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

BETWEEN: **JOAN MONICA MALONEY**
Appellant

AND

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part 1: Certification for publication

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

Part II: Statement of issues

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

   (a) whether schedule 1R of the *Liquor Regulation 2002* (Qld) (**the *Liquor Regulation***) is a law of a State by reason of which members of the Appellant's race do not enjoy the same rights as persons of other races within the meaning of s. 10 of the *Racial Discrimination Act 1975* (Cth); and

   (b) whether the Liquor Regulation is a *"special measure"* within the meaning of s. 8(1) of the *Racial Discrimination Act*.

Part III: Section 78B notices

3. The Appellant's outline confirms that notices have been given in compliance with s. 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

4. The Respondent does not contest any of the material facts set out in the Appellant's narrative of facts.

RESPONDENT'S SUBMISSIONS
Filed on behalf of the Respondent

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Part V: Applicable provisions

5. The provisions identified by the Appellant are accepted.

Part VI: Statement of Respondent's argument

6. In order for the appellant to succeed, she must:
   (a) Identify a particular "human right or fundamental freedom" possessed by her;
   (b) Demonstrate that the impugned provisions of the *Liquor Act 1992* (Qld) ("**the *Liquor Act***") bear the character of a law referred to in s.10(1) of the *Racial Discrimination Act* 1975 (Cth); and,
   (c) Show that the provisions do not constitute a "special measure" within the meaning of s .8(1) of the *Racial Discrimination Act.*

7. It is respectfully submitted that the Appellant can establish none of these propositions.

8. The appellant has acknowledged that there is no universal human right to possess or to consume alcohol.[1] It is respectfully submitted that that acknowledgement is correct. The possession and consumption of alcohol has been the subject of sumptuary legislation and government restriction in Australia since the last decade of the 18th Century.

> Colonial Sydney was a drunken society, from top to bottom. Men and women drank with a desperate, addicted quarrelsome singlemindedness. Every drop of their tipple had to be imported.[2]
> ... Cheap Bengali rum, even with restrictions, was the most profitable kind and it did incalculable social damage, from the bottom of the colony to the top.[3]
> (William Bligh, as Governor) concluded that bartering in spirits was the root of much evil... he issued general orders to prohibit the exchange of spirits as payment for grain, animal food, labour, wearing apparel or any other commodity.[4]
> ...The man who cleaned up this system was Lachlan Macquarie (1762-1824) ... It was not an easy task. He could not, for instance, abolish the social addiction to rum by an act of will. The Rum Corps was gone, but the thirst remained ... The rum monopolists' day would therefore have ended anyway, but Macquarie hastened it by a series of enactments against drinking...[5]

9. The first New South Wales Act dealing with the subject,[6] established a system of licensing of retailers. It restricted where and when liquor could be sold and created offences in connection with drunken behaviour.[7] This Act was

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[1] Appellant's Outline paragraph 3.
[2] *The Fatal Shore,* Robert Hughes, Harville Press, 1996, page 110.
[3] *ibid* at page 292.
[4] *A History of Australia,* CMH Clarke, Melbourne University Press, 1962, volume 1, page 214.
[5] *ibid* at pages 293, 294.
[6] which repealed even earlier Acts passed by the Legislative Council which had been established by the *New South Wales Act 1823* (Imp.).
[7] *Sale of Liquors Licensing Act of 1862* (NSW).

succeeded by a similar Act in 1881 and by successive Acts thereafter in New South Wales and all other States and Territories.

10. Legal restrictions upon the use of liquor have an even longer history in the United Kingdom.[8]

11. The *Liquor Act* is therefore merely the latest in a long line of colonial and State statutes that have regulated the supply and possession of "liquor"[9]. In this respect it is consistent with legislation in all jurisdictions which seeks to regulate (or prohibit entirely) the possession or sale of things which are potentially dangerous to consume or to use.[10]

12. The *Liquor Act* establishes a system of licensing of retailers.[11] It also regulates, largely by prohibition, the access by minors to liquor and to premises where liquor may be purchased.[12] It limits the hours when persons may consume liquor.[13] In addition, it prohibits the consumption of liquor in certain public places.[14]

13. All of these limitations upon a person's freedom of action in relation to liquor have the statutory object to "minimise harm caused by alcohol abuse and misuse and associated violence"[15] and they are all of general application to all persons of any race.

14. Since 2008, further restrictions concerning access to places have been enacted which designate "drink safe precincts" from which persons can be excluded. The *Liquor Act* establishes a regime pursuant to which a particular person may be ordered not to enter such areas. The stated purpose of those provisions is also to minimise harm from alcohol abuse and misuse and associated violence and to minimise alcohol related disturbances or public disorder in a locality.[16]

15. The legislative restrictions upon freedom of action to possess and to consume alcohol are themselves justified by the object of ensuring "security of the person and protection against violence and bodily harm", which, according to Article 5[17] are recognised human rights. In this respect, they are no different from similar restrictions which prohibit the possession of weapons, drugs and other potentially dangerous things.

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[8] *A History of English Law,* Holdsworth, volume 10, pages 183-188, volume 14 pages 218-20.
[9] "a spirituous or fermented fluid of an intoxicating nature intended for human consumption": s.4B.
[10] see eg *Drugs Misuse Act 1986* (Qld); *Weapons Act 1990* (Qld); *Criminal Justice and Police Act 2001* (UK) sections 12-13.
[11] see sections 58A to 103D.
[12] see sections 155 to 160.
[13] see section 161.
[14] see section 173B; Notwithstanding that prohibition, a local government may designate a public place as an area in which liquor can be consumed see section 173C.
[15] see section 3(e).
[16] see sections 173O and 173P; the United Kingdom has enacted similar provisions: see *Criminal Justice and Police Act 2001* (UK) sections 12-13.
[17] *Convention on the Elimination of All Forms of Racial Discrimination* (**"the Convention"**).

16. Both the place of s.168B of the *Liquor Act* within that statutory environment and the terms of s.10 of the *Racial Discrimination Act* therefore render exigent the requirement for the appellant to identify with precision the right which the she contends that, as an Aboriginal woman, she does not enjoy by reason of the *Liquor Act* but which is enjoyed by persons of another race. It is only after the right has been identified that it is possible to determine whether s.10 of the *Racial Discrimination Act* has been engaged.

17. Section 168B(1) of the *Liquor Act* in combination with ss.37A and 37B of the *Liquor Regulation* and schedule 1R thereof:

    (a) Prohibit the possession of more than a certain quantity of liquor;

    (b) By any person (regardless of race or residence);

    (c) While in a public place or the canteen on Palm Island;

18. The elements of the offence, therefore, apply generally to all persons by reference to presence in a public place on Palm Island. Such places are defined specifically by their location within a specified geographical area and by reference to their public character and the prohibition applies generally to all persons who are present in public places on Palm Island, whether or not they are Aboriginals or are residents. Although it can reliably be assumed that the resident population of each of the areas declared under the Act is mostly Aboriginal, persons of other races also reside there and are also present there temporarily from time to time. The prohibition applies equally to such persons and, upon proof of the facts constituting the offence, any such person would be found guilty and convicted regardless of race.

19. The Act does not impinge upon the freedom of residents of Palm Island to possess liquor elsewhere in Queensland, whatever their race.

20. Laws that restrict conduct in public places are commonplace. For example, the *Summary Offences Act 2005* (Qld) is a law which has as its express object ensuring, as far as practicable, that members of the public may lawfully use and pass through public places without interference from others. It prohibits the possession of certain things and the doing of certain acts in public places (including being in such a place while drunk). Other such laws, including town planning laws, restrict the range of possible actions in particular locations.

21. It is respectfully submitted that the Court of Appeal was wrong to conclude that s.10 was engaged. McMurdo P said:

> But the practical purpose and effect of the relevant provisions is to discriminate directly against the overwhelmingly Aboriginal inhabitants of Palm Island as to their right to own a particular property. As a result of their Aboriginality, they cannot own alcohol other than beer in their own community in the way that other Queenslanders can. The right is not the right to own rum or bourbon, but the right to own rum or bourbon in the same way and to the same extent as non-Indigenous Australians.[18]

[18] Reasons [18].

22. At the hearing of this appeal, the Respondent will seek the Court's leave to file a notice of contention accordingly. A copy of that notice is attached to these submissions.

23. It is respectfully submitted that her Honour was wrong to conclude that any discrimination was "direct" or that there was any discrimination at all. Direct discrimination, as that expression is usually employed, refers to discrimination which occurs by the application of a law which operates directly by reference to a person's possession of a particular attribute. In this case, a law would be directly discriminatory if it applied, expressly, only to Aboriginal persons.

24. There have been such expressly racist laws in the past in Queensland and elsewhere which directly prohibited the supply of liquor to Aboriginals. Section 19 of the *Aboriginals' Protection and Restriction of the Sale of Opium Act 1867* (Qld) was one of them. In New South Wales, s.8(1)(b) and (c) of the *Liquor Act 1898* also prohibited the supply of liquor to any "aboriginal native" or to "any person belonging to any of the coloured races of the South Pacific Islands.[19]

25. Indirect discrimination, as that term is commonly used,[20] occurs when an apparently neutral condition is imposed which cannot be satisfied by persons who possess a prescribed attribute, such as race, because of their possession of that attribute. In this case, the neutral condition is presence in a public place on Palm Island.

26. In all cases of indirect discrimination, the neutral condition must be demonstrated to be unreasonable or irrelevant; such demonstration would establish that the true discriminant was race. Proof that the condition is relevant and reasonable, even one with which compliance is impossible for a protected group, demonstrates that a provision is not racially discriminatory for the discrimination occurs not by reason of race.

27. The *Racial Discrimination Act* was enacted "for the prohibition of racial discrimination and ... to make provision for giving effect to the Convention." The expression "racial discrimination" is defined in Article 1 of the Convention as follows:

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

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[19] The subject is treated in *The Destruction of Aboriginal Society,* CD Rowley, Pelican, 1974 at 130 *et seq,* 182 *et seq;* and to a more limited extent in *A History of Australia,* CMH Clark, MUP, 1980, eg in volume 4, pages 222-223.

[20] see eg *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Sex Discrimination Act 1984* (Cth); *Anti-Discrimination Act 1991* (Qld).

28. Article 2(1)(c) obliged Australia to "take effective measures to ... amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."

29. The *Racial Discrimination Act* should be read accordingly. Section 10 may be taken to be the provision in the Act by which Australia discharged her obligation under Article 2(1)(c) by providing that certain laws will not "have the effect of creating or perpetuating racial discrimination".

30. The *Racial Discrimination Act* does not use the terms "direct" or "indirect" in relation to discrimination and s.10 does not refer to discrimination at all but the expressions remain relevant. As Mason J said in *Gerhardy v Brown*:[21]

> Consequently, section 10 should be read in the light of the Convention as a provision which is directed to lack of enjoyment of a right arising by reason of a law whose purpose or effect is to create a racial discrimination.[22]

31. In *Gerhardy v Brown,*[23] Gibbs CJ explained:

> It would not be right to give to s. 10(1) a construction which fails to give its words their natural meaning and at the same time renders it ineffective to mitigate the effect of legislation which attempts to disguise the fact that it effects a discrimination based on race, colour or national or ethnic origin by attaching to the criteria of entitlement to the right in question some additional characteristic which persons of the disadvantaged race, colour or national or ethnic origin would be unable to satisfy.

32. In the same case, Brennan J held:[24]

> It was argued that the difference in treatment is not based on race but on the traditional ownership of the lands...Traditional ownership is itself a criterion based on race. As a matter of fact as well as of statutory definition, all traditional owners must be Aborigines. If the benefited class were defined simply in terms of 'traditional owners', the definition would nevertheless be based on race, for the attribute of 'traditional owners'...is specific to Aborigines, and the attribute of traditional ownership of particular land is specific to particular Aboriginal peoples. A definition of a class by reference to an attribute specific to particular race identifies the members of that race as the members of that class as surely as if the membership of the particular race was expressed in the definition.

33. In *Western Australia v Ward,*[25] the plurality held:

> It is because native title characteristically is held by members of a particular race that interference with the enjoyment of native title is capable of amounting to discrimination on the basis of race, colour, or national or ethnic origin.

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[21] (1985) 159 CLR 70.
[22] *(supra)* at 99.
[23] (1985) 159 CLR 70 at 85.
[24] At 118.
[25] (2002) 213 CLR 1 at 104 [117] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

34. The terms of s.10 require, for that section to operate, relevantly that there be a restriction upon the enjoyment of a right by a person "by reason of, or of a provision of, a law ... of a State" and that that right is nevertheless enjoyed by "persons of another race" without restriction. The use of the comparator "persons of another race" engages the definition of "racial discrimination" in the Convention which is itself founded upon a restriction "based on race".

35. Neither presence nor residence on Palm Island is an attribute characteristically possessed by Aborigines nor is it a distinction based upon race.

36. The use of a comparator is the usual method to identify the relevant discriminant.[26] The identification of a comparator is required by the words "enjoyed by a person of another race". Such a person must be one in similar circumstances who is enjoying the right the enjoyment of which is restricted in the case of Aboriginal persons.

37. It can immediately be seen that a comparison between the appellant as an Aboriginal in a public place on Palm Island and a person of any other race in a public place on Palm Island will demonstrate the irrelevance of race as determinant. In terms of s.10, there is no right which has been restricted in the case of the appellant which is "enjoyed by persons of another race". On the other hand, the consequence of upholding the appellant's contention would be that "by force of" s.10, Aboriginal persons would enjoy the unqualified right to possess alcohol in public places but persons of other races would not. Consequently, persons of Aboriginal descent would be immune from prosecution under s.168B(1) but persons of other races (who cannot claim the protection of s.10) would not be immune. Alternatively, if the appellant is correct, the result would be that Aboriginal persons would be entitled, by force of s.10 of the *Racial Discrimination Act,* to enjoy a right to be free from the operation of s.168B(1); a person of another race would then be entitled to rely upon s.10 to free himself or herself from the operation of s.168B(1) because such a person could rightly claim that, not being an Aboriginal, he or she does not enjoy a right that is enjoyed by persons of another (the Aboriginal) race. Section 10 would have the effect that such persons were freed from the stricture of s.168B and it would apply to nobody. These absurdities are indicators that the appellant's contentions must be wrong.

38. If the comparison is made between the appellant, as an Aboriginal, and a person of another race elsewhere in Australia, the same result follows. The problem immediately arises that an Aboriginal in a public place elsewhere in Australia, as well as persons of all other races, also enjoy the right to possess liquor in a public place. Section 10 again cannot be engaged because the "right to own alcohol in their community" is enjoyed by persons of the appellant's own race in Australia. However, if the opposite conclusion contended for by the appellant is reached based upon this comparator, the same absurd result as has been described in the preceding paragraph would also ensue.

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[26] Or any other proscribed discriminant: see eg *Purvis v NSW* (2003) 217 CLR 92 at [213] *et seq. per* Gummow, Hayne and Heydon JJ.

39. These anomalous consequences follow from the appellant's argument because the discriminant in s.168B is not race - which is irrelevant to the law; the discriminant is the place of possession. The reasons of the Court of Appeal do not consider the question of comparator to any extent and it is respectfully submitted that the learned President of the Court of Appeal was wrong to conclude that "as a result of their Aboriginality, they cannot own alcohol other than beer in their community in the way other Australians can." [27] Chesterman JA, with whom Daubney J agreed, followed the earlier decision of the Court of Appeal in *Morton v Queensland Police Service*[28] that these provisions were discriminatory because "the legal and practical effect of the legislation is to restrict possession of alcohol by members of a group who are identified, by the fact of their residence, as Aboriginal."[29] In *Morton,* the President agreed with Chesterman JA that the provisions "discriminate directly against the overwhelmingly Aboriginal inhabitants of Palm Island as to their right to legally possess alcohol."[30] Chesterman JA disposed of the issue in a single paragraph in which, having observed that the inhabitants of Palm Island were "overwhelmingly Aboriginal", he concluded that legal and practical effect of the legislation is therefore to restrict the possession of alcohol by the members of a group which are identified, by the fact of their residence, as Aboriginal."[31]

40. It is submitted that the provision does not engage s.10 any more than a liquor licensing law regulating the sale of alcohol in Chinatown in Brisbane or Sydney would do so just because most businesses conducted there are conducted by Chinese, indeed, even if *all* business conducted there were conducted by Chinese. The reasons would be the same: the discriminant for the provision is the doing of acts within a locality for which provision must be made for the benefit of all who are present within it. The discriminant is not the race of the persons who happen to do the acts.

41. That the violent offenders whose violence the legislation seeks to curb are all Aboriginals (if that is so) is also beside the point because, notwithstanding that the object of the enactment is to prevent violence by such Aboriginals which has been induced by alcohol, the means adopted has been to prohibit the possession of liquor by all persons of any race in order to reduce the general availability of alcohol.

42. Had the enactment prohibited the possession of alcohol on Palm Island only by Aboriginal persons (upon the basis, say, that offenders have all been Aboriginal persons), it would have engaged s.10. That result would have followed because the comparator, a non-Aboriginal person in a public place on Palm Island, would have enjoyed a right, the freedom from a legal prohibition against the possession of alcohol on Palm Island, which was not enjoyed by Aboriginal persons. Had the prohibition been directed against convicted violent offenders on Palm Island, s.10 would not have been engaged

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[27] Reasons [18].
[28] [2010] QCA 160.
[29] Reasons at [84].
[30] *Morton (supra)* at [5].
[31] *Morton (supra)* at [54]; Holmes JA agreed with Chesterman JA.

because the relevant discriminant would have been conviction for an offence involving violence – even if all such persons happened to be Aboriginal.[32]

43. Section 10 operates only when "by reason of a law" a person of one race does not enjoy a right but "persons of another race" do. A law could have such an effect because it makes race the express discriminant (thereby invoking the words "persons of another race"). But for the provisions concerning special measures, the *Racial Discrimination Act* assumes that race is an irrelevant discriminant upon which to base a distinction concerning the enjoyment of rights. Section 10 would operate accordingly. Alternatively, a law could have such an effect if its racial basis is made indirect or it is disguised by the imposition of a supposedly neutral, but actually irrelevant or unreasonable, condition which cannot be met by persons of a particular race or by most of them. It would follow that persons of one race could not enjoy the right but persons of another race could.

44. But, if the condition is shown to be relevant to the subject matter of the law which otherwise restricts the enjoyment of a right by those who cannot satisfy the condition, then it would be concluded that the full enjoyment of the rights by those who satisfy the condition is not due to their identity as "persons of another race" but by reason of their being persons who satisfy the condition irrespective of race. Section 10 would not operate. For example, s.4(3)(k) of the *Jury Act 1995* (Qld) disqualifies from jury service persons who cannot read and write English. Section 10 would not be engaged merely because the provision operates "overwhelmingly" upon persons of foreign ethnicity.

45. It would be absurd to construe s.10 so that it vitiates legislation directed at a neutral condition for the benefit of the public merely because the mischief to which an Act is directed is overwhelmingly a feature of a particular racial or ethnic group. The text of s.10 does not require such a construction.

46. There is a second reason why s.10 has not been engaged. The express object of the provisions is to "minimise harm caused by alcohol abuse and misuse and associated violence".[33] By ratifying the Convention, Australia undertook a duty "guarantee the right of everyone, without distinction as to race...to equality of the law, notably in the enjoyment of ... the right to security of the person and protection by the State against violence or bodily harm".[34]

47. A law which has been passed to ensure the enjoyment of that right by the residents of and visitors to Palm Island will not, by intruding upon another right, a freedom to possess alcohol in public places,[35] engage s.10. No invalid diminution of property rights occurs where the State acts in order to achieve a legitimate and non-discriminatory public goal.[36]

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[32] *Cf. Purvis (supra).*
[33] s.3(e) *Liquor Act 1992.*
[34] Convention Article 5(b).
[35] if there is any such right.
[36] per Ryan, Moore and Tamberlin JJ in *Bropho v Western Australia* (2008) 169 FCR 59 at 84; special leave to appeal to the High Court refused 31 July 2009; *Gerhardy v Brown* (1985) 159 CLR 70 at 102 per Mason J.

The rights affected are not "rights" to which section 10 of the RDA applies

48. The *"rights"* to which s. 10 of the *Racial Discrimination Act* applies are the *"human rights and fundamental freedoms with which"* the *International Convention on the Elimination of all Forms of Racial Discrimination* is concerned.[37] Ascertaining what those rights are requires the application of the recognised principles for the interpretation of international instruments. Under those principles, the starting point is the *"four corners"* of the text of the Convention because that text is presumed to be an authentic expression of the intentions of the parties.[38] That text is to be interpreted in context, including prior and subsequent agreements between the parties relating to the treaty.[39]

49. The appellant contends that three rights recognised by Article 5 of the Convention are affected by the *Liquor Regulation:*[40]

    (a) the right to equality before tribunals and other organs administering justice;[41]

    (b) the right to access goods and services; and

    (c) the right to own property.[42]

50. These contentions should be rejected for three reasons.

51. First, the Appellant erroneously interprets the right to equality before tribunals and other organs administering justice as a right to equality in the substantive provisions of the law.[43] Such an interpretation is not supported by the text of the Convention and ought to be rejected. The express recognition of other rights in Article 5 of the Convention would be otiose if the right to equality before tribunals and other organs administering justice was interpreted as a general right to equality in the substantive provisions of the law. Indeed, the right to *"equality before the law"* recognised by article 26 of the *International Covenant on Civil and Political Rights* which the Appellant relies upon to support her interpretation[44], is a right to equality in the *application* of the law rather than in its substantive provisions.[45]

52. The right to equality before tribunals and other organs administering justice is a right to equal treatment in proceedings before adjudicative bodies exercising

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[37] *Gerhardy v Brown* (1985) 159 CLR 70 at 86, 125-126; *Mabo v Queensland* (1988) 166 CLR 186 at 198, 216 and 229.
[38] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 255 per McHugh J.
[39] *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 252 per McHugh J.
[40] Paragraph [28] of the Appellant's submissions.
[41] Article 5(a).
[42] Article 5(d)(v).
[43] Paragraph [36] of the Appellant's submissions.
[44] Paragraph [34] of the Appellant's submissions.
[45] Travaux preparatoires of the ICPR, Annotation on the Text of the Draft International Covenant on Human Rights, 10 UN GOAR, Annexes (Agenda item 28, pt. II) 1, 61, UN Doc A/2929 (1955).

adjudicative functions. The *Liquor Regulation* did not affect the Appellant's right to equality before any tribunal or other organ administering justice. They did not affect her right to equal treatment before the Magistrates Court, the District Court, the Court of Appeal, or the High Court. The *Liquor Regulation* does not require any of those courts to apply the law to the Appellant in a manner that is different to how it is applied in respect of other persons who are not aboriginal.

53. In any case, the *Liquor Act* applies equally to all races.

54. Secondly, *"the right to access goods and services"* is not a right recognised by Article 5 of the Convention. Article 5(f) recognises:

> 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.

55. The *Liquor Regulation* does not affect the appellant's enjoyment of this right. Its only effect is to restrict the possession of liquor in public places. It does not affect access to any place or service. As Keane JA said in *Aurukun*,[46] Article 5(f) assumes the existence of various kinds of facilities which are generally available to the public and seeks to ensure that such facilities are equally available to persons of all races. It does not oblige the establishment of such facilities to ensure enjoyment of the same living conditions.

56. Thirdly, the rights recognised by the Convention are the rights and freedoms that are *"fundamental"* to *"existence as a human being and as a free individual in society"*.[47]

57. The right to possess liquor is not one which evokes a universal value common to all societies for which universal recognition and observance is required. The right to possess or own liquor is regulated by different legal systems in a variety of ways reflecting local rather than universal values and policies.[48]

Special Measures

58. Although the term *"special measures"* originates from the Convention,[49] its place in Australian domestic law is as a creature of the *Racial Discrimination Act*. Its meaning and operation in Australian domestic law is a matter of statutory construction on which this Court is the final arbiter.

59. There is no support in the text of the Convention for an interpretation that mandates prior consultation or a manifest intention of temporary effect as a condition precedent to characterisation of a measure as a *"special measure"*.

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[46] *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing* [2012] 1 Qd R at 67 [150].
[47] *Gerhardy v Brown* (1985) 159 CLR 70 at 101.
[48] As Keane JA noted in *Aurukun* at 67 [151] in many human communities the selling and consumption of alcohol is not permitted by law.
[49] Article 1(4).

60. Article 1(4) of the Convention is concerned with the purpose of a measure rather than the process preceding its introduction. Whether a measure has the relevant purpose is principally a matter of political assessment[50] which can only be challenged on the ground that it was not reasonably capable of being made.[51]

61. In *Gerhardy*, Brennan J's reference to the wishes of the groups affected by special measures was not a statement of principle that consultation with or the consent of those groups is a necessary precondition to characterisation as a special measure. His Honour merely identified this as a relevant consideration for determining whether a particular measure is reasonably capable of being for the purpose of securing to the beneficiaries their *"adequate advancement"* and of being *"necessary in order to ensure equal enjoyment of human rights and freedoms"*.[52] The same analysis applies to General Recommendation No 32 by the Committee on the Elimination of Racial Discrimination relied upon by the Appellant.[53]

62. Article 1(4) of the Convention says nothing about a *"special measure"* requiring a manifest intention of temporary effect. It merely requires that it not continue in effect after its objectives have been achieved.[54]

63. The power to make the *Liquor Regulation* was subject to the requirement that it be tabled in and not disallowed by Parliament.[55] The necessity for the Liquor Regulation was therefore principally a matter for the Parliament to assess. Relevant to that assessment was the fact that the Liquor Regulation could not be made without the Minister first being satisfied that it is necessary to minimise harm caused by alcohol abuse, associated violence and or alcohol related disturbances and public disorder.[56] The Minister was accountable to Parliament for that satisfaction which has not otherwise been challenged.[57]

64. Also relevant to Parliament's assessment were the explanatory notes that were required to be tabled with the Liquor Regulation.[58] That is why the Appellant's submission[59] that the explanatory notes are irrelevant is wrong. Those notes informed Parliament's assessment. The explanatory notes tabled with the Liquor Regulation informed Parliament that there was common agreement across the Palm Island community that unrestricted alcohol was a major concern that needed to be addressed.[60]

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[50] *Gerhardy v Brown* (1985) 159 CLR 70 at 138 per Brennan J.
[51] *Gerhardy v Brown* (1985) 159 CLR 70 at 105, 139, 149 and 162 per Mason, Brennan, Deane and Dawson JJ.
[52] *Gerhardy v Brown* (1985) 159 CLR 70 at 135 and 137 per Brennan J.
[53] Paragraph [55] of the Appellant's submissions.
[54] *Gerhardy v Brown* (1985) 159 CLR 70 at 88-89, 105-106, 113, 140, 154, 160-161 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ.
[55] *Statutory Instruments Act 1992* (Qld), ss. 49 and 50.
[56] Sections 173F and 173G of the *Liquor Act 1992* (Qld).
[57] Cf. *Wotton v State of Queensland* (2012) 285 ALR 1. As to the mechanism for such a challenge, see: *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611.
[58] *Statutory Instruments Act 1992* (Qld), s. 49 and *Legislative Standards Act 1992* (Qld), ss. 22 and 24.
[59] Paragraph [72] of the Appellant's submissions.
[60] *Liquor Amendment Regulation (No. 4) 2006*, Explanatory Notes, page 3.

65. The Liquor Regulation has a finite life unless exempted from expiry by the making of another regulation.[61] A number of reports have been tabled in Parliament reporting on key indicators in indigenous communities including Palm Island. The key indicators include reported offences against the person and hospital admissions for assault. Those indicators informed amendments made by the *Liquor Amendment Regulation (No 3) 2008*.[62]

66. In all of the circumstances, the Liquor Regulation is reasonably capable of having been made for a purpose so as to characterise it as a special measure within the meaning of s. 8(1) of the *Racial Discrimination Act*.

Conclusion

67. The Appellant's arguments should be rejected and the appeal ought to be dismissed.

Part VII: Statement of argument on notice of contention

68. For the reasons set out in paragraphs 21-47 of these submissions, the Respondent will argue that the Court of Appeal should have concluded that schedule 1R of the *Liquor Regulation* was not a law to which s.10 of the *Racial Discrimination Act* applies because it did not, by its operation in conjunction with s.168B(1) of the *Liquor Act*, have the effect that persons of a particular race, colour or national of ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national of ethnic origin, nor have the effect that any such persons enjoy any such rights to lesser extent than the said persons.

Part VIII: Time estimate

69. It is estimated that the Respondent's oral argument will take approximately 2 hours.

Dated: 16 November 2012

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[61] *Statutory Instruments Act 1992* (Qld), ss. 54, 56 and 56A.
[62] See explanatory notes for SL2008 No. 364.