IN THE HIGH COURT OF AUSTRALIA
BRISBANE OFFICE OF THE REGISTRY

No. B57 of 2012

B E T W E E N:

JOAN MONICA MALONEY

Appellant

and

THE QUEEN

Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

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Filed on behalf of the Attorney General for Western Australia by:

STATE SOLICITOR FOR WESTERN AUSTRALIA
LEVEL 16, WESTRALIA SQUARE
141 ST GEORGES TERRACE
PERTH WA 6000
SOLICITOR FOR THE ATTORNEY GENERAL
FOR WESTERN AUSTRALIA

TEL: (08) 9264 1159
FAX: (08) 9264 1442
SSO REF: 4458-12
EMAIL: c.bydder@sso.wa.gov.au

PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the Respondent.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. The provisions identified by the Appellant are accepted.

PART V: SUBMISSIONS

5. Western Australia addresses the following issues. *First,* the order of inquiry required by the *Racial Discrimination Act 1975. Second,* the operation of s 8 of the *Racial Discrimination Act 1975. Third,* aspects of the operation of s 10 of the Act.

FIRST MATTER - the order of inquiry

6. It has been customary when considering the operation of Part II of the *Racial Discrimination Act 1975* to commence analysis with a consideration of whether s 9 has been contravened and/or s 10 engaged, and to thereafter consider s 8. This was the process followed by all judges in the series of Queensland Court of Appeal decisions culminating in this matter[1].

7. Although s 8 is described in its heading as an exception, in operation it is not. It is a substantive provision, the operation of which does not require a prior determination of the applicability of either of s 9 or s 10.

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[1] *Aurukun Shire Council v Chief Executive Officer, Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1; [2010] QCA 37 (**"Aurukun"**); *Morton v Queensland Police Service* (2010) 203 A Crim R 478; [2010] QCA 160 (**"Morton"**); *R v Maloney* (2012) 262 FLR 172; [2012] QCA 105 (**"Maloney"**).

8. Section 8 does not literally apply or incorporate the whole of Article 1(4) of the Convention. This paragraph is a proviso to the definition of racial discrimination for the purpose of the Convention in Article 1(1), and the paragraph is not transliterated into the Act. Section 8(1) operates as follows[2]:

> This Part does not apply to, or in relation to the application of, special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms, 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.

9. If a State law is a special measure in this sense, there is no need to inquire whether s 9 is contravened or s 10 engaged because they do not apply. Indeed, before determining whether a law is of the kind to which s 10 applies, it is necessary to determine whether s 10 applies at all in light of s 8.

10. Where, as in this matter, it is patent that the State enacting the impugned law is seeking to invoke s 8(1), the application of the section is sensibly the starting point of analysis.

SECOND MATTER – s 8 of the *Racial Discrimination Act 1975*

11. In addition to the Respondent's Submissions in this respect, Western Australia makes the following further submissions[3]. First, neither the Appellant nor the

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2 Albeit subject to the exception for measures to which s 10(1) applies by virtue of s 10(3) of the *Racial Discrimination Act 1975*. It is apparent from this exception that special measures need not be confined to "positive measures", such as affirmative action programmes, because otherwise it would have been unnecessary to exclude the measures referred to in s 10(3).

3 Section 6A ought to be noted. What underlies s 6A is explained by Mansfield J in *Elekwachi v Human Rights and Equal Opportunity Commission* (1997) 79 FCR 271 at 281-282. This background notwithstanding, s 6A(1) is not limited in its terms to complementary Commonwealth/State dispute resolution processes. If s 6A requires a consideration of whether an impugned State law furthers the objects of the Convention in terms of Article 2(2) of the Convention, because of the coincidence of the terms of Article 1(4) and Article 2(2) of the Convention and the incorporation of Article 1(4) through s 8 of the Act, not much is served by answering this question. Although Article 1(4) and Article 2(2) of the Convention are not co-extensive, the differences do not appear to be material in this context. A "special and concrete" measure taken by a State Party in performance of an obligation under Article 2(2) is a "special measure" within the meaning of that term in Article 1(4): see *Gerhardy v Brown*

Respondent bear an onus to establish that the liquor restrictions were or were not a special measure. It is for the Court to determine the facts as best it can for the purpose of deciding whether a law is a special measure. Second, while consultation and consent might be thought to be desirable, neither is essential in order for a law to be a special measure. Third, when dealing with laws directed at abuse of addictive substances, like alcohol, the notion of community consent is problematic. Fourth, there is no requirement that a law manifest an intention to be temporary for that law to be a valid special measure.

12. The Appellant does not suggest that the liquor restrictions are incapable of being a special measure[4]. Indeed, it has been recognised by the Race Discrimination Commissioner that the benefits of restricting access to alcohol include: a reduction in the incidence of violent crime within the community, including violence against women; a reduction in the representation of Aboriginal people in the criminal justice system; an improvement in the health of individual abusers of alcohol; an improvement in the health and well-being of non-drinkers who experience violence, suffer problems resulting from an inadequate diet as a result of community income being spent on alcohol, and who suffer the stress that flows from involvement with alcohol abusers; a corresponding increase in available income to spend on necessities such as food, clothing and housing; removing the burden that alcohol places on existing health and medical services; a corresponding improvement in the health and medical resources available to communities to devote to other types of health problems; the fostering of an environment conducive to education; and a renewal of interest in the heritage of the community and the preservation of a community's identity[5].

13. The Queensland Court of Appeal in *Morton*[6] found that the liquor restrictions were a special measure and had regard to the "legislative intent"[7] underlying them

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(1985) 159 CLR 70 (***"Gerhardy v Brown"***) at 112 per Wilson J, at 132-133 per Brennan J and at 147-148 per Deane J.

4 Appellant's Submissions [3], where the Appellant accepts that "some form of alcohol management plan is appropriate for Palm Island."

5 See Race Discrimination Commissioner, *Alcohol Report* (1995) at 145, which identified these as examples of the benefits of restricting access to takeaway alcohol.

6 *Morton* at 490-492 [33]-[37] per McMurdo P and at 507-509 [109]-[117] per Chesterman JA (with whom Holmes JA agreed at 493 [39]).

7 Though, with respect, more properly, legislative purpose.

as disclosed by the relevant explanatory notes and statement of statutory purpose. As the Court of Appeal found, the purposes were: to confer a benefit on the predominantly Aboriginal members of the Palm Island community by minimising harm to them from alcohol-fuelled violence in order that they may enjoy equally with others their right to security of person and protection by the State against violence or bodily harm[8]; or, put differently, to advance rights recognised by Article 5 of the Convention, namely the right to security of person and protection by the State against violence and bodily harm and the social right to public health[9].

14. These benefits coincide with several of those identified by the Race Discrimination Commissioner 17 years ago.

15. The applicant in *Morton* unsuccessfully contended that the onus was on the respondent Police Service to establish that the liquor restrictions were special measures and that there was no evidence to support such a finding. In particular, the applicant emphasised the absence of any meaningful consultation between the Palm Island community and the Queensland government prior to the introduction of the impugned provisions[10]. In dismissing this contention, all judges of the Court of Appeal relied upon the relevant explanatory notes which addressed consultation and McMurdo P noted that the applicant had offered no evidence to show that the statements of legislative intent were disingenuous[11].

16. The Appellant's three central contentions as to the operation of s 8 are unsupported by the text of the Act and the Convention and contrary to authority.

First issue - onus

17. The Appellant contends that the Court of Appeal erred by assuming, or proceeding upon a premise that, the burden lay upon the accused at trial to establish that the restrictions were not special measures[12]. The Court of Appeal did not make that assumption or proceed upon that premise.

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8 *Morton* at 492 [36] per McMurdo P.

9 *Morton* at 509, [117] per Chesterman JA (with whom Holmes JA agreed).

10 *Morton* at 488 [26] per McMurdo P and at 506-507 [107] per Chesterman JA.

11 *Morton* at 492 [36] per McMurdo P and at 507-508 [109]-[113] per Chesterman JA.

12 Appellant's Submissions [62].

18. The Appellant's contention before the Court of Appeal was that the decision in *Morton* was underpinned by findings of fact that were wrong[13]. The Appellant sought in the Court of Appeal, as she does now, to demonstrate this by reference to affidavits sworn by fourteen of the approximately 2,000 inhabitants on Palm Island[14]. These affidavits were relied upon by the Appellant in her appeal from the Magistrates Court to the District Court for the purpose of establishing a lack of genuine or extensive consultation[15]. The Court of Appeal in this matter considered whether the affidavit evidence led by the Appellant was sufficient to establish that the findings of fact relied upon in *Morton* to make findings that the liquor restrictions were a special measure were wrong.

19. When deciding in *Morton* that the impugned provisions constituted a special measure, the Court of Appeal (or at least the majority in that case[16]) did not hold that either party before it bore an evidentiary onus. Rather, the Court of Appeal adopted the approach explained by Gibbs CJ in *Gerhardy v Brown*[17]. On that approach, matters of fact upon which the constitutional validity of some general law may depend do not form issues between the parties but simply involve information which the Court should have in order to judge properly the validity of the statute. It is for the Court to determine as best it can the relevant facts, taking judicial notice of notorious facts and relying on material placed before the Court.

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13 See the observation of Chesterman JA, with whom Daubney J agreed, in *Maloney* at 204 [102].

14 See AB 17-61.

15 See *Maloney* at 208-210 [107]-[113] per Chesterman JA, with whom Daubney J agreed.

16 See *Morton* at 508 [115] per Chesterman JA, with whom Holmes JA agreed. See also *Morton* at 492 [36]-[37] per McMurdo P.

17 *Gerhardy v Brown* at 87-88. The report to which Gibbs CJ refers at the end of the quotation was a report made by the Pitjantjara Land Rights Working Party of South Australia in June 1978 ("the Report"): see *Gerhardy v Brown* at 75. See also *Gerhardy v Brown* at 104-105 per Mason J, where his Honour relied upon the Minister's second reading speech and the materials before the Court including the Report; at 113 per Wilson J, where his Honour referred to the legislation in issue as bearing "upon its face the clear stamp of a special measure such as is contemplated by the Convention" and relied upon the Minister's second reading speech; at 135, 136 per Brennan J where his Honour observed that the purpose of the legislation could be collected from its terms, the Report and the speeches of the Ministers in charge of the Bill for the State Act in the South Australian Parliament; and at 161-162 per Dawson J.

20. This remains the correct approach and neither the Appellant nor the Respondent has or had any evidentiary onus to discharge in relation to whether the liquor restrictions are a special measure[18].

21. Contrary to the Appellant's Submissions[19], this case is not analogous to cases in which it is necessary for one party to show "reasonable necessity", such as cases involving s 92 of the *Constitution* and the implied freedom of political communication[20]. The restrictions here will only be invalid if they are inconsistent with the *Racial Discrimination Act 1975*. It is necessary to construe that Act to determine whether the restrictions are inconsistent with any of its provisions, rather than to rely upon a test which is directed to inconsistency with the *Constitution* itself.

Second issue - consultation and consent

22. There is nothing in the text of the Act or the Convention which requires prior consultation or consent in order for a law to be a valid special measure. The Appellant does not suggest otherwise. Nor does authority support the existence of such a requirement[21].

23. While it might be thought desirable for legislatures to consult with the beneficiaries of special measures before introducing them[22], not least to ensure that a special measure is appropriately designed to achieve its purpose[23], elevating consultation or consent to a requirement for validity may impair the attainment of the objects of the Act and the Convention through the use of special measures[24]. Further, it is to be noted that provisions such as s 8 are designed to encourage, rather than to discourage, the taking of special measures for the purpose of

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18 See *Gerhardy v Brown* at 141-142 per Brennan J and compare at 107-108 per Murphy J and at 152 per Deane J; see also *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149; [2004] FCA 1250 at 160-161 [34] per Crennan J.

19 Appellant's Submissions [66].

20 See *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; [2008] HCA 11 at 477 [102]-[103] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ; *Thomas v Mowbray* (2007) 233 CLR 307; [2007] HCA 33 at 332-333 [24] per Gleeson CJ; and *Aurukun* at 73 [168] per Keane JA.

21 See *Gerhardy v Brown* at 135, 137 per Brennan J. No other judgment in *Gerhardy v Brown* or subsequent cases has referred to consultation or consent as being required for a special measure to be valid, as Chesterman JA observed in *Morton* at 508 [113].

22 *Morton* at 489 [28] per McMurdo P.

23 *Morton* at 508 [114] per Chesterman JA.

24 See *Morton* at 490 [31] per McMurdo P and at 508 [114] per Chesterman JA.

achieving substantive equality and attempts to take such measures ought not to be judged by reference to criteria that are too difficult to comply with[25].

24. There is nothing in the text of Art 1(4) or the rest of the Convention which supports the proposition that consultation must occur or consent must be obtained before a law can be a valid special measure. Nor does the Appellant identify any agreement, instrument, practice or rule of international law of the kind contemplated by Article 31 of the *Vienna Convention on the Law of Treaties* which would bear upon the interpretation of Article 1(4) of the Convention[26].

25. Instead, the Appellant relies upon General Recommendations 23 and 32 of the Committee on the Elimination of Racial Discrimination[27]. While such recommendations can inform consideration of the Convention's context, object and purpose they are not binding[28], as the Commonwealth Government expressly stated when it rejected General Recommendation 23's assertion that it could not, or should not, make any decisions directly relating to the rights and interests of indigenous Australians without their "informed consent"[29].

26. The Appellant also relies upon the *United Nations Declaration on the Rights of Indigenous Peoples*[30]. In terms of Article 31(3) of the Vienna Convention, the *United Nations Declaration on the Rights of Indigenous Peoples* is not an agreement between the parties to the Convention regarding its interpretation. Nor is it (in terms of Article 31(3) of the Vienna Convention) subsequent practice in the application of the Convention which establishes the agreement of the parties regarding its interpretation. Nor is it (in terms of Article 31(3) of the Vienna

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25 See *Walker v Cormack* (2011) 196 FCR 574; [2011] FCA 861 at 583 [30] in relation to s 7D of the *Sex Discrimination Act 1984* (Cth). While the provisions differ from those in the *Racial Discrimination Act 1975*, it is to be noted that Article 2(2) of the Convention requires States Parties to take special measures in certain circumstances and s 8 should not be construed in a way which discourages or limits the capacity of Government to take special measures.

26 See in this regard the proper approach to interpreting treaties in this context as set out, for example, in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231 per Brennan CJ, at 239 per Dawson J, at 251-256 per McHugh J (with whom Gummow J agreed at 277) and at 294 per Kirby J.

27 Appellant's Submissions [54] and [55].

28 See *Jacomb* at 163 [43] per Crennan J, where her Honour was referring to comparable general recommendations made by the Committees on the Elimination of Discrimination Against Women under the *Convention on the Elimination of All Forms of Discrimination Against Women 1979*.

29 See *Comments by the Government of Australia on the concluding observations of the Committee on the Elimination of Racial Discrimination*, 5 April 2006 (CERD/C/AUS/CO/14/Add.1) [20].

30 Appellant's Submissions [56]-[57].

Convention) a relevant rule of international law applicable in the relations between the parties.

27. The Appellant also relies upon "thematic advice" from the Expert Mechanism on the Rights of Indigenous Peoples established by the United Nations Human Rights Council[31], which obviously cannot affect the obligations of the parties to the Convention and, further relies upon the decision of the European Court of Human Rights in *DH v Czech Republic*[32], a case concerned not with the interpretation of the Convention but with whether the Czech Republic's approach to the education of Roma children contravened Article 14 of the *European Convention on Human Rights* (**"ECHR"**) read in conjunction with Article 2 of Protocol No 1 to the ECHR.

28. Properly construed, s 8 of the Act does not require prior consultation or consent for a law to be a valid special measure. In any event, as the Queensland Court of Appeal found in *Morton*[33] and *Maloney*[34] there was consultation before the impugned provisions were introduced.

Third issue – the problem of consent

29. The formulation sought to be superimposed onto s 8 as a requirement is that there be genuine consultations "in order to obtain the consent of those affected by the purported benefit"[35]. The vagueness of this is patent. How is the consent of children who may be victims of alcohol fuelled violence by their parents to be sought? How is the consent of adults addicted to alcohol to be obtained? What if those addicted to alcohol object? Who decides whether an objecting person is addicted to alcohol? What of the opinions of non-Aboriginal residents or visitors to Palm Island?[36] Consider a case such as *Bropho v Western Australia*[37] where a

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31 Appellant's Submissions [58]-[59].

32 (2008) 47 EHRR 3.

33 *Morton* at 490-492 [33]-[37] per McMurdo P and at 507-509 [109]-[117] per Chesterman JA.

34 *Maloney* at 189-191 [44]-[47] per McMurdo P and at 208-210 [106]-[113] per Chesterman JA.

35 Appellant's Submissions [2(c)(i)], [60].

36 See in this regard *Aurukun* at 71 [163] per Keane JA, where his Honour observed that "[t]he legislature is not subject to the constraints which are inherent in the judicial process. The legislature is able to vindicate the interests of the women and children of Aurukun and Kowanyama who were not represented in this Court." See also *Bropho v Western Australia* (2008) 169 FCR 59; [2008] FCAFC 100 at 83 [81]-[82] per Ryan, Moore and Tamberlin JJ.

State law revoked managment by a particular corporation of an Aboriginal reserve due to concern for the safety of women and children on the reserve, and in particular their sexual abuse by a group of men in charge of the particular corporation. What if these victims were too frightened to speak out?

30. These questions illustrate the difficulties associated with elevating consultation or consent to a requirement for validity, which may impair the attainment of the objects of the Act and the Convention through the use of special measures[38].

31. They also reflect that, as this Court recognised in *Gerhardy v Brown*, whether a law has the necessary purpose for it to be a special measure within the meaning of s 8 is principally a matter of political assessment which cannot be challenged except on the ground that it was not reasonably capable of being made[39]. The Court, as Brennan J observed in *Gerhardy v Brown*, "is ill-equipped to answer a political question"[40].

Fourth issue - the requirement that a special measure be temporary

32. There is no requirement that the restrictions manifest an intention that they be temporary[41]. As Mason J explained in *Gerhardy v Brown* in relation to the *Pitjantjatjara Land Rights Act 1981* (SA)[42]:

> "In the present case the legislative regime has about it the air of permanence. It may need to continue indefinitely if it is to preserve and protect the culture of the Pitjantjatjara peoples. Whether that be so is a question which can only be answered in the fullness of time and in the light of the future development of the Pitjantjatjara peoples and their culture. The fact that it may prove necessary to continue the regime indefinitely does not involve an infringement of the proviso. What it requires is a discontinuance of the special measures after achievement of the objects for which they were taken. It does not insist on discontinuance if discontinuance will bring about a failure of the objects which justify the taking of special measures in the first place.

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37 *Bropho v Western Australia* (2008) 169 FCR 59; [2008] FCAFC 100.

38 See in this regard *Morton* at 490 [31] per McMurdo P and at 508 [114] per Chesterman JA.

39 See *Gerhardy v Brown* at 137-139, 141 per Brennan J, at 149 per Deane J and at 161-162 per Dawson J.

40 *Gerhardy v Brown* at 137-138. See also *Aurukun* at 71 [163] per Keane JA.

41 *Gerhardy v Brown* at 88-89 per Gibbs CJ, at 105-106 per Mason J, at 108 per Murphy J, at 113 per Wilson J, at 140 per Brennan J and at 153-154 per Deane J.

42 *Gerhardy v Brown* at 106.

> That the State Act is expressed to operate indefinitely is not a problem. It would be impracticable for the legislation to specify a terminal point in the operation of the regime which it introduces. It is sufficient to say that, if and in so far as the validity of the State Act depends on its fitting the character of special measures within Art 1.4 of the Convention, its validity would come in question once the proviso to the article ceases to be satisfied."

THIRD MATTER – s 10 of the *Racial Discrimination Act 1975*

33. For the reasons explained above, it is unnecessary and undesirable to consider this matter. The following submissions in respect of s 10 are made on the basis that the Court considers it necessary to go beyond s 8.

34. First; s 10 is limited in its operation to laws. It is not engaged in a circumstance of an absence of law. So if people of a particular race do not enjoy rights enjoyed by others because of a *lack* of laws, the section does not operate. The section does not (and cannot) impose an obligation to enact legislation.

35. Second; it is unlikely that precise application of the section is enhanced by considering whether it responds to "direct" or "indirect" discrimination. Though these terms have been considered from time to time[43], as the judgment of Callinan J in *Western Australia v Ward*[44] (with respect) discloses, in the context of s 10, these terms are apt to deflect proper analysis[45].

36. Third; the two ways in which s 10 operates in respect of State legislation were explained by Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Ward*[46], having regard to observations of Mason J in *Gerhardy v Brown*[47].

37. The first application of s 10 is to a State law which fails to make enjoyment of a (relevant) right applicable to people of all races, or does not confer enjoyment of

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43 *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 357-358 per Mason CJ and Gaudron J, at 392 per Dawson and Toohey JJ and at 402 per McHugh J; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 487-488 per Mason CJ, at 509-510 per Brennan J and at 566 per Gaudron J; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478-479 per Gaudron and McHugh JJ; *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251 at 255 per Bowen CJ and Gummow J.

44 *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 ("***Ward***") at 281 [656].

45 With respect, the conclusion of Callinan J in *Ward* at 284 [659] would appear to be at odds with the judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Ward* at 99-100 [106]-[108].

46 *Ward* at 99-100 [106]-[108].

47 *Gerhardy v Brown* at 98.

the right on persons of a particular race[48]. In such a case, no issue of inconsistency with s 10 arises; s 10 supplements State law to confer the right on all or on persons of the particular race. The second application is to State law which prohibits enjoyment of a (relevant) right by some people, being a right enjoyed by others, and where a criterion of the application of the prohibition is people of a particular race. In such a case, the State law is inconsistent with s 10, and s 109 invalidates the State law. The State law prohibition on enjoyment of the right by the people of the particular race is invalid.

38. This matter is said to be an instance of the second circumstance.

39. Fourth, s 10 only operates in respect of rights. Not all differential treatment because of race falls within the section. There must first be identified a right not enjoyed because of race. This is to be contrasted with the manner in which ss 8 and 9 operate. For ss 8 and 9(1), the indicia of the operation of the substantive aspect of paragraph 4 of Article 1 is racially differential treatment[49].

40. As is discussed below, for the purpose of s 10, identification and articulation of the right or rights which premise the operation of the section is a process of difficulty and complexity[50].

41. Fifth, where State legislation is facially benign as to race, the words in s 10 which are critical are "do not enjoy a right". These words require that once the right is identified it is necessary to then determine whether the prohibition of exercise of the right – that is, that it is not enjoyed - operates *by* or "according to" race[51] or is "based on" race[52].

42. As this matter, and the Queensland Court of Appeal decisions which preceded it demonstrate, the processes of articulation of the relevant right, and whether the impugned law prescribes this right "according to" or "based on" race are not necessarily discrete, and determination of whether a statutory prohibition of

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48 As was made clear in *Gerhardy v Brown,* in s 10 "persons of a particular race" can include all people other than those of "another race"; see *Gerhardy v Brown* at 83 per Gibbs CJ, at 100-101 per Mason J, and at 122 per Brennan J.

49 In s 8, the proviso relates to rights.

50 See *Ward* at 103-104 [116], per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

51 *Ward* at 103 [113].

52 *Ward* at 103 [115].

exercise of a right operates by or according to or is based on the criterion of race is complex.

43. There are two matters of real complexity in s 10; identification of the right that is putatively not enjoyed, and the operation of the criterion of race.

Identification of the right

44. The operation of s 10(1) of the Act depends upon the identification of a right. Identifying the right involves at least two difficulties. First, identifying the rights with which the Convention (and therefore s 10) is concerned. Second, identifying the precise content of the right the enjoyment of which is alleged to be prevented or limited by reason of the law.

45. As the Queensland Court of Appeal cases touching s 10 which have culminated in the appeal to this Court disclose[53], a prohibition on possession of liquor in places on Palm Island, can be characterised as the denial of rights of various degrees of abstraction. Similar illustrations are obvious. In *Lochner v New York*[54], a majority of the United States Supreme Court construed a New York law that prohibited proprietors of bakery businesses from requiring employees to work more than sixty hours in one week as offending rights variously described as "the right of contract between the employer and employees concerning the number of hours in which the latter may labor in the bakery of the employer"; "the right to make a contract in relation to his business"; "the right to make a contract in relation to his business [which] is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution"; and "a right to not be deprived of life, liberty or property without due process of law".

46. The principled basis upon which "rights" denied by a statutory prohibition are characterised or articulated is little developed[55]. In this matter, for the reasons their Honours give, the approach of Keane JA in *Aurukun* and Chesterman JA in *Morton* and *Maloney* is to be preferred.

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53 See *Aurukun* at 36-38 [29]-[35] per McMurdo P, at 58-59 [113]-[116] per Keane J and at 96-98 [234]-[242] per Phillipides J; *Morton* at 485-486 [18] per McMurdo P and at 497-501, 503 [58]-[78], [85] per Chesterman JA (with whom Holmes JA agreed); and *Maloney* at 176-178 [9]-[14] per McMurdo P and at 199-200 [81]-[83] per Chesterman JA (with whom Daubney J agreed).

54 *Lochner v New York*, 198 US 45 (1905).

55 See the observation of Keane JA in *Aurukun* at 63 [137].

47. Of course, this difficult issue need not be addressed if the s 8 matter is considered first and the outcome of this consideration is as contended.

The criterion of race in s 10

48. The issue presented is whether a legislative prohibition that is facially benign as to race is nonetheless a denial of the enjoyment of a right to people of a race.

49. Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Ward*[56], make plain that, in determining whether a law prohibits enjoyment (of a right) by people of a particular race, regard can be had to the practical, substantive operation and effect of the law. It is not an exercise of form but of substance and practical operation. This reasoning does not preclude reference to purpose. The point made is that determining whether a law prohibits enjoyment (of a right) by people of a particular race is not done solely by regard to statutory purpose.

50. When considering s 10, for most laws that are facially benign as to race, purpose is not the issue, but it can be, and inevitably it is for a law which seeks to invoke s 8. Where a legislative purpose is to create a special measure, if the measure does not fall within s 8, it is axiomatic that the impugned law prescribes the right "according to" or "based on" race. This is its purpose, and if the law is not a special measure, s 10 is then inevitably attracted, whether or not the purpose is effectual or effected[57].

51. The importance of the reasoning of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Ward*[58] in this respect is that the operation of s 10 cannot be evaded by a law which is, in form, facially benign as to race, and whatever its purpose, if the practical and substantive effect of the law is that people of a particular race do not enjoy a right[59] enjoyed by others.

52. Because of a dearth of authority there is little to guide when considering, in this context, the practical and substantive effect of a law.

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56 *Ward* at 99 [105] and 103 [115], again having regard to the judgment of Mason J in *Gerhardy v Brown* at 99.

57 This explains why it is sensible to commence consideration of these matters at s 8.

58 *Ward* at 99 [105] and 103 [115].

59 Or enjoy it to a more limited extent.

53. In *Gerhardy v Brown* a specific contention was advanced which arose from the terms of s 19 of the *Pitjantjatjara Land Rights Act 1981* (SA). The provision created an offence for a person who was not Pitjantjatjara to enter defined land without permission. Pitjantjatjara was defined as a person who was Yungkutatjara or Ngaanatjara and a traditional owner of the land.

54. It was contended (in seeking to uphold the validity of the *Pitjantjatjara Land Rights Act 1981*) that, for the purpose of s 10, the Pitjantjatjara (as defined) were not people of a race because one of the defining characteristics was that Pitjantjatjara be traditional owners, and traditional ownership was not a criterion of race. It was contended to follow from this that s 10 was not engaged because right of entry to land was not a right enjoyed by people of a particular race and that, therefore, the denial of this right to non-Pitjantjatjara was not a right not enjoyed by people of another race[60].

55. The context of *Gerhardy v Brown* is the opposite of the context in this matter. *Gerhardy v Brown* involved the first application of s 10 as explained above. The s 10 issue was, in effect, whether, by reason of a law of a State, persons of all races except Race X do not enjoy a right that is enjoyed by people of Race X. If it was, the consequence was that "people of the first-mentioned race shall enjoy that right to the same extent as people of [Race X]".

56. In *Gerhardy v Brown* the question, for the purpose of s 10, was whether the right to enter the lands was a right enjoyed by people of Race X.

57. In this matter, the s 10 question is of the second type or application, namely whether, by reason of a law of a State, persons of Race X do not enjoy a right that

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60 This contention was perhaps expressed most clearly by Wilson J in *Gerhardy v Brown* at 111:

> "The submission is that the State Act proceeds to vest lands and to grant the right to control access to those lands by reference to a criterion which is not racial in character. That criterion is traditional ownership of the lands in question. It is true that every traditional owner will be an Aboriginal person but he is not a traditional owner for that reason. It is not his race that invests him with the character of a traditional owner. There must be the further distinguishing characteristic that he has, in accordance with Aboriginal tradition, social, economic and spiritual affiliations with, and responsibilities for, the lands or any part of them. It is this special relationship to the lands which, as I have already noted, provides the pivot on which the Act turns."

His Honour, though posing the question, did not answer it because his judgment relied simply on s 8; see *Gerhardy v Brown* at 111-112. With respect, the correct approach.

is enjoyed by people of all races except Race X. If the answer is yes, then the law is invalid (unless it is a special measure).

58. Even though the context is different, *Gerhardy v Brown* and the reasoning of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Ward* provide assistance. The answer to the contention advanced in *Gerhardy v Brown* is that although traditional ownership was not a criterion defined to be specific to a racial group, practically it was because all traditional owners of those lands were Pitjantjatjara. In *Ward,* the same conclusion was reached by Gleeson CJ, Gaudron, Gummow and Hayne JJ[61]:

> "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..."

59. Where the criterion of operation of a law, that is facially benign as to race, is not a feature *uniquely* possessed by a racial group, difficulties arise and it is necessary to consider the practical and substantive effect and operation of the law.

60. As this matter illustrates, even this common sense proposition presents challenges. Here, the effect of the relevant provisions is to prohibit possession of liquor[62] in places on Palm Island. The prohibition is facially benign as to race. It applies to people of all races present at any time at the relevant places on Palm Island.

61. Considering how the legislative liquor restrictions substantively and practically operate can be approached by comparing the central contention of the Respondent and the reasoning of Chesterman JA[63] in *Morton*[64].

62. The Respondent's central contention is that "neither presence not residence on Palm Island is an attribute characteristically possessed by Aborigines nor is it a distinction based upon race"[65]. Chesterman JA in *Morton* observed:

> "It may, I think, be accepted that s 168B, together with its application to Palm Island by s 173G and s 173H of the *Liquor Act* and the terms of the Regulation, are discriminatory on the ground of race. Their effect is to prohibit the inhabitants of Palm Island from possessing more than the specified type and quantity of alcohol. The inhabitants of Palm Island are

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61 *Ward* at 104 [117].

62 Beyond a certain threshold.

63 With whom Holmes JA agreed.

64 *Morton* at 496 [54]. His Honour repeated this in his judgment in *Maloney* at 200 [84].

65 Respondent's Submissions [35].

> overwhelmingly Aboriginal. The legal[66] 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."[67]

63. This divergence demonstrates that this matter is, and can only be, determined by s 8. If Chesterman JA's observation is correct, then, even in the absence of express assertion that such laws are special measures, patently they are.

64. The contention of the Respondent stated above requires care. It relates only to a criterion of operation or attribute that is not *characteristically* possessed by a racial group. The term characteristically is one of some elasticity. A law which, though facially benign as to race, prohibits conduct by people of (say) particular physical features that are more common in one racial group than others may not avoid s 10 (or s 9) on the contrivance that the feature was not unique to a particular racial group. That it is a well known characteristic of a particular racial group may be enough to bring such legislative prohibition within a practical and substantive operation of s 10.

65. It falls then to consider the reliance by McMurdo P in *Aurukun*[68] upon the submission in that case by HREOC:

> "...consider the effect of the prohibition on the rights of the predominantly Indigenous residents of these communities in comparison to the rights of non-Indigenous people in other parts of ... Queensland rather than in comparison to the rights of visitors, such as workers employed at a nearby mine site."[69]

66. With respect this reasoning should not be accepted. Where the legislation at issue is a prohibition, focus must be upon the terms of the prohibition. Here what is prohibited is conduct at a particular location. The specific location is critical.

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66 With respect, his Honour is plainly wrong to assert that this is a *legal* effect of the legislation.

67 *Morton* at 496 [54].

68 *Aurukun* at 40-41 [43]-[45].

69 The facts in *Aurukun* were different to those here, but the contention can be readily applied to the facts of this case.

PART VI: LENGTH OF ORAL ARGUMENT

67. It is estimated that the oral argument for the Attorney General for Western Australia will take 10 minutes.

Dated: 23 November 2012.

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G R DONALDSON SC
Solicitor General for
Western Australia
Telephone: (08) 9264 1806
Facsimile: (08) 9321 1385

C S BYDDER
Senior Assistant State Counsel
State Solicitor's Office
Telephone: (08) 9264 1159
Facsimile: (08) 9264 1442