly. However, on 3 April 2009, the Government announced that Australia had reversed its position and supported the UNDRIP.

[38] Emphasis added. The concept of "*free, prior and informed consent*" also appears in articles 10, 11(2), 28, 29(2), 32(2) of the UNDRIP. Article 21 provides for measures to ensure continuing improvement of the economic and social conditions of indigenous peoples.

[39] Cf *Re East; ex parte Nguyen* (1998) 196 CLR 354 at [19].

the standards articulated in it bears upon the construction of the concept of "*special measures*" in s 8 of the RDA.[40]

58. In 2007, the UN Human Rights Council established an Expert Mechanism on the Rights of Indigenous Peoples), pursuant to resolution 6/36, to provide thematic advice in the form of studies and research on the rights of indigenous peoples, as directed by the Council. In 2011, the Expert Mechanism adopted Advice No 2 (2011) "*Indigenous peoples and the right to participate in decision making*" which provides inter alia as follows:

> "2. The right of indigenous peoples to participation is well established in international law ...
>
> 3. This spectrum of rights is well illustrated by the Declaration on the Rights of Indigenous Peoples, which contains more than 20 general provisions pertaining to indigenous peoples and decision-making ...
>
> 8. The requirement that consultations be carried out through appropriate procedures implies that general public hearing processes are not normally regarded as sufficient to meet this procedural standard. Consultation procedures need to allow for the full expression of indigenous peoples' views, in a timely manner and based on their full understanding of the issues involved, so that they may be able to affect the outcome and consensus may be achieved.
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> 9. Moreover, consultations should be undertaken in good faith and in a form appropriate to the relevant context. This requires that consultations be carried out in a climate of mutual trust and transparency. Indigenous peoples must be given sufficient time to engage in their own decision-making process, and participate in decisions taken in a manner consistent with their cultural and social practices. Finally, the objective of consultations should be to achieve agreement or consensus. ...
>
> 21. The duty of the State to obtain indigenous peoples' free, prior and informed consent entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes. Consent is a significant element of the decision-making process obtained through genuine consultation and participation. Hence, the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples' rights. ...

59. The appellant likewise contends that EMRIP's Advice No 2 (2011) must bear upon the meaning to be given to "*special measures*" in s 8 of the RDA. The European Court of Human Rights has also emphasised the significance of informed consent, given in full knowledge of the facts, with respect to segregated, racially discriminatory schooling of Roma children.[41]

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[40] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 per Brennan J at 264-265; *Gerhardy* per Brennan J *at* 124; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 per Brennan CJ at 230-231, Dawson J at 239-240, McHugh J at 250-251, Gummow J at 294; *Qantas Airways Limited v Christie* (1998) 193 CLR 280 per McHugh J at 303, Kirby J at 332-3.

[41] *DH v Czech Republic* (2008) 47 EHRR 3 especially at [198]-[203]; see also the discussion of the shift of the burden of proof to the State (at [182]-[195]), and of the absence of a reasonable relationship of proportionality between the means used and the aim pursued at [205]-[209].

60. In the absence of evidence of genuine consultations in order to obtain the consent of those affected by the measures and of their representative institutions, the courts can and should conclude that the special measures are not appropriate and adapted in the requisite sense, in the absence of compelling justification for both the lack of consultation and the measures themselves. A compelling justification for lack of consultation might be the great urgency of the measure in some new circumstances, and/or the absence of any reasonable means of consulting with a completely dysfunctional community (although that circumstance will be very rare).

61. As submitted above, adopting this approach is consistent with *Gerhardy*, is consistent with the international understanding and application of CERD, and appropriately takes account of the competing imperatives and difficulties that arise in considering this issue. Further, to fail to consult in a proper and meaningful fashion with affected members of the racial (etc) group said to be the "*beneficiaries*" of the special measure is to fail to accord them the dignity, autonomy, respect and entitlement to equality which lies at the heart of CERD and of the RDA. Moreover, without such consultation – and, so far as possible, consent – the efficacy of the purported special measure is unlikely to be achieved.

Onus

62. An important aspect of the Court of Appeal's reasoning was the premise – assumed but not supported by argument – that the burden of proof and persuasion with respect to establishing that the impugned provisions *were not* special measures under s 8 lay upon the appellant.[42] That premise is erroneous.

63. This case was a criminal prosecution. The appellant disputed the validity of the charge. It fell on the respondent to make good that there was, in law, an available charge.

64. Even if the case was viewed as, say, a civil discrimination claim, the Court's approach was in error. It may be accepted that the burden to establish that s 10 of the RDA applies falls upon the person who asserts discrimination. That burden having been discharged, it is for the party or parties asserting that, even so, Part II of the RDA does not apply because of s 8 to make out that proposition. This approach is consistent with the remedial objectives of the RDA and CERD, for it avoids the too-ready acceptance of special measures simply because of the absence of relevant evidence. This is a matter of importance in circumstances where relevant evidence may not be readily to hand, as in *Gerhardy*, or may not exist at all.

65. Further, to establish that a measure falls within s 8 and article 1(4) involves consideration of such matters as the purpose of the measures, the circumstances which called the measure forth and which are said to make it "*necessary*", and how the measure is intended to secure "*adequate advancement*" of the purported beneficiaries.[43] Those matters are more likely to be within the knowledge of the governmental party. That fact favours the onus being on that party.[44] To require the contrary is to put the burden on a challenger to make out a negative proposition.

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[42] See McMurdo P at [52], Chesterman JA at [102].

[43] See *Gerhardy* at 133-138 per Brennan J.

[44] *R v Turner* (1816) 105 ER 1026 at 1028; *General Accident Fire and Life Assurance Corp v Robertson* [1909] AC 404 at 413.

66. An analogy can be drawn with the approach taken to s 92 of the Constitution. The Court has affirmed that, if a measure is found to impose a discriminatory burden on interstate trade and commerce, then the party supporting the validity of the measure on the basis that the measure was adopted in pursuit of a legitimate competing objective bears the burden of establishing the regulatory justification for the law.[45]

The requirement to be temporary

67. Article 1(4) imposes a temporal limitation, namely that the special measures "*shall not be continued after the objectives for which they were taken have been achieved*". The appellant submits that for a provision to be characterised as a special measure there should in general be a manifest intention that it be temporary in nature – for example, that it be imposed only for a relatively limited period of time, or that there be a review mechanism. The absence of such a limitation is a factor undermining the characterisation of a provision as a special measure.

68. In *Gerhardy* the Court accepted the scheme there was a special measure despite the absence of any such indication. In light of developments in the understanding of the RDA and CERD, it may well be that the scheme there would now be regarded in any event either as a manifestation of ordinary and equal incidents of property rights, and/or as involving specific cultural and traditional rights which have no ready counterpart in the common law, and recognition of which is not relevantly discriminatory.[46]

69. In any event, the measures at issue in *Gerhardy* were readily characterisable as for the benefit and advancement of the Pitjantjatjara people, and on a long-term basis. When the regime at issue imposes a discriminatory burden on the minority racial group, and where the characterisation of that burden is much more contestable, the absence of any temporal limitation becomes more significant.

The facts here

70. For the respondent to have established that the Liquor Restrictions were a special measure, it would need to have adduced evidence, inter alia, of:

    (a) the (sole) purpose for which the Liquor Restrictions were imposed;

    (b) the circumstances said to make the Liquor Restrictions "*necessary*", and how the Liquor Restrictions were intended to secure "*adequate advancement*" of the purported beneficiaries; and

    (c) a process of consultation directed to obtaining the free, prior and informed consent of those affected by the Liquor Restrictions, in particular of their representative institutions;

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[45] *Betfair Pty Ltd v State of Western Australia* (2008) 234 CLR 418 at [102]-[103], approving Mason J in *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 608.

[46] Note eg the CERD Committee's *General Recommendation No.32*, at [15], as quoted by McMurdo P at [38]; also *Native Title Act Case* (1995) 183 CLR 373 per the plurality at 483-4.

(d) a process for keeping the Liquor Restrictions under review in order to ascertain when the objectives for which they were taken have been achieved.[47]

71. The respondent led no such evidence. In the District Court it referred to the Explanatory Notes in submissions in answer to the RDA challenge. The respondent neither read any affidavits nor tendered any reports or statistics or the like. Nor did it seek to do so in the Court of Appeal, save that it referred to the tabling of reports in Parliament on key indicators in Indigenous communities, including Palm Island. McMurdo P, at [59]-[60], referred to some statistics from one such report which were not supportive of the efficacy of the Liquor Restrictions.

72. The Explanatory Notes are incapable of constituting relevant and admissible evidence or, at best, were insufficient to establish the requisite matters. Even if the Explanatory Notes were admissible, at their highest they do not set out the necessity for, or proportionality of, the measure. There is no discussion of any assessment undertaken as to whether this measure was appropriate to achieve the purpose, including whether the purpose warrants the human rights breaches, or whether other measures were available that were considered inappropriate or unsuitable. In the absence of evidence it must be assumed that there were no such assessments.[48] Further, the Explanatory Notes were in a number of respects capable of being misleading (for example, insofar as they suggested that the AMP was "*based on the recommendations of the Palm Island Shire Council*"), and in other respects so general and unspecific as to be incapable of proving any relevant fact.

73. Even if the Explanatory Notes have some *prima facie* evidential value (which the appellant contests), once evidence was adduced to cast doubt on the contents of the Notes, then the respondent was put to proof. The necessity for and justification of a claimed special measure cannot depend upon the mere say-so of a self-justificatory document prepared by the Executive for an entirely different purpose. There was before the District Court uncontested evidence adduced by the appellant in the form of affidavits from 14 deponents.

74. Chesterman JA stated at [111] that the appellant "*did not put the respondent on notice, then or subsequently, that she contended the effect of the affidavits was to nullify the Explanatory Notes*". That criticism is unfounded. The Explanatory Notes had not been provided to the Local Court, as the RDA issue was not raised there. The respondent was provided the affidavits in advance of the hearing in the District Court. The respondent had the opportunity to respond to them, but made no attempt to do so. None of the deponents was required for cross-examination. And it was entirely evident from the content of the affidavits that they were directed to the issue of consultation, and that they would contradict some of the content of the Explanatory Notes if, indeed, the respondent chose to tender those Notes to the Court.

75. Those affidavits establish amongst other things the following:

(a) The Palm Island Aboriginal Shire Council (**PIASC**) opposed the Liquor Restrictions in the form proposed by the Government,[49] including the way the Government's proposal

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[47] *Gerhardy* at 88 per Gibbs CJ at 98-99, Mason J at 106-6, Wilson J at 11, and Brennan J at 139.
[48] Cf *Jones v Dunkel* (1959) 101 CLR 298.
[49] Affidavit of Gavin Barry, PIASC councillor, at [4] and [8]; affidavit of Magdalena Blackley, PIASC councillor, at [4]; affidavit of Zachariah Sam, PIASC councillor, at [3].

was presented to the councillors[50] and the way the Government had ignored the work of the Palm Island community, through their Local Government Council, towards a community-supported alcohol management plan.[51]

(b) No community forum was convened to obtain community input into developing an alcohol management plan for Palm Island,[52] the community had no input into developing an alcohol management plan and the community did not see the Government's draft final document.[53]

(c) The normal protocols[54] of consulting with elders[55] and holding community meetings[56] were not observed.

(d) The largest employer on Palm Island, the Community Development Employment Program, was not consulted in relation to the alcohol management plan.[57]

(e) There were considerable irregularities in the processes of the non-statutory community justice group[58], including no notice of meetings,[59] the holding of meetings in private,[60] an absence of discussion or consultation with the community,[61] and the filling of the statutory community justice group with persons who were supportive of the Government's proposed alcohol management plan *"whatever the true wishes of the community might be"*.[62]

76. Chesterman JA held at [113] that *"that there was consultation; the people of Palm Island were divided as to whether alcohol restrictions should be imposed and disagreement between those who thought there should be restrictions as to what restrictions were appropriate. There was no prospect of agreement"*. These findings do not reflect the evidence. There had been no genuine attempt to consult with the Palm Island community and its representative institution, PIASC, or the elders, in order to seek their consent.

77. Chesterman JA referred at [119] to a Ministerial Statement made by the former Premier (the Hon PD Beattie) on 23 February 2005, following a meeting with the Palm Island Aboriginal Council on 17 February 2005 (**the Ministerial statement**). In particular, his Honour referred to details of the Premier's meeting on Palm Island, and the Premier's

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[50] Affidavit of Magdalena Blackley, PIASC councillor, at [14]-[15].
[51] Affidavit of Magdalena Blackley, PIASC councillor, at [16]-[18].
[52] Affidavit of Zachariah Sam, PIASC councillor, at [4]; also affidavit of Jeannie Ling, member of statutory and non-statutory CJG, at [7]; affidavit of Gavin Barry, PIASC councillor, at [6].
[53] Affidavit of Cindy Clumpoint, member of statutory CJG, at [9].
[54] First affidavit of Thomas Geia, at [4]; second affidavit at [2].
[55] Affidavit of Roy Nallajar, elder, at [5]; affidavit of Keith Bligh, elder, at [7]-[8]; affidavit of Ronald Hero, elder, at [4]-[5]; affidavit of Thomas Lenoy, elder/cabinet maker at [4].
[56] Affidavit of Keith Bligh, elder, at [4]-[7]; affidavit of Ronald Hero, elder, at [4]; affidavit of Roy Nallajar, elder, at [5]-[6]; affidavit of Thomas Lenoy, elder/cabinet maker at [4]-[6].
[57] Affidavit of Andrea Kyle, member of statutory CJG, at [12]; affidavit of Raymond Roberts, acting manager of CDEP, at [6].
[58] Gazettal of *Aboriginal Communities (Land and Justice) Amendment Regulation (No 2) 2006* (Qld). The statutory community justice group was not established until 21 April 2006, after consultation was said to have finished, and 14 days prior to the gazettal of the Palm Island community area as a *"restricted area"*.
[59] Affidavit of Magdalena Blackberry, at [12].
[60] Affidavit of Magdalena Blackberry, at [13]. affidavit of Cindy Clumpoint, member of statutory CJG, at [4]-[6].
[61] Affidavit of Rhiannon Walsh, member of statutory CJG, at [3]-[9]; affidavit of Cindy Clumpoint, member of statutory CJG, at [7]; affidavit of Jeannie Ling, member of non-statutory CJG, at [11].
[62] Affidavit of Andrea Kyle, member of statutory CJG, at [4]-[10], [14].

statement that "*I no longer believe that [the Palm Island Council] can adequately represent the people of Palm Island. I do not believe that they can deliver services to the people. I think they are basically dysfunctional and that the people of Palm Island are badly served*". At best, this material went to the Premier's opinions, which might conceivably be relevant to his and the Government's purposes. But Chesterman JA appears to rely on this material as proof of the facts, in particular as to what consultation occurred and whether the Council was dysfunctional. Such a usage was inappropriate and unfair. The appellant would not be permitted to impeach those statements.[63] That being so, the statements in the Ministerial Statement cannot be asserted against her as facts. In any case, the Ministerial Statement conveys a sense of the context in which the Premier had "*come to the island **on this day** to talk to them about it; in other words, consult them*", and the unhappy denouement of the meeting on that day.

78. To be characterised as a special measure the Liquor Restrictions must be proportionate, or appropriate and adapted, to the sole purpose of securing the adequate advancement of the Palm Island indigenous community, and "*necessary*" for the equal enjoyment or exercise of human rights and fundamental freedoms. They are not:

(a) The purported benefit involves the criminalisation of personal conduct which is lawful in other than Aboriginal and Torres Strait Island community areas declared to be restricted areas. Such criminalisation occurs in a context in which the law (criminal and other) provides protection against alcohol-related abuse and violence, and alcohol-related disturbances or public disorder, and of wider government legislative and non-legislative strategies to reduce the level of alcohol related harm in Indigenous communities. There are, in other words, other measures available to achieve the claimed legitimate ends. The respondent provided no evidence of any assessment of other options, nor any evidence as to why such measures were unlikely to be suitable or efficacious. Such criminalisation cannot be equated with limitations on the sale of liquor, or the times and circumstances in which liquor can be sold.

(b) The unchallenged evidence was that the representative institution of the Palm Island community area opposed the proposed measures, and that the normal protocols[64] of consulting with elders[65] and holding community meetings[66] were not observed. There were no genuine consultations in order to obtain the consent of those affected by the purported benefit.

(c) There is no evidence of any compelling justification for dispensing with the requirement of consultation, nor for the Restrictions themselves, and there are no such justifications.

(d) The Restrictions manifest no temporal limitation.

79. In these circumstances – and regardless of where the onus lies – the Liquor Restrictions cannot be characterised as special measures within s 8 of the RDA. They were thus

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[63] Article 9 of the *Bill of Rights 1688*, as implicitly picked up by s 9, *Constitution of Queensland 2001* (Qld).
[64] First affidavit of Thomas Geia, at [4]; second affidavit at [2].
[65] Affidavit of Roy Nallajar, elder, at [5]; affidavit of Keith Bligh, elder, at [7]-[8]; affidavit of Ronald Hero, elder, at [4]-[5]; affidavit of Thomas Lenoy, elder/cabinet maker at [4].
[66] Affidavit of Keith Bligh, elder, at [4]-[7]; affidavit of Ronald Hero, elder, at [4]; affidavit of Roy Nallajar, elder, at [5]-[6]; affidavit of Thomas Lenoy, elder/cabinet maker at [4]-[6].

rendered invalid by virtue of s 10 of the RDA together with s 109 of the Constitution. The appellant's conviction should be overturned.

Part VII: Applicable provisions

80. Applicable constitutional provisions, statutes and regulations are set out in the Annexure.

Part VIII: Orders sought

81. The appellant seeks the following orders:[67]

1. The appeal be allowed with costs.

2. The orders of the Court of Appeal of the Supreme Court of Queensland be set aside and in lieu thereof:

10 (a) the appeal is allowed with costs;

(b) the conviction of the appellant on 27 October 2010 in the Magistrates Court of Queensland sitting in Townsville is set aside; and

(c) the appellant is acquitted of the offence against s 168B(1) of the *Liquor Act 1992* (Qld), namely, having in her possession a 1125 ml bottle of Jim Beam bourbon and a 1125 ml bottle of Bundaberg rum (three-quarters full) on 31 May 2008 in a public place on Palm Island within a restricted area declared under s 173H of the *Liquor Act*.

Part IX: Timing of oral argument

82. It is estimated that the appellant's oral argument will take approximately 2 hours.

20 Dated: 26 October 2012

Chris Ronalds SC
Tel: 02 9229 7378
Fax: 02 9221 6944
ronalds@fjc.net.au

J K Kirk SC
Tel: 02 9223 9477
Fax: 02 8028 6060
kirk@wentworthchambers.com.au

30

Sarah Pritchard SC
Tel 02 9223 8594
Fax: 02 9232 7626
s.pritchard@selbornechambers.com.au

Tony McAvoy
Tel: 02 9229 7395
Fax: 02 9221 6944
mcavoy@fjc.net.au

[67] These proposed orders differ from the orders sought in the original Notice of Appeal in relation to costs, but leave to file an Amended Notice of Appeal is being sought.

ANNEXURE

APPLICABLE PROVISIONS

Australian Constitution

Section 109
Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Racial Discrimination Act 1975 **(Cth)**

Section 8
Exceptions

(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 except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

(2) This Part does not apply to:

(a) any provision of a deed, will or other instrument, whether made before or after the commencement of this Part, that confers charitable benefits, or enables charitable benefits to be conferred, on persons of a particular race, colour or national or ethnic origin; or

(b) any act done in order to comply with such a provision.

(3) In this section, ***charitable benefits*** means benefits for purposes that are exclusively charitable according to the law in force in any State or Territory.

Section 10
Rights to equality before the law

(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.

(3) Where a law contains a provision that:

(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or

(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;

not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in

relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

***Liquor Act 1992* (Qld)**
(as at 31 May 2008)

Section 3
Objects of Act

The objects of this Act are—

(a) to facilitate and regulate the optimum development of the tourist, liquor and hospitality industries of the State having regard to the welfare, needs and interests of the community and the economic implications of change; and

(b) to provide for the jurisdiction of the tribunal to hear and decide appeals authorised by this Act; and

(c) to provide for a flexible, practical system for regulation of the liquor industry of the State with minimal formality, technicality or intervention consistent with the proper and efficient administration of this Act; and

(d) to regulate the liquor industry in a way compatible with –

(i) minimising harm arising from misuse of liquor; and

(ii) the aims of the National Health Policy on Alcohol;

(e) to regulate the sale and supply of liquor in particular areas to minimise harm caused by alcohol abuse and misuse and associated violence; and

(f) to regulate the provision of adult entertainment; and

(g) to provide revenue for the State to enable the attainment of the objects of this Act and for other purposes of government.

Section 168B
Prohibition on possession of liquor in restricted area

(1) 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.

Maximum penalty—

(a) for a first offence—500 penalty units; or

(b) for a second offence—700 penalty units or 6 months imprisonment; or

(c) for a third or later offence—1000 penalty units or 18 months imprisonment.

(2) However, subsection (1) does not apply to the possession of liquor in the ordinary course of lawful business by—

(a) a licensee or permittee in the licensee's or permittee's licensed premises; or

(b) a carrier who—

(i) has collected it from, and is delivering it to, licensed premises in the area; or

(ii) has collected it from licensed premises outside the area and is delivering it to licensed premises in the area; or

(iii) has collected it from licensed premises in the area and is delivering it to licensed premises outside the area; or

(c) if the liquor was seized under part 7, division 1—a carrier who is carrying it, under the direction of an investigator, in a restricted area.

(3) Also, subsection (1) does not apply to the possession of liquor in the ordinary course of lawful business by a carrier if—

(a) the carrier collected the liquor from a person, and is delivering it by means of a vehicle to another person, at premises outside the restricted area; and

(b) the package or container in which the liquor is to be delivered is labelled in writing on the outside with—

(i) the name and address of each of the consignor and the consignee of the liquor; and

(ii) if the consignment of the liquor is for the purpose of sale and the seller of the liquor is not the consignor, the name and address of the seller; and

(iii) if the consignment of the liquor is for the purpose of sale and the purchaser of the liquor is not the consignee, the name and address of the purchaser; and

(c) the liquor is not removed from the vehicle while the vehicle is in the restricted area; and

(d) the liquor is securely stored in—

(i) a locked container fixed to the vehicle; or

(ii) a part of the vehicle that is locked; and

(e) neither the liquor, nor the package or container mentioned in paragraph (b), is visible from outside the vehicle.

(4) In a proceeding for an offence against subsection (1), proof that liquor was, at the material time, in or on a vehicle is conclusive evidence that the operator of the vehicle had in possession all the liquor in or on the vehicle unless the operator proves that, at the time, he or she neither knew nor had reason to suspect that the liquor was in or on the vehicle.

(5) For subsection (4), it is immaterial that another person claims to have had in possession any of the liquor at the material time.

(6) In this section—

carrier means a carrier, delivery person or other person engaged in the ordinary course of lawful business of delivering liquor.

licensed premises includes premises to which a permit relates.

operator, of a vehicle, includes—

(a) the person in command or control, or who appears to be in command or control, of the vehicle; and

(b) for a vehicle registered in a State or Territory under a law of the State or Territory providing for the registration of vehicles—the person in whose name the vehicle is so registered.

vehicle includes a boat and an aircraft.

PART 6A Restricted areas

Section 173F

Purpose of pt 6A

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.

Section 173G

Declaration of restricted area

(1) A regulation may declare an area to be a restricted area.

(2) Without limiting subsection (1), a community area, or part of a community area, may be declared to be a restricted area.

(3) In recommending the Governor in Council make the regulation, the Minister must be satisfied the declaration is necessary to achieve the purpose of this part.

Section 173H

Declaration of prohibition of possession of liquor in restricted area

(1) A regulation may declare that a restricted area is an area to which section 168B applies.

(2) A regulation under subsection (1) must state the quantity of liquor that a person may have in possession in in a public place in the restricted area (the ***prescribed quantity***) without a restricted area permit.

Section 173I

Consultation with community justice groups for declarations

(1) This section applies if a community area is, or a community area or part of a community area is in—

(a) an area to be declared under a regulation under section 173G to be a restricted area; or

(b) a restricted area to be declared under a regulation under section 173H to be an area to which section 168B applies.

(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.

(3) Also, the Minister must consider a recommendation made by the community justice group about changing the declaration.

(4) However, failure to comply with subsection (2) or (3) does not affect the validity of a regulation made for the subsection.

Liquor Regulation 2002 **(Qld)**

(as at 31 May 2008)

Section 37A

Declaration of restricted area—Act, s 173G(1)

An area stated in a relevant schedule is a restricted area.

Section 37B

Declaration of prohibition of possession of liquor in restricted area—Act, s 173H

(1) Each restricted area is an area to which section 168B of the Act applies.

(2) The prescribed quantity of liquor for a restricted area is the quantity stated for the area in a relevant schedule.

SCHEDULE 1R PALM ISLAND

(commenced operation 19 June 2006)

1 Areas declared to be restricted areas

Each of the following areas is a restricted area—

(a) the community area of the Palm Island Shire Council;

(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.

2 Prescribed quantity

(1) The prescribed quantity of liquor for each restricted area, other than the canteen, is—
(a) for beer in which the concentration of alcohol is less than 4%—11.25L; and
(b) for any other liquor—zero.

(2) The prescribed quantity for the canteen is—
(a) for beer in which the concentration of alcohol is less than 4%—any quantity; and
(b) for any other liquor—zero.

(3) In this section—
canteen means the licensed premises known as the Palm Island Canteen at Beach Road, Palm Island.

AMENDMENTS SINCE 31 MAY 2008
(Date of arrest of Ms Maloney)

***Liquor Act 1992* (Qld)**

Section 168B
(Amended by Act No. 30 of 2008 s 22, from 1 July 2008; Act No. 66 of 2008 s 4 sch, from 1 January 2009; Act No. 73 of 2008 s 554 sch 1, from 1 July 2009)

Prohibition on possession of liquor in restricted area

(1) A person must not, 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 a type of liquor for the area, other than under the authority of a restricted area permit.
Maximum penalty—
(a) for a first offence—375 penalty units; or
(b) for a second offence—525 penalty units or 6 months imprisonment; or
(c) for a third or later offence—750 penalty units or 18 months imprisonment.

(2) However, subsection (1) does not apply to the possession of liquor in the ordinary course of lawful business by—
(a) a licensee or permittee in the licensee's or permittee's licensed premises; or
(b) a carrier, licensee or permittee who—
(i) has collected it from, and is delivering it to, licensed premises in the area; or
(ii) has collected it from licensed premises outside the area and is delivering it to licensed premises in the area; or
(iii) has collected it from licensed premises in the area and is delivering it to licensed premises outside the area; or
(c) if the liquor was seized under part 7, division 1—a carrier who is carrying it, under the direction of an investigator, in a restricted area; or
(d) a licensee or permittee who has collected it from licensed premises outside the area and is delivering it, via the area, by means of a vehicle to a person at premises outside the area.

(3) Also, subsection (1) does not apply to the possession of liquor in the ordinary course of lawful business by a carrier if—

(a) the carrier collected the liquor from a person, and is delivering it by means of a vehicle to another person, at premises outside the restricted area; and

(b) the package or container in which the liquor is to be delivered is labelled in writing on the outside with—

(i) the name and address of each of the consignor and the consignee of the liquor; and

(ii) if the consignment of the liquor is for the purpose of sale and the seller of the liquor is not the consignor, the name and address of the seller; and

(iii) if the consignment of the liquor is for the purpose of sale and the purchaser of the liquor is not the consignee, the name and address of the purchaser; and

(c) the liquor is not removed from the vehicle while the vehicle is in the restricted area; and

(d) the liquor is securely stored in—

(i) a locked container fixed to the vehicle; or

(ii) a part of the vehicle that is locked; and

(e) neither the liquor, nor the package or container mentioned in paragraph (b), is visible from outside the vehicle.

(3A) Also, subsection (1) does not apply to the possession of liquor by a person, other than a carrier, licensee or permittee in possession of the liquor in the ordinary course of lawful business, travelling in a vehicle on a public road prescribed under a regulation if—

(a) the person collected the liquor from a place outside the area; and

(b) the person is travelling with the liquor, via the area, to a destination outside the area; and

(c) the travel is uninterrupted, other than—

(i) for the person to use a public facility prescribed under a regulation; or

(ii) because of an emergency; and

(d) the liquor is not removed from the vehicle while the vehicle is in the area; and

(e) the liquor is stored in—

(i) a container that is fixed to the vehicle and locked while the vehicle is left unattended; or

(ii) the vehicle, that is locked while it is left unattended; and

(f) the liquor is not visible from outside the vehicle.

(3B) In a proceeding for a contravention of subsection (1), for subsection (3A), the burden of proving that the liquor was collected from a place outside the area and the person is travelling with it, via the area, to a destination outside the area is on the person alleged to have contravened subsection (1).

(3C) For subsection (3B), the burden of proof is on the balance of probabilities.

(3D) Also, subsection (1) does not apply to the possession of permitted liquor by a person at residential premises.

(4) In a proceeding for an offence against subsection (1), proof that liquor was, at the material time, in or on a vehicle is conclusive evidence that the operator of the vehicle had in possession all the liquor in or on the vehicle unless the operator proves that, at the time, he or she neither knew nor had reason to suspect that the liquor was in or on the vehicle.

(5) For subsection (4), it is immaterial that another person claims to have had in possession any of the liquor at the material time.

(6) In this section—

carrier means a carrier, delivery person or other person engaged in the ordinary course of lawful business of delivering liquor.

licensed premises includes premises to which a permit relates.

operator, of a vehicle, includes—

(a) the person in command or control, or who appears to be in command or control, of the vehicle; and

(b) for a vehicle registered in a State or Territory under a law of the State or Territory providing for the registration of vehicles—the person in whose name the vehicle is so registered.

permitted liquor means liquor of a type that may, under the regulation that makes the declaration mentioned in subsection (1), be possessed in the area, other than under the authority of a restricted area permit.

public facility means a facility for use by the public.

public road means a road ordinarily used by the public.

residential premises see the Residential Tenancies and Rooming Accommodation Act 2008, section 10.

vehicle includes a boat and an aircraft.

Section 173H

(Amended by Act No 30 of 2008 s 30, from 1 July 2008)

Declaration of prohibition of possession of liquor in restricted area

(1) A regulation may declare that a restricted area is an area to which section 168B applies.

(2) A regulation under subsection (1) must state the quantity of a type of liquor that a person may have in possession in the restricted area (the prescribed quantity) without a restricted area permit.

(3) Subject to any conditions imposed under this Act about the quantity of a type of liquor that a person may have in possession at licensed premises, or premises to which a permit relates, in the restricted area, the prescribed quantity does not apply to the premises.

Liquor Regulation 1992 **(Qld)**

(amended by SL 181 of 2008, from 1 July 2008)

Section 37B

Declaration of prohibition of possession of liquor in restricted area—Act, s 173H

(1) Each restricted area is an area to which section 168B of the Act applies.

(2) The prescribed quantity of a type of liquor for a restricted area is the quantity of the type stated for the area in a relevant schedule.

SCHEDULE 1R -- PALM ISLAND

1 Areas declared to be restricted areas

Each of the following areas is a restricted area—

(a) the community area of the Palm Island Shire Council;

(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.

2 Prescribed quantity

The prescribed quantity of liquor for each restricted area is—

(a) for beer in which the concentration of alcohol is less than 4%—11.25L; and

(b) for any other liquor—zero.