

BETWEEN:



JOAN MONICA MALONEY  
Appellant

AND

THE QUEEN  
Respondent

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**AUSTRALIAN HUMAN RIGHTS COMMISSION'S SUBMISSIONS  
SEEKING LEAVE TO INTERVENE**

**Part I: Publication**

1. The submission is in a form suitable for publication on the internet.

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**Part II: Basis of intervention**

2. The Commission seeks to intervene to address the interpretation of ss 8 and 10 of the *Racial Discrimination Act 1975 (Cth)* (**RDA**) and the application of relevant international human rights instruments. The Commission does not seek to be heard in support of any particular party.

**Part III: Why leave to intervene should be granted**

3. The appeal involves issues of general principle and public importance that may affect, to a significant extent, persons other than the parties who are before it. The Court's consideration of how and when ss 8 and 10 of the RDA apply has implications for the application of the RDA to a wide range of fields.
4. One of the Commission's functions is to intervene in proceedings that involve racial discrimination and/or human rights issues, with the court's leave: see s 20(e) of the RDA and s11(1)(o) of the *Australian Human Rights Commission Act 1986 (Cth)* (**AHRC Act**).
5. The Commission has acquired special expertise and knowledge in the performance of its statutory functions under s 20 of the RDA and s 46C(1)(b) of the AHRC Act relevant to the RDA, *International Convention on the Elimination of Racial Discrimination (CERD)*<sup>1</sup> and human rights issues generally. Paragraphs 12 - 16 of the affidavit of Professor Gillian Triggs affirmed on 25 October 2012 [AB ] sets out how the Commission has provided expert guidance on the interpretation of the RDA.
6. The Commission also has a specific function under the AHRC Act 'to promote discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders'.<sup>2</sup>

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<sup>1</sup> CERD, opened for signature 7 March 1966, [1975] ATS 40 (entered into force generally 4 January 1969, except Art 14 which entered into force generally 4 December 1982; entered into force for Australia 30 October 1975, except Art 14 which entered into force generally 28 January 1993).

<sup>2</sup> AHRC Act, s 46C(1)(b) - the Social Justice Commissioner is required to have regard to CERD.

7. Having regard to its statutory functions, the Commission seeks leave to intervene because it has:
- a specific responsibility to address and raise concerns in relation to the human rights of Aboriginal peoples and Torres Strait Islanders;<sup>3</sup>
  - an interest in the subject of litigation greater than a mere desire to have the law declared in particular terms;<sup>4</sup> and
  - an ability to make submissions which the Court might consider that it 'should have to assist it to reach a correct determination' with its special knowledge and expertise relevant to the issues the subject of the appeal.<sup>5</sup>

#### Part IV: Applicable provisions

8. The Commission adopts the Appellant's list of applicable provisions.

#### Part V: Issues addressed

9. As a matter of general principle, the appeal raises the question whether a law can be justified as a special measure pursuant to s 8 of the RDA when the law impairs the right to equality before the law and the enjoyment of the right to property for members of a racial group. If the sole purpose of a special measure is the advancement and protection of human rights of a particular racial group, then the measure should promote rather than impair the intended beneficiaries' rights. A law that punishes and restricts behaviour of the so-called beneficiaries and points to no plausible or predictable ameliorative effect cannot be a special measure.<sup>6</sup>
10. The Commission agrees with the Appellant that the issue is not whether there is a human right to possess or use alcohol.<sup>7</sup> Rather, the Commission submits that a law - s 168B of the *Liquor Act 1992* and Schedule 1R of the *Liquor Regulation 2002* (Qld) (the **impugned provisions**) - that disproportionately exposes Aboriginals<sup>8</sup> to a criminal penalty for possession of goods, when such goods may be possessed lawfully in other parts of Queensland, is unlikely to satisfy the requirements of a special measure under s 8 of the RDA and is not consistent with the objects of the RDA or the relevant international human rights laws which the RDA seeks to implement.
11. In summary, the Commission contends that:
- (a) s 10(1) of the RDA is directed to promoting racial equality in the enjoyment of a wide range of domestic and internationally recognised rights, not just those set out in article 5 of CERD;
  - (b) a law that targets certain racial groups directly or indirectly by criminalising acts which can be committed only by persons belonging to such groups is contrary

<sup>3</sup> *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 331.

<sup>4</sup> *Kruger v Commonwealth of Australia* (1996) 3 Leg Rep 14.

<sup>5</sup> *Levy v State of Victoria* (1997) 189 CLR 579, 603; *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534.

<sup>6</sup> *R v Kapp* [2008] 2 SCR 483, 517, [54].

<sup>7</sup> Appellant's Submissions 26 October 2012, [3].

<sup>8</sup> The Commission recognises that the impugned provisions also disproportionately expose Torres Strait Islanders living on Palm Island to criminal penalties. These submissions focus on the impact of the impugned provisions on Aboriginals.'

to the right of equality before the law. Accordingly, such a law will be inconsistent with s 10(1) of the RDA;

- (c) a law which disproportionately exposes Aboriginal peoples to criminal penalty for conduct that is otherwise lawful in non-Aboriginal communities, can only be characterised as a special measure in extraordinary circumstances for the purpose of s 8 of the RDA, having regard to article 1(4) and 2(2) of CERD;
- (d) free, prior and informed consent or alternatively consultation is a relevant consideration in the assessment of one or more of the requirements for the validity of a special measure under s 8 of the RDA.

10 **Section 10 of the RDA**

12. Section 10(1) and (2) of the RDA relevantly provide:

**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.

13. Section 10 should be construed by considering the plain and ordinary meaning of the words of the section. In addition, the Court may also consider the context including the general purpose and policy of the provisions.<sup>9</sup>

***Purpose and policy***

14. Turning first to the purpose and policy. The RDA was enacted to approve the ratification of CERD (see s 7 of the RDA) and provide legally enforceable rights to be free from racial discrimination.<sup>10</sup> The legislative intention of s 10 of the RDA was to guarantee equality before the law without distinction as to race.<sup>11</sup>
15. The RDA does not have an express objects clause. Its objects and purpose may be ascertained from the objects of CERD. CERD is reproduced in full in the Schedule to the RDA. The preamble to CERD makes plain that its purpose, *inter alia*, is the promotion of the right to equality before the law, and equal protection of the law against race discrimination.
16. Article 2 of CERD sets out the States Parties' obligations including Article 2(1)(c) which requires State Parties to take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations

<sup>9</sup> *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 86 ALJR 1044, 1052, [41].

<sup>10</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 155 – 156.

<sup>11</sup> Commonwealth Parliamentary Debates, House, 13 February 1975, 285 and Senate, 15 April 1975, 999.

which have the effect of creating or perpetuating racial discrimination wherever it exists.

17. Section 10(1) of the RDA provides a general right to equality before the law and its underlying object must be to ensure that Commonwealth, State and Territory laws do not operate in a manner that creates or results in adverse distinctions because of race. As Mason J observed in *Gerhardy v Brown* (1985) 159 CLR 70 at 94 (**Gerhardy**), s 10 is not aimed at striking down a law. It seeks to ensure a right of equality before the law by providing that persons enjoy the same rights under the law.

10 **Textual consideration**

18. Section 10(1) turns relevantly on the meaning of the following key expressions:

- (a) 'a right' and 'a right of a kind'
- (b) 'enjoy'
- (c) 'to the same extent'
- (d) 'by reason of'

19. To the extent any of the expressions used in s 10 derive from CERD, the meaning of such expressions should be given the meaning ascribed by international law.<sup>12</sup>

- 20 Consistent with the purpose and policy of the RDA, s 10(1) should be construed broadly and beneficially.<sup>13</sup> Consistent with adopting a beneficial and purposive approach, the court may give such legislation *the widest interpretation that its language will permit*.<sup>14</sup>

21. The CERD is intended to guarantee rights which are practical and effective rather than theoretical or illusory.<sup>15</sup> Section 10(1) of the RDA should be interpreted in a manner that results in practical and effective protection of equality before the law, both *de jure* and *de facto*.

22. It follows that s 10 should not be interpreted as a device to restrict or limit human rights. It is accepted that Courts should not impute a legislative intention to interfere with fundamental rights, in the absence of unmistakable and unambiguous language.<sup>16</sup>

30 **A right and a right of a kind**

23. Section 10(1) refers to a 'right'. Having regard to the ordinary and plain meaning of the word, a right may be any right recognised at both domestic and international law. It includes but is not necessarily limited to human rights.<sup>17</sup> A 'right' is not or is not necessarily a legal right or right enforced in municipal law.<sup>18</sup>

<sup>12</sup> *Gerhardy*, 124,157; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 264- 265.

<sup>13</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359.

<sup>14</sup> *Qantas Airways Limited v Christie* (1998) 193 CLR 280, 332 [152]

<sup>15</sup> *Railway Express Agency Inc v New York* 336 US 106, 112-113 (1949); *Artico v Italy* (1980) 37 Eur. Ct. H.R. (ser. A), [33], *Soering v United Kingdom* (1989) 161 Eur. Ct. H.R. (ser. A), [87].

<sup>16</sup> *Coco v The Queen* (1994) 179 CLR 427, 437.

<sup>17</sup> See *Mabo v Queensland* (1988) 166 CLR 186, 229.

<sup>18</sup> *Mabo v Queensland* (1988) 166 CLR 186 at 216 - 217, *Bropho v State of Western Australia* (2008) 169 FCR 59 at 81-82, [78]- [79].

24. Arguably the reference to a 'right' includes legal rights of any kind recognised in Australian law including rights described as 'fundamental rights' entrenched or guaranteed by the common law.<sup>19</sup> Given the breadth of the expression, a 'right' may include any freedom to engage in any conduct that is not otherwise prohibited by law.<sup>20</sup>
25. As for international human rights, s 10(2) of the RDA provides that the reference in s 10(1) to a 'right' *includes* a reference to a right of a kind referred to in Article 5 of CERD. Article 5 of CERD does not provide an exhaustive list of 'rights' as the chapeau to article 5 makes plain.
- 10 26. Article 5 of CERD makes it plain that the overarching obligation on the state is to *'prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights'*. The overarching human right is equality before the law.<sup>21</sup>
27. Article 5 then sets out a non-exclusive list of rights, which should be enjoyed equally regardless of race. The expression '*notably*' suggests that the rights listed in article 5 are not exclusive. The preamble to CERD refers to '*principles of the dignity and equality inherent in all human beings*' and to a number of international human rights instruments.<sup>22</sup>
- 20 28. Where s 10(2) of the RDA uses the expression '*rights of a kind*', it does not seek to confine the rights by reference or exclusively to those listed in article 5 of CERD.<sup>23</sup> The expression refers to a class or group of like human rights. Consistently with the approach taken by international courts, international human rights instruments are interpreted as 'organic' or 'living instruments' having regard to present day conditions.<sup>24</sup>
29. As Brennan J observed in *Gerhardy* at 126:
- 30 In 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. That is not to say that it is devoid of meaning, much less to say that the provisions of the *Racial Discrimination Act* which contain or incorporate a reference to the term, namely, ss 8(1) and 9(1) have no effect or operation. But it is not necessary to give an exhaustive definition to human rights and fundamental freedoms in order to give meaning to those provisions.
30. Accordingly, the expression 'rights of a kind' may include rights declared in later international conventions such as the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* or the *International Covenant on Civil and Political*

<sup>19</sup> Compare *Department of Health & Community Services v JWB & SMB* ("Marion's Case") (1992) 175 CLR 218, 253-254 (trespass to the person), *Noakes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, 1020 (freedom to choose an employer), *New South Wales v Corbett* (2007) 230 CLR 606, [22]. See also *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 478.

<sup>20</sup> cf *Entick v Carrington* [1765] 19 St Tr 1030, *Malone v Metropolitan Police Commissioner* [1979] Ch 344,367, *Cozens v Brutus* [1973] AC 854; *Coleman v Power* (2004) 220 CLR 1, 97-98 [253].

<sup>21</sup> *South West Africa Cases (Second Phase)* [1966] ICJR 3 at 293, *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 418-419 [167].

<sup>22</sup> See Preamble to CERD.

<sup>23</sup> *Gerhardy*, 101-2, 125-6.

<sup>24</sup> *Minister of Home Affairs v Fisher* [1980] AC 319, 328, *R v DPP Ex parte Kebilene and Others* [1999] 3 WLR 972, 988E-H.

*Rights (ICCPR)*, as well as rights recognised by customary international law or as *jus cogens*.<sup>25</sup> The term 'rights of a kind' may include rights recently recognised in international law, through UN declarations.

31. Finally, the expression 'rights of a kind' also points to a broad interpretation of the scope of the identified right, which may extend beyond the specific text of the international instrument.<sup>26</sup>

### **Enjoy**

- 10 32. Section 10(1) is directed to the enjoyment of the relevant right.<sup>27</sup> The expressions enjoy or enjoyed when construed in context mean simply to possess, use, or experience the rights in a beneficial manner.<sup>28</sup> Such an interpretation is consistent with the rights in issue being effective and practical rather than illusory.<sup>29</sup>

33. The enjoyment of a right means that the scope of the right and any limitations which may attach to the right should be considered. For example, the right to liberty of the person in international law includes a protection against *arbitrary* arrest and detention. It is not an unqualified right against arrest or detention (see article 9(1) of the ICCPR). Accordingly, whether there is enjoyment of the right will involve an assessment of the scope and the nature of the right, particularly if the right is qualified.

### **To the same extent**

- 20 34. Section 10(1) of the RDA requires some comparison between people of different races to demonstrate that persons of one race do not enjoy a particular right or rights *to the same extent* as persons of a different race. The expression *to the same extent* simply points to some objective evidence that enjoyment of the right in issue has been limited.

35. The Commission submits that s 10(1) should not be construed by resort to concepts of 'direct' and 'indirect' discrimination, being short hand expressions to describe the different ways discrimination may occur.

36. Section 10(1) does not require any finding of discriminatory treatment of persons because of race.<sup>30</sup> Arguably, there is no requirement to find that the rights in issue have been impaired or nullified in all cases.

- 30 37. Section 10 is directed to the legal protection of equality rather than responding to specific instances of discrimination. This is reflected in the heading to s 10 which reads 'rights to equality before the law'. Because of this, the Commission submits that s 10(1) should be construed in a way that promotes equality. In this respect, there is an important distinction between the concepts of discrimination and equality. They describe different conclusions. Section 9 of the RDA proscribes racial discrimination. Freedom from discrimination is directed to eliminating distinctions that are unfair, arbitrary and

<sup>25</sup> Gerhardy, 101-102.

<sup>26</sup> See, e.g., *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 564, [78].

<sup>27</sup> *Ward v Western Australia* (2002) 213 CLR 1, 103, [115].

<sup>28</sup> The concept of enjoyment or quiet enjoyment is a long standing principle in the common law, particularly in relation to the use of property (*Hargrave v Goldman* (1963) 110 CLR 40, 62) and treatment in workplaces (*R v Equal Opportunity Board; ex parte Burns* (1985) VR 317, 319 [32]).

<sup>29</sup> In *Gerhardy* at 93, Mason J observed that the argument did not address 'a right' in the context of 'enjoy the right'. He noted that this aspect of s 10(1) has its difficulties but did not address the issue.

<sup>30</sup> *Gerhardy*, 99. See also, *Ward v Western Australia* (2002) 213 CLR 1, 99, cf 279-281, 285-286, *WA v Commonwealth* (1995) 183 CLR 373, 435-439, *Mabo v Queensland* (1988) 166 CLR 186, 217-218, 231.

unreasonable because of a person's race etc.<sup>31</sup> Non - discrimination looks to treating all people the same way regardless of race etc. On the other hand, equality is not so much concerned with identifying wrongful distinctions or arbitrary treatment. The concept of equality is concerned with ensuring that legitimate distinctions or differences are made and are directed to achieving fair and appropriate outcomes. Equality may be achieved by eliminating discrimination. Equality may also be achieved by implementing measures that have the effect of delivering fair and appropriate outcomes. Recognising and achieving the right of equality may involve treating equals equally and unequals differently.<sup>32</sup>

- 10 38. The relevant comparison in the circumstances of this case is between the restrictions imposed, by reason of the impugned provisions, on residents living in Palm Island compared with persons residing in other parts of Queensland. The impugned provisions prohibit the possession of any quantity of liquor in public places across the whole of Palm Island, not just specific parts. Persons living in other parts of Queensland may carry any quantity of liquor in a motor vehicle without being intercepted by the police, having their car searched, the liquor confiscated and being subject to trial before a Magistrate for a criminal offence.

**By reason of**

- 20 39. When used in s 10(1), the expression *by reason of* suggests that there be a causal nexus between the lack of enjoyment of a right and the impugned law.<sup>33</sup> In determining the causal nexus, the impugned law does not need to make an explicit reference to or distinction based on race. Section 10(1) is directed at '*the practical operation and effect*' of the impugned law and is '*concerned not merely with matters of form but with matters of substance*'.<sup>34</sup>
- 30 40. The Commission agrees with the finding of the Court of Appeal in *R v Maloney* (2012) 262 FLR 172 at [84] [AB ] that a causal nexus exists between the impugned provisions and the lack of enjoyment of a right by members of a particular race in this case. The inhabitants of Palm Island are overwhelmingly Aboriginal. Consequently, the legal and practical effect of the impugned provisions is to impose a criminal penalty for possession of certain goods by members of a group who are identified, by the fact of their residence, as Aboriginal.
- 41 Race and geography are inextricably linked in this case.<sup>35</sup> That there may be a few Non - Aboriginals resident on Palm Island does not detract from this. The explicit purpose for the imposition of alcohol restrictions in prescribed communities, including Palm Island, and no other parts of Queensland is to prevent or minimise alcohol - related harm in Indigenous Communities.<sup>36</sup>
- 40 42 Finally s 10(1) does not require a court to find a legislative intention to undermine the enjoyment of rights on the ground of race. Again, it simply requires the impugned law to have the effect of limiting the enjoyment of a right.

<sup>31</sup> *Gerhardy*, 128 - 131. See also *Australian Building and Construction Commissioner v McConnell Dowell Constructors (Aust) Pty Ltd* (2012) 203 FCR 345.

<sup>32</sup> *Minority Schools in Albania, Advisory Opinion*, PCIJ, 1935, Ser A/B No. 64, 19. See also *Street v Queensland Bar Association* (1989) 168 CLR 461, 571-3.

<sup>33</sup> *Purvis v New South Wales* (2003) 217 CLR 92, 163 [236], *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 86 ALJR 1044, 1052 [43], 1062 [101].

<sup>34</sup> *Mabo v Queensland* (1988) 166 CLR 186, 230, *Gerhardy*, 99, *Ward v Western Australia* (2002) 213 CLR 1, 103, [115], 107, [126], *Jango v Northern Territory* (2006) 152 FCR 150 at 324, [667].

<sup>35</sup> See *City Council of Pretoria v J Walker Case* (CCT8/97) [1988] ZACC 1, 24.

<sup>36</sup> *Explanatory Notes for the Indigenous Communities Liquor Licences Bill 2002, Explanatory Notes for the Liquor Amendment Regulation (No 4) 2006.*

### Relevant 'right' in the present matter

- 43 The Commission respectfully submits that the majority of the Court of Appeal in *Maloney* adopted a narrow approach to the identification of the 'right' in issue. The identification of human rights should not be treated as a selection of discrete items from a shopping catalogue of rights. Human rights are by their nature 'universal, indivisible and interdependent and interrelated.'<sup>37</sup> The identification of the 'right' for the purpose of s 10(2) or 'human right' by reference to article 5 of CERD or otherwise must be read in context and mindful that international instruments are cast in broad and sometimes vague language.<sup>38</sup>
- 10 44 In the present matter, the Commission contends that the relevant right is the right to equality before the law. This right is similar to the right to 'equal treatment in common with other persons' referred to by Mason J in *Gerhardy*.<sup>39</sup> It is also consistent with McMurdo P's approach in *Morton v Queensland Police Service*, where she identified the relevant right as the '*right to equal protection against discrimination from the practical effect of substantive law*'.<sup>40</sup> The Commission submits that Her Honour's approach identifies the relevant right simply by reference to the right of equality before the law. It was not necessary in the circumstances to go further to determine whether any right other than the right to equality before the law existed and then whether those rights were contravened.
- 20 45 In *The Queen v Drybones* [1970] S.C.R. 282, the Canadian Supreme Court considered the scope of the right of equality before the law protected by s 1(b) in the then Canadian Bill of Rights in the context of a liquor control law which targeted Indigenous Canadians. There, Justice Ritchie said:
- ... I think that s1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.<sup>41</sup>
- 46 In *Gerhardy* at 126- 27, Brennan J also expressed the right in a broad way, saying:<sup>42</sup>
- 30 The conception of human rights and fundamental freedoms in the Convention definition of racial discrimination describes that complex of rights and freedoms the enjoyment of which permits each member of a society equally with all other members of that society to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of that society. **If it appears that a racially classified group or one of its members is unable to live in the same dignity as other people who are not members of the group, or to engage in a public activity as freely as others can engage in such an activity in similar circumstances, or to enjoy the public benefits of that society to the same extent as others may do, and that the disability exists because of the racial classification, there is a prima facie nullification or impairment of human rights and**
- 40 **fundamental freedoms.** ... (emphasis added)
- 47 The scope of the right to equality before the law is provided by article 26 of the ICCPR. The UN Human Rights Committee has interpreted this right to apply to

<sup>37</sup> Article 5, Vienna Declaration, World Conference on Human Rights, Vienna, 14 - 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993).

<sup>38</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 392.

<sup>39</sup> *Gerhardy*, 101-102.

<sup>40</sup> (2010) 240 FLR 269, 277, [20].

<sup>41</sup> Cf *Attorney General of Canada v. Lavell* [1974] SCR 1349 but note 1371-2.

<sup>42</sup> *Mabo v Queensland* (1988) 166 CLR 186, 217.

legislation, regardless of the subject matter of the legislation in issue.<sup>43</sup> The Commission notes the Respondent's contention at [51] that article 26 of the ICCPR is 'a right to equality in the application of the law rather than in its substantive provisions'. The Commission submits that most violations of article 26 established by the UN Human Rights Committee have been caused by unreasonable (discriminatory) provisions in legislative enactments rather than the application of the law.<sup>44</sup>

10 48 Alternatively, the Commission submits that the right to equality before the law, consistent with the approach taken by *McMurdo P*, is a right of a similar nature or character to the right recognised in article 26 of the ICCPR.

49 The Commission also agrees that in addition to the right to equality before the law, consistent with the approach taken by *McMurdo P*, that the impugned provisions engage the Appellant's enjoyment of her right to own property for the purpose of article 5(d)(v) of CERD.

### ***Bropho issue***

20 50 In *Maloney* at [19] – [29] [AB ], *McMurdo P* applied *Bropho v State of Western Australia* (2008) 169 FCR 59 (***Bropho***), which resulted in her Honour concluding that there had been no diminution of the Appellant's property rights: see [26]. The majority *Chesterman JA* and *Daubney J* did not address the application of *Bropho* in any detail.<sup>45</sup>

51 In *Bropho* at 83 [81] – [83], the Full Court of the Federal Court considered the application of s 10 of the RDA. The Court said s 10 requires a court to consider:

(a) whether there is a relevant 'right' or 'rights' that are affected by the impugned law; and

(b) if so, whether persons of a particular race do not enjoy that right or enjoy it to a more limited extent than persons of another race by reason of the impugned law.

They found that the second step requires it to ask:

(a) whether there is a limitation upon the enjoyment of a right by people of a particular race by reason of law; and

30 (b) whether any limitation upon the right is a legitimate one, intended to achieve a non-discriminatory purpose.

52 In *Bropho*, the Full Court correctly had regard to the relevant human right in issue. Then consistently with international law, the Court found that human rights are not

<sup>43</sup> For example, see *Broeks v The Netherlands* Communication 172/1984, U.N. Doc CCPR/C/29/D/172/1984 (1987), [12.4]. See also: Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37<sup>th</sup> sess, U.N. Doc A/45/40 (1989), [12].

<sup>44</sup> M. Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2005, 2nd revised ed), 628, [49]. See also: A. Conte, A & R. Burchill, *Defining Civil and Political Rights The jurisprudence of the United Nations Human Rights Committee* (2nd ed, 2009), Chapter 11. See also: Human Rights Committee, *General Comment No. 18*, [12]. C.f Joseph, Shultz and Castan, *The International Covenant on Civil and Political Rights* (2004), 745, [23.105].

<sup>45</sup> See *Chesterman JA*, [95] – [99] [AB ].

absolute and may be subject to legitimate and justifiable limitations: see [81]. The Court correctly noted that where there are claims of competing rights or interests, a court may be called on to strike a balance between the competing claims and determine when and how certain rights may be limited. In *Bropho*, the Full Court accepted that forms of differential treatment resulting from the operation or effect of a State law are permissible if the law has a legitimate and non-discriminatory public goal (see [83]).

10 53 As noted above, the expression 'enjoy a right' in s 10(1) must take into account any qualification of the right. The Commission submits that the approach taken in *Bropho* is consistent with the approach taken by Justices Mason and Brennan in *Gerhardy*. Justice Brennan addressed this issue in *obiter* at 127 where he referred to two exceptions to the general right of racial equality – legitimate distinctions and special measures. For a legitimate distinction to be drawn on race he used the example of a person of a particular race selected because of his authenticity. Justice Brennan noted that a person of a different race could not claim that his rights have been impaired because the distinction was for a particular and legitimate purpose. His Honour observed that in the context of race, this would be rare exception.<sup>46</sup> Justice Mason made a similar observation about freedom of movement being legitimately limited by traffic laws or to protect private and property rights of others (at 102).

20 54 The approach taken by Justices Brennan and Mason is consistent with international human rights law being subject to legitimate and necessary exceptions:

- the CERD Committee's General Recommendation XXXI notes that laws that have a legitimate objective and respect the principle of proportionality will not contravene CERD.<sup>47</sup>
- the UN Human Rights Committee's General Comment 18 concerning article 26 of the ICCPR notes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>48</sup>

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55 In *Bropho* the right in issue was property. There the Court identified the permissible limits that could be placed upon the right to property at international law. At [80], the Court held that 'a State has a right to enforce such laws as it deems necessary to control the use of property in accordance with the general interest'. At [83], the Court also held that 'no invalid diminution of property rights occurs where the State acts in order to achieve a legitimate and non-discriminatory public goal'. The Court found that the laws in that case interfered with the rights of the Indigenous residents, but did so for the purpose of protecting the safety and welfare of the residents, particularly women and children. The impugned law did not contravene s 10(1) of

<sup>46</sup> Sadurski W "Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case that Wasn't" (1986) 11 *Sydney Law Review* 5 at 41, 43.

<sup>47</sup> CERD Committee, *General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, U.N. Doc A/60/18 (2005), 98 - 108.

<sup>48</sup> General Comment No. 18, [13]. See also *Singh Bhinder v Canada*, Communication No 208/1986, U.N. Doc CCPR/C/37/D/208/1986 (1989), *Blom v Sweden* Communication No. 191/1985, U.N. Doc. CCPR/C/OP/2 at 216 (1990), *Lindgren v Sweden* Communication No. 298/1988 and 299/1988, U.N. Doc. CCPR/C/40/D/298/1988 at 84 (1990), *Gillot v France* Communication No. 932/2000, U.N. Doc. CCPR/C/75/D/932/2000 (2002).

the RDA because the effect of the permissible limitation was that there was no diminution in the enjoyment of the right to property.

- 56 The Commission does not agree with the Appellant's contention that *Bropho* only has application to property rights.<sup>49</sup> The Full Court's approach, when considered with the approach taken by Justices Brennan and Mason in *Gerhardy* suggests that other non-absolute human rights might be considered in the same way. By way of example, if the right in issue was privacy, then international law recognises a right to be free from *arbitrary* interference with one's privacy (see article 17 of the ICCPR). It follows that attention must be directed to whether a measure is an arbitrary interference before concluding that a person's enjoyment of the right has been impaired. When considering any limitation on a human right, the international jurisprudence makes it plain that any limitation on rights should be construed strictly, be appropriate and adapted to achieve the relevant aim or public purpose.
- 10
- 57 The Commission respectfully submits that the approach taken by the Court of Appeal has misconstrued the way in which limitations on the right/s in issue should be construed. There is nothing in the RDA generally or specifically in the text of s 10(1) of the RDA that allows a court to find that a law is saved from s 10(1) if the law is made for a legitimate goal or in the public interest. Apart from s 8, the RDA does not provide any exceptions or defences to conduct or laws which impair or nullify rights because of race. The Full Court recognised as much in *Bropho* at [82].
- 20
- 58 To the extent that the Queensland Court of Appeal in *Maloney* and also in *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 have read into s 10(1) an exception of this kind, it is not correct. Any limitations or exceptions (other than s 8 of the RDA) must be considered in the context of the right in issue. If the right in issue is a human right defined by international human rights instruments, then these rights may have specific limitation clauses. These internationally recognised limitation clauses should not be overlooked when considering whether a person's enjoyment of such a right has been impaired.
- 30
- 59 In the present matter, assuming the rights in issue are the right to equality before the law and the right to own property, then the question is whether there is a permissible limitation to these human rights recognised by international law.
- 60
- 40 The Commission accepts that a law that has the objective of protecting the community from alcohol abuse and alcohol related violence is a legitimate purpose consistent with protecting other human rights (see for example article 5(b) of CERD, Article 22(1) of the *Declaration on the Rights of Indigenous Peoples (Declaration)*).<sup>50</sup> However, it is not enough to simply assert that the measure that will restrict or impair a human right has a legitimate purpose. The question should be whether the law is appropriate and adapted to achieve the particular objective. The Commission respectfully submits that in *Bropho* and the Queensland Court of Appeal decisions, the courts have accepted on face value the crowns' statement that the relevant provisions seek to achieve a legitimate purpose but do not then assess whether the law in question is proportionate to achieve the purpose without unduly impairing the right in issue.

<sup>49</sup> Appellant's Submissions, [33].

<sup>50</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), U.N. Doc A/RES/61/295 (2007).

### **Applying Bropho**

- 61 The Commission submits that the following steps should be considered in applying the decision in *Bropho* and determining what will constitute a 'legitimate' interference with rights.<sup>51</sup>
- 62 First, when determining the legitimacy of a limitation of a right, the assessment is an objective one — it is not sufficient, for example, that the legislature lacked a discriminatory motive or intention.<sup>52</sup>
- 10 63 Second, proportionality will be a vital factor in making assessments of what is 'legitimate', 'reasonable' or 'justifiable' — a measure will not be legitimate if its impact upon rights is disproportionate to the claimed purpose or benefit of the measure. In considering proportionality, the court may consider the following:
- is the measure applied only for a specific purpose and directly related to a specific need?
  - is the regime the least restrictive one available to achieve the lawful objectives pursued? The court should consider whether the measure can reasonably be said to involve the least possible interference with the right to be free from race discrimination and the promotion of equality.
- 20 64 Third, the legitimacy of any limitation upon a right must be assessed in the context of the right in question. In this respect, not all rights should necessarily be limited in the same way.
- 65 Fourth, because the 'balancing' of rights is taking place in the context of the right to racial equality before the law, legitimacy should be judged against the objectives and purposes of CERD and other relevant human rights instruments such as the ICCPR.<sup>53</sup>

### **Are any limitations upon the rights in this case legitimate?**

- 30 66 The Commission submits it is important to consider the reasons for the limitation of the relevant rights. There is no dispute as to the seriousness of the alcohol problem in Indigenous communities.<sup>54</sup> President McMurdo set out the objects of the *Liquor Act* in her reasons at [24] [AB ]. The Legislature's objective was to 'minimise harm in community areas caused by alcohol abuse and misuse and associated violence': see s 3(a), (c), (d) and (e).<sup>55</sup>
- 67 The Commission submits that the objectives of eliminating alcohol-related harm and violence against women and children are legitimate reasons for limiting individuals' rights including the right to equality before the law and the right to own property.

<sup>51</sup> United Nations Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc E/CN.4/1985/4, Annex (1985) ('Siracusa Principles').

<sup>52</sup> See *Ward v Western Australia* (2002) 213 CLR 1,103 [115].

<sup>53</sup> Committee on the Elimination of Racial Discrimination (CERD Committee), *General Recommendation 14: Definition of Racial Discrimination*, 42<sup>nd</sup> sess, U.N. Doc A/48/18 at 114 (1994), [2] and Human Rights Committee, General Comment No. 18, [13].

<sup>54</sup> Race Discrimination Commissioner, *Race Discrimination, Human Rights and the Distribution of Alcohol*, (1995).

<sup>55</sup> See also: *Explanatory Notes for the Liquor Amendment Regulation (No 4) and the Indigenous Communities Liquor Licences Bill 2000*.

Unquestionably, governments have an obligation to protect the right to security of the person and to protect and care for the wellbeing of children. They also have an obligation under article 12 of the ICESCR to protect the right to the 'highest attainable standard of physical and mental health'.

- 68 However, the critical question is whether the impugned provisions are a proportionate response. This involves the court assessing whether the impugned provisions involve the least possible interference with the rights outlined in order to achieve their stated objective. Relevant to this question is what other measures could have been implemented on Palm Island to deal with issues surrounding the abuse/misuse of alcohol and/or the prevention of alcohol-related disturbances and violence.
- 10
- 69 A factor critical to an assessment of proportionality in this case is that the impugned provisions impose criminal sanctions on all persons in possession of liquor in public places on Palm Island regardless of whether their conduct is violent or creating a public disorder. The Commission notes the following likely unintended consequences of such regimes: (a) displacement from communities into larger towns where liquor is available; (b) increased drinking in unsafe environments; (c) the likelihood that Aboriginal peoples may not be able to pay fines; and (d) likely increased contact with the criminal justice system.
- 20 70 Also relevant to the question of determining whether the limitation upon rights in the present case is legitimate are the wishes of Aboriginal peoples in relation to measures affecting them. The Commission notes the comparative success of community based alcohol bans over blanket alcohol prohibitions.<sup>56</sup>
- 71 The Commission respectfully submits that in applying *Bropho*, *McMurdo P* has not undertaken the assessment required: see [26] [AB ]. The principle in *Bropho* is correct, but its application was incorrect in this case.

### Special measures

- 72 Unlike other federal discrimination laws, the RDA provides for very few exceptions or defences for racially discriminatory acts.
- 30 73 The principle exception is s 8(1) of the RDA. It provides that Part II of the RDA does not apply to 'special measures'. It operates as an exception or defence to conduct that would otherwise amount to unlawful discrimination.<sup>57</sup> The exception applies to defeat any claim by a different group that it has been discriminated against because preferential treatment has been accorded to a particular racial group.<sup>58</sup> Section 8(1) is not limited to s 10(1) but applies to complaints of race discrimination based on the impairment or nullification of human rights (s 9) and complaints of race discrimination in relation to access to places and facilities, land, housing and accommodation, provision of goods and services, trade unions and employment (ss 11 – 15 of the RDA).

<sup>56</sup> T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2007 (2008), Ch 2.

<sup>57</sup> See s 3 of the AHRC Act.

<sup>58</sup> See, for e.g., Theodor Meron, 'The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination' (1985) 79 *Am J. Int'l Law* 283, 305, N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination*, 32, N. Lerner, *Group Rights and Discrimination in International Law* (2nd ed, 2003), 182 and Human Rights Committee, General Comment No. 18, [10].

- 74 The expression 'special measures' is not defined in the RDA and it takes its meaning directly from article 1(4) of CERD. Article 1(4) should be read with article 2(2) of CERD which also addresses special measures. In international law special measures operate in two contexts:
- 10
- to fulfill a State's obligation to redress historical disadvantage and create more favourable conditions or confer benefits on a particular racial group. In this context, special measures are associated with affirmative action or measures designed to promote substantive equality for disadvantaged groups (see article 2(2) of CERD).<sup>59</sup>
  - as an exception to measures or conduct that would otherwise amount to racial discrimination (see article 1(4) of CERD).
- 75 In *Gerhardy*, Brennan J listed the following five criteria for any measure to be considered a 'special measure' under s 8 of the RDA:
- 20
- it must confer a **benefit**;
  - on some or all members of a **class of people** whose membership is based on race, colour, descent, or national or ethnic origin;
  - the **sole purpose** of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;
  - the protection given to the beneficiaries by the measure must be **necessary** for them to enjoy and exercise their human rights equally with others,<sup>60</sup> and
  - the measure must **not have yet achieved its objectives** (the measure must stop once its purpose has been achieved and not set up separate rights permanently for different racial groups).<sup>61</sup>
- 30

#### ***Use of special measures to restrict or impair rights***

- 76 When the text of article 1(4) of CERD was drafted, some States were concerned that special measures could be used to perpetuate the separation of certain groups from the rest of the population. The debate makes it clear that the purpose of article 1(4) of CERD was not to emphasise the distinctions between different racial groups, but rather to ensure that persons belonging to such groups could be integrated into the community, in order to attain the objective of equal development for all citizens.<sup>62</sup>
- 40 77 The Commission submits that the exception based on special measures should be usually restricted to forms of favourable or preferential treatment necessary to advance substantive equality for particular groups; or individuals facing persistent disparities. The measure should have an ameliorative purpose and effect. Characterising measures that restrict the rights of members of a racial group, as

<sup>59</sup> M Bossuyt, Special Rapportuer, *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination*, 19 June 2000 U.N. Doc E/CN.4/Sub.2/2000/11, CERD Committee, *General Recommendation 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination*, U.N. Doc CERD/C/GC/32 (2009), [12].

<sup>60</sup> *Gerhardy*, 133.

<sup>61</sup> *Gerhardy*, 139-140.

<sup>62</sup> See N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination*, 32-39.

'special measures' is undesirable and should only be used in an exceptional case.<sup>63</sup> This view is supported by the Special Rapporteur on the rights of Indigenous people, who observes:

[I]t would be quite extraordinary to find, consistent with the objectives of the Convention [the CERD], that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members. Ordinarily, special measures are accomplished through preferential treatment of disadvantaged groups, as suggested by the language of the Convention, and not by the impairment of the enjoyment of their human rights.<sup>64</sup>

10 **Requirement for consultation and consent**

78 An issue in this appeal is whether 'free, prior and informed consent' or alternatively, consultation is a necessary requirement for the validity of a special measure.

79 In *Maloney*, the Court of Appeal doubted whether consultation was a requirement for special measures under s 8 of the RDA. This accords with the law as developed in *Aurukun* and *Morton*, where the Court of Appeal found that consultation was desirable but not essential.<sup>65</sup>

80 The Commission submits that in order to determine whether the measures confer a real 'benefit' on the members of the racial group and are for the sole purpose of securing their advancement, a court should assess whether there is either 'free, prior and informed consent' to the measures or alternatively, the intended beneficiaries have been consulted.<sup>66</sup>

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81 As the terms of s 8 of the RDA are derived from article 1(4) of CERD, it is appropriate to interpret s 8 that conforms with the way article 1(4) has been interpreted and applied at the present time, by relevant international bodies, notably the CERD Committee.<sup>67</sup>

82 Interpreting s 8 of the RDA to require a consideration of whether there is either 'free prior and informed consent' or alternatively consultation for its validity is consistent with the approach taken by the following relevant international bodies:

Body	Reference and approach
CERD Committee	In General Recommendation XXXII on the meaning of special measures <sup>68</sup> - the Committee notes that special measures are designed and implemented on the basis of <b>prior consultation</b> with affected communities and the <b>active participation</b> of such communities. <sup>69</sup>
	General Recommendation XXIII on Indigenous Peoples, the Committee calls on State parties to: (d) Ensure that members of Indigenous peoples

<sup>63</sup> See *R v Kapp* [2008] 2 SCR 483, 517, [54].

<sup>64</sup> See Special Rapporteur, Report on the situation in Australia, U.N. Doc A/HRC/15/37/Add.4 (1 June 2010), Appendix B, [21].

<sup>65</sup> *Aurukun* [80] (McMurdo P), [195]-[208] (Keane J), [249] (Phillipides J), *Morton* [31] (McMurdo P), [114] (Chesterman JA), [39] (Holmes JA agreeing).

<sup>66</sup> *Gerhardy*, 135.

<sup>67</sup> see paragraph 29 above. Justice Brennan noted that the international meaning may develop over time.

<sup>68</sup> CERD Committee, General Recommendation No. 32, 75<sup>th</sup> sess, U.N. Doc CERD/C/GC/32 (2009), [15]-[18], [22], [27], [35].

<sup>69</sup> CERD Committee, General Recommendation 32, [18]. See also the CERD Committee's Concluding Observations on Australia, U.N. Doc CERD/C/AUS/CO/15-17, [16].

	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 <b>informed consent</b> . <sup>70</sup>
	Since the adoption of the Declaration, the CERD Committee has begun to stress that states should obtain the consent of indigenous peoples before a project can take place on their lands. <sup>71</sup>
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance	Special Rapporteur said that meaningful participation of groups or individuals discriminated in political life and decision-making processes on the grounds of their race, colour, descent, or national or ethnic origin is crucial to preventing and combating racism, racial discrimination, xenophobia and related intolerance. Ensuring the right to effective participation in the public and political life of discriminated individuals, including members of minorities, <b>in particular with regard to decisions that affect them</b> , has also been highlighted as a broad area of concern by the Independent Expert on minority issues. <sup>72</sup>
Committee on Economic, Social and Cultural Rights	The General Comment on the right to take part in cultural life in article 15.1(a) of the ICESCR lists one of the core obligations of states parties as allowing and encouraging 'the participation of persons belonging to minority groups, Indigenous peoples or to other communities in the design and implementation of laws and policies that affect them.' <sup>73</sup>
The Declaration (article 19)	<i>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.</i>  Australia has acknowledged its support of the Declaration and that Australia's existing obligations under international human rights treaties are mirrored in the Declaration's fundamental principles. <sup>74</sup>
Human Rights Committee	In <i>Poma Poma v Peru</i> (2009) UN HRC Communication No 1457/2006 at [7.6], the Committee said that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members for the purpose of article 27.
Inter-American Court of Human	<i>Case of the Kichwa Indigenous People of Sarayaku v Ecuador</i> , Inter-Am. Ct. H.R. Case No. 12.465 (27 June 2012) [164] finding the obligation to

<sup>70</sup> CERD Committee, General Recommendation No. 23, 51<sup>st</sup> sess, U.N. Doc CERD/A/52/18, annex V (1997), [4(d)].

<sup>71</sup> For e.g., see: Concluding Observations of the CERD Committee Chile, U.N. Doc CERD/C/CHL/CO/15-18 (7 September 2009), [22], Concluding Observations of the CERD Committee Guatemala, U.N. Doc CERD/C/GTM/CO/12-13, (19 May 2010), [11], Concluding Observations of the CERD Committee Bolivia (Plurinational State of), U.N. Doc CERD/C/BOL/CO/17-20 (8 April 2011), [20], and Draft Concluding Observations of the CERD Committee Fiji, U.N. Doc CERD/C/FJI/CO/18-20, (31 August 2012), [14].

<sup>72</sup> Special Rapporteur, Annual Report to Human Rights Council (2012), U.N. Document A/HRC/20/33, [5]-[6].

<sup>73</sup> ESCR Committee, *General Comment 21: Right of everyone to take part in cultural life*, 43<sup>rd</sup> sess, U.N. Doc E/C.12/GC/21, (21 December 2009), [55(e)].

<sup>74</sup> The Hon J Macklin MP, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples', Speech delivered at Parliament House, Canberra, 3 April 2009, available at [www.un.org/esa/socdev/unpfii/documents/Australia\\_official\\_statement\\_endorsement\\_UNDRIP.pdf](http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf)

Rights	consult is now 'a general principle of International Law'.
United Nations Permanent Forum on Indigenous Issues <sup>75</sup>	The Forum noted that as a crucial dimension of the right of self-determination, the right of indigenous peoples to free, prior and informed consent is also relevant to a wide range of circumstances in addition to those referred to in the Declaration. Such consent is vital for the full realization of the rights of Indigenous peoples and must be interpreted and understood in accordance with contemporary international human rights law, and recognized as a legally binding treaty obligation where States have concluded treaties, agreements and other constructive arrangements with indigenous peoples. In this regard, the Permanent Forum emphatically rejects any attempt to undermine the right of indigenous peoples to free, prior and informed consent. Furthermore, the Forum affirms that the right of indigenous peoples to such consent can never be replaced by or undermined through the notion of "consultation". <sup>76</sup>

83 The Commission further submits that because it is necessary for a measure to be 'appropriate and adapted' to the relevant purpose of advancing certain racial groups or individuals,<sup>77</sup> it is also not possible to reach that conclusion without considering the wishes of the particular intended beneficiaries. To the extent that the impact of the measures upon group members may differ, the specific wishes of those persons who are the intended beneficiaries of the measure must be considered closely. To take any other approach contemplates a paternalism that considers irrelevant the views of a racial group or individuals as to their wellbeing and decisions materially affecting them.

10 84 The Commission acknowledges that the wishes of the intended beneficiaries may not always be determinative of whether the measure in question is a special measure. It also submits that the extent of consultation and the need for consent must be considered in the context of each particular case. But, where the measures purport to advance a racial group by restricting their human rights, free, prior or informed consent, or alternatively consultation should be essential.

**How can a court assess whether there is 'free prior and informed consent' or whether consultation has occurred?**

20 85 As s 8 of the RDA is technically an exception provision, the onus of proof with respect to satisfying a court that there is free prior and informed consent or alternatively that consultation has occurred should arguably lie with the State. It is also for the State to identify with some precision who are the intended beneficiaries of the measure are and whether these are particular individuals or a racial group.

86 By reference to the purpose of the impugned provisions, which is to prevent harm in community areas caused by alcohol abuse and misuse and associated violence and public disorder, the Commission submits that the intended beneficiaries of the measure are the racial group of all Aboriginal peoples living on Palm Island.

30 87 By its object and purpose, the measures will also restrict the beneficiaries' rights to equality before the law and to own property. In this case, it is therefore critical to consider whether the intended beneficiaries have provided free, prior and informed consent or alternatively have been consulted in order to assess whether the

<sup>75</sup> The Forum is an expert advisory body to the UN Economic and Social Council.

<sup>76</sup> UN Permanent Forum on Indigenous Issues, Report on the tenth session (2011), [36]

<sup>77</sup> Gerhardy, 105, 149.

measures are for the 'sole purpose' of securing their advancement or alternatively whether the measures are appropriate and adapted to securing their advancement.

- 88 The 'common practical understanding' of free, prior and informed consent elaborated by the UN Permanent Forum on Indigenous issues is:

*Free.* This implies no coercion, intimidation or manipulation.

*Prior.* This implies that consent should be sought sufficiently in advance of any authorisation or commencement of activities, and that the relevant agents should guarantee enough time for the consultation/consensus processes to take place.

- 10 *Informed.* This implies that indigenous peoples should receive satisfactory information in relation to certain key areas, including the nature, size, pace, reversibility and scope of the proposed project, the reasons for launching it, its duration and a preliminary assessment of its economic, social, cultural and economic impact. This information should be in a form that is accessible, meaning that indigenous peoples should fully understand the language used.

- 20 *Consent.* This should be intended as a process of which consultation and participation represents the central pillars. While consultation should be undertaken in good faith, full and equitable participation of Indigenous peoples should be guaranteed. Indigenous peoples should also have equal access to financial, human and material resources in order to engage constructively in this discussion. Moreover, they should be able to participate through their own freely chosen representatives and according to their customs.<sup>78</sup>

- 89 Page 8 of the Explanatory Notes to the Indigenous Communities Liquor Licence Bill 2002 refers to '*extensive consultations involving more than 700 people in remote Indigenous communities in late 2001 and early 2002*'. In particular, it refers to:

- a document setting out the legislative proposals being 'widely distributed' following its release in April 2002;
- workshops with representatives of Community Justice Groups in Cairns in April 2002 and June 2002;
- 30 • a summary of the Bill provided to all Aboriginal and Island Councils in July 2002; and
- a discussion of the Bill occurred at the Northern Zone meeting of the Queensland Hotels Association.

- 90 Page 2-3 of the Explanatory Notes to the Liquor Amendment Regulation (No. 4) 2006 also state that the '*Community Justice Group and Council for the Indigenous Community of Palm Island have recommended alcohol limits as part of their community alcohol management strategies*'.

- 40 91 The Commission does not take any position on whether the evidence in this particular case constituted free, prior and informed consent or alternatively, satisfied

<sup>78</sup> See M. Barelli, "Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples: developments and challenges ahead", *The International Journal of Human Rights* Vol 16, No 1, January 2012, 1 – 2 and references cited therein. See also M. Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report (2011)*, 115-116, *Social Justice Report (2010)*, 104, Appendix 4 and references cited therein.

a requirement to consult. It notes the following 'consultation activities' are referred to in the affidavit evidence led by Mrs Maloney: a presentation about the proposal to the Palm Island Aboriginal Shire Council<sup>79</sup> and several small group meetings about the proposal.<sup>80</sup> The evidence points to some consultation prior to the enactment of the impugned provisions. However, the affidavit evidence establishes the following perceived problems with the consultation process:

- 10
- all of the members of the community's elected representatives, the Palm Island Aboriginal Shire Council, did not support the proposal;<sup>81</sup>
  - neither the Council nor the Community were given any real opportunity to be part of the reform process;<sup>82</sup>
  - the proposal was forced onto the community;<sup>83</sup>
  - there was no special meeting with large attendance anywhere in the community;<sup>84</sup>
  - there was objection to the proposals;<sup>85</sup>
  - some Community Elders were not consulted.<sup>86</sup>
- 20

92 This aspect of the evidence suggests that there may not have been 'full and equitable participation of Indigenous peoples'. The process may not have given due regard to the relevant community's representative and decision-making structures.

#### **Part VI: Timing of oral submissions**

93 The Commission seeks to intervene by filing written submissions, subject to the Court seeking the Commission's assistance by way of oral submissions. If requested, any oral submissions would not exceed 15 minutes.

30 Dated: 23 November 2012

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<sup>79</sup> Affidavit of Gavin Francis Barry, sworn 12 April 2011, [3] [AB ].

<sup>80</sup> Affidavit of Gavin Francis Barry, [7], [8] [AB ]; Affidavit of Magdalena Blackley, sworn 11 April 2011, [11] [AB ].

<sup>81</sup> Affidavit of Gavin Francis Barry, [4] [AB ]; Affidavit of Magdalena Blackley, [4] [AB ].

<sup>82</sup> Affidavit of Zachariah Sam, sworn 6 April 2011, [3] [AB ].

<sup>83</sup> Affidavit of Gavin Francis Barry, [5] [AB ].

<sup>84</sup> Affidavit of Gavin Francis Barry, [6] [AB ].

<sup>85</sup> Affidavit of Gavin Francis Barry, [7]-[9] [AB ].

<sup>86</sup> Affidavit of Ronald Edward Hero, sworn 15 April 2011, [4] [AB ]; Affidavit of Roy Nallajar, sworn 15 April 2011, [5]-[6] [AB ]; Affidavit of Thomas Alfred Lenoy, sworn 15 April 2011, [4] [AB ].