SUPREME COURT OF QUEENSLAND

CITATION:	*Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37
PARTIES:	**AURUKUN SHIRE COUNCIL** (applicant/appellant) **v** **CHIEF EXECUTIVE, OFFICE OF LIQUOR GAMING AND RACING IN THE DEPARTMENT OF TREASURY** (respondent/respondent) **KOWANYAMA ABORIGINAL SHIRE COUNCIL** (applicant/appellant) **v** **CHIEF EXECUTIVE, OFFICE OF LIQUOR GAMING AND RACING IN THE DEPARTMENT OF TREASURY** (respondent/respondent)
FILE NO/S:	Appeal No 13499 of 2008 Appeal No 13501 of 2008 SC No 516 of 2008 SC No 528 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	1 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	4 August 2009
JUDGES:	McMurdo P, Keane JA and Philippides J Separate reasons for judgment of each member of the Court, each agreeing to the order dismissing the appeals
ORDERS:	**In each appeal:** **1. Application to adduce further evidence refused** **2. Appeals dismissed**
CATCHWORDS:	HUMAN RIGHTS – DISCRIMINATION – GROUNDS OF DISCRIMINATION – RACIAL DISCRIMINATION – where the appellants are local government authorities constituted under the *Local Government Act* 1993 (Qld) – where the appellants held general liquor licences under the *Liquor Act* 1992 (Qld) – where the appellants' licences were

revoked under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act* 2008 (Qld) – where the appellants were the only licence holders affected by the Act – where the populations governed by the appellants are almost entirely Indigenous – where the appellants are entirely comprised of Indigenous members – whether the Act offends s 10 of the *Racial Discrimination Act* 1975 (Cth) – whether the Act limits the enjoyment of Aboriginal people of the right to equal protection of laws without discrimination – whether the Act limits the enjoyment of Aboriginal people of the right to equal participation in cultural activities – whether the Act limits the enjoyment of Aboriginal people of the right to access places and services used or intended for use by the general public – whether the Act limits the enjoyment of Aboriginal people of the right to not be arbitrarily be deprived of property

Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act 2008 (Qld)
Aboriginal Communities (Justice and Land Matters) Act 1984 (Qld)
Acts Interpretation Act 1901 (Cth), s 22(1)(a)
Acts Interpretation Act 1954 (Qld), s 36
Commonwealth Constitution, s 109
Community Services Legislation Amendment Act 2002 (Qld)
Indigenous Communities Liquor Licences Act 2002 (Qld)
Liquor Act 1992 (Qld), s 3(a), s 3(b), s 3(e), s 3(A)(4), s 106(4), s 278, s 278(1), s 278(2), s 279
Local Government (Aboriginal Lands) Act 1978 (Qld), s 3, s 5, s 6, s 9, s 10, s 12, s 19
Local Government (Community Government Areas) Act 2004 (Qld), s 11(1), s 70
Local Government Act 1993 (Qld), s 3, s 36(1), s 146
Racial Discrimination Act 1975 (Cth), s 6, s 6A, s 8, s 8(1), s 9, s 10, s 10(1), s 10(2), s 12, s 13, s 14, s 15, s 18
United Nations Universal Declaration of Human Rights, Art 1, Art 2, Art 7, Art 17, Art 17(2), Art 29(2)
United Nations International Covenant on Civil and Political Rights, [1980] ATS 23, Art 1, Art 26, Art 28
United Nations International Convention on the Elimination of All Forms of Racial Discrimination, [1975] ATS 40, Art 1, Art 1(1), Art 1(4), Art 2, Art 2(1), Art 2(2), Art 2(d)(v), Art 2(d)(ix), Art 2(e)(vi), Art 2(f), Art 5, Art 5(a), Art 5(b), Art 5(d)(v), Art 5(d)(ix), Art 5(e)(vi), Art 5(f)

Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council (2007) 162 FCR 313; [2007] FCA 615, cited
Attorney-General (WA) v Marquet (2003) 217 CLR 545; [2003] HCA 67, cited
Aurukun Shire Council v CEO Office of Liquor Gaming and

Racing in the Department of Treasury (2008) 222 FLR 122; [2008] QSC 305, considered
Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106; [1992] HCA 45, applied
Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 485; [1993] HCA 15, applied
Bropho v Western Australia [2009] HCATrans 170, cited
Bropho v Western Australia and Others (2008) 169 FCR 59; [2008] FCAFC 100, applied
Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436; [1990] HCA 1, cited
Clunies-Ross v The Commonwealth (1984) 155 CLR 193; [1984] HCA 65, cited
Dilworth v Commissioner of Stamps [1899] AC 99, cited
Ebber and Another v Human Rights and Equal Opportunity Commission and Others (1995) 129 ALR 455, cited
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, applied
Gerhardy v Brown (1985) 159 CLR 70; [1985] HCA 11, applied
Hewlett v Min of Finance & Anor (1982) (1) SA 490 (ZS) 490, cited
Jango v Northern Territory (2006) 152 FCR 150; [2006] FCA 318, cited
Kartinyeri v The Commonwealth of Australia (1998) 195 CLR 337; [1998] HCA 22, applied
Koowarta v Bjelke-Petersen (1982) 153 CLR 168; [1982] HCA 27, applied
Mabo v Queensland (1988) 166 CLR 186; [1988] HCA 69, applied
Mathieson v Burton (1971) 124 CLR 1; [1971] HCA 4, cited
Minister for Resources v Dover Fisheries Pty Ltd (1993) 43 FCR 565, cited
Muslimin v The Queen [2009] HCA Trans 240, cited
National Provincial Bank Ltd v Ainsworth [1965] AC 1175; [1965] UKHL 1, cited
Nationwide News Ltd v Wills (1992) 177 CLR 1; [1992] HCA 46, cited
Neutral Bay P/L v DCT; MA Howard Racing P/L v DCT; Broadbeach Properties P/L v DCT [2007] QCA 312, applied
Pilkington (Australia) Ltd v Minister of State for Justice and Customs (2002) 127 FCR 92; [2002] FCAFC 423, considered
Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476; [2003] HCA 2, applied
R v KU & Ors; ex parte A-G (Qld) [2008] QCA 154, cited
R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327; [1982] HCA 69, applied
Re East; Ex parte Nguyen (1998) 196 CLR 354; [1998] HCA 73, cited
Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads [2007] 2 Qd R 373; [2007] QCA

73, applied
State of Tasmania v The Commonwealth of Australia and State of Victoria (1904) 1 CLR 329; [1904] HCA 11, cited
St Vincent de Paul Society Qld v Ozcare Ltd & Ors [2009] QCA 335, applied
Vanstone v Clark (2005) 147 FCR 299; [2005] FCAFC 189, cited
Western Australia v The Commonwealth (1995) 183 CLR 373; [1995] HCA 47, cited
Western Australia v Ward (2002) 213 CLR 1; [2002] HCA 28, applied
Woomera Aboriginal Corporation v Edwards (1993) HREOCA 24; (1994) EOC 92-653, cited
York v The Queen (2005) 225 CLR 466; [2005] HCA 60, cited
YZ Finance Co Pty Ltd v Cummings (1963) 109 CLR 395; [1964] HCA 12, cited

COUNSEL: D Campbell SC, with G Del Villar, for the appellants
M Hinson SC, with M Plunkett, for the respondent
K Eastman for the Australian Human Rights Commission

SOLICITORS: Bottoms English for the appellants
Crown Law for the respondents
No appearance for the Australian Human Rights Commission

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[1] **McMURDO P:** These two appeals turn on similar facts and raise related, complex and divisive human rights issues. The appellants are, respectively, the Aurukun Shire Council[1] and the Kowanyama Shire Council.[2] The Aurukun Shire Council is the lessee of all the land in the Aurukun Shire.[3] The Aurukun Shire Council holds its interest in this land on trust for the benefit of residents of its shire.[4] Residency rights in Aurukun Shire are largely restricted to those Aborigines entitled to reside there on 5 April 1978, their descendants, and partners.[5] The Kowanyama Shire Council, once an "Aboriginal council"[6] became Kowanyama Shire Council under the *Local Government (Community Government Areas) Act* 2004 (Qld).[7] The respondent in both appeals is Queensland's Chief Executive, Office of Liquor, Gaming And Racing in The Department of Treasury. Before 1 July 2008, each appellant held a general liquor licence under the *Liquor Act* 1992 (Qld) for licensed premises, the only liquor licence in each shire. It is common ground that both the Aurukun Shire[8] and the Kowanyama Shire[9] are remote Queensland Indigenous communities and that all the appellants' councillors and most of their constituents are Indigenous.

[2] On 21 May 2008, the Queensland legislature amended the *Liquor Act*[10] to provide that local governments like the appellants may not apply for or hold a general liquor licence.[11] I will refer to these amendments as "the impugned provisions". The primary judge refused the appellants' application to declare the impugned provisions invalid. The appellants submit that the impugned provisions are inconsistent with s 10 of the *Racial Discrimination Act* 1975 (Cth) ("the RDA") in that they compromise the enjoyment of Indigenous persons' rights to equal treatment before the law; to own property; to freedom of peaceful assembly and association; to equal participation in cultural activities; and of access to a service intended for use by the general public, such as hotels. They further contend that the impugned provisions are not within the special measures exceptions in s 8 of the RDA and therefore should be struck down under s 109 of the *Commonwealth Constitution*.[12]

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1 Appeal No 13499 of 2009.

2 Appeal No 13501 of 2009.

3 *Local Government (Aboriginal Lands) Act* 1978 (Qld), s 3(1)(a).

4 *Local Government (Aboriginal Lands) Act* 1978 (Qld), s 5.

5 *Local Government (Aboriginal Lands) Act* 1978 (Qld), s 19.

6 See *Aboriginal Communities (Justice and Land Matters) Act* 1984 (Qld).

7 See *Local Government (Community Government Areas) Act* 2004 (Qld), ss 69 – 83 and Sch 3.

8 The Quarterly Report on Key Indicators in Queensland's Discrete Indigenous Communities April-June 2009 describes Aurukun as located in western Cape York, 900 kilometres northwest of Cairns and 200 kilometres south of Weipa with a population of about 1,200 people as at 30 June 2008. It is peopled by the "Wik and Wik Waya peoples comprised of five spiritual clan groups: Apalech, Winchanam, Wanam, Chara, and Puutch. The five spiritual clan groups are comprised of 17 families or tribes. These families and tribes are linked to culturally significant areas of land through totemic ownership and distribution." (p 8).

9 The Quarterly Report on Key Indicators in Queensland's Discrete Indigenous Communities April-June 2009 describes Kowanyama as located in western Cape York, 620 kilometres northwest of Cairns with a population of about 1140 as at 30 June 2008. It is peopled by the "Koko Berra, Yir Yorant (or Kokomnjen), Kunjen, Olkol, and other regional Aboriginal people. Its inhabitants are defined by their relationship to the Mitchell River, the main language groups are Yir Yorant, Yik Thangalkl (together comprising Kikomenjen group), Uw Oykangand and Olgol (together comprising the Kunjen group), and Kokobera." (p 32)

10 *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act* 2008 (Qld).

11 *Liquor Act* 1992 (Qld), s 106(4); s 278(1) and s 279.

12 "109. Inconsistency of laws

[3] The respondent's primary position is that the impugned provisions do not offend s 10 as they do not compromise Indigenous people's enjoyment of a human right enjoyed by non-Indigenous people. The respondent's secondary position is that, if they do, they are within the exceptions referred to in s 8 and not unlawful.

[4] Consistent with the approach taken to *amicus curiae* in *Levy v Victoria*,[13] this Court gave leave to the Commonwealth Human Rights and Equal Opportunity Commission (HREOC) to make written and oral submissions in these appeals. HREOC, in attempting to assist the Court, did not contend for a particular outcome. It encouraged this Court, however, to adopt a broad approach in construing the rights to which s 10 refers.

[5] I have reached the following conclusions. The impugned provisions compromise the enjoyment of Indigenous people's rights to equal treatment before the law and of access to a service intended for use by the general public, such as hotels. The appellants have failed to establish in this case that the impugned provisions compromise the enjoyment of Indigenous people's rights to own property; to freedom of peaceful assembly and association; or to equal participation in cultural activities. Despite the fact that the impugned provisions compromise the enjoyment of s 10 human rights, they are special measures under s 8 of the RDA and so are exempt from the application of the RDA. They are therefore not inconsistent with the RDA, and s 109 of the *Commonwealth Constitution* has no application. These are my reasons for reaching those conclusions and for dismissing both appeals.

The relevant explanatory notes and related background material

[6] I consider it critical in these appeals to understand the legislative intent behind the impugned provisions, in order to determine both whether they compromise a s 10 right and whether they are special measures exceptions to the RDA under s 8. The following extracts from the explanatory notes to the relevant amending Bill[14] and from other related material are pertinent to that discussion.

[7] The explanatory notes include the following pertinent statements:

> "The main objectives of the Bill are to amend relevant legislation to:
>
> (a) ensure that the full policy intent of the alcohol restrictions in discrete Indigenous communities, namely the reduction of alcohol-related harms, can be more effectively and consistently realised …
>
> **Policy rationale**
> **Amendments relating to alcohol**
>
> *Background*
> In December 1998 the then Minister for Women's Policy established the Aboriginal and Torres Strait Islander Women's Task Force on Violence. In July 2001 Justice Tony Fitzgerald, at the request of the Queensland Government, undertook the Cape York Justice Study in relation to Indigenous communities on the Cape. Both concluded

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

13 (1997) 189 CLR 579.

14 *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Bill* 2008 (Qld).

that harmful levels of alcohol consumption in remote Indigenous communities were the chief precursor to violence, crime, injury and ill-health in these populations.

The *Meeting Challenges, Making Choices* (MCMC) strategy was the Queensland Government's response to the Study in 2002 and aimed to improve the health and well-being of those people living in the 19 discrete Indigenous communities (the MCMC communities) with an immediate focus on addressing the level of alcohol use and related violence.

(The MCMC communties are: Aurukun, … Kowanyama … .)

Alcohol management under the MCMC strategy had three interdependent elements:

(a) separation of the management of canteens from councils: while legislation was passed to support the divestment of canteen licences, implementation proved to be problematic and divestment has not occurred to date.

(b) restriction of supply and availability of alcohol: broadly, the alcohol restrictions regime is implemented through legislation: the *Liquor Regulation 2002* has a schedule for each community which details the restricted area and the restrictions and the *Liquor Act 1992* provides that it is an offence to have more than the prescribed amount of liquor in a restricted area (section 168B).

In determining the restrictions on the type and amount of alcohol in individual communities, the Government considered the level of harm occurring in the community and the recommendations of the local community justice group. The outcome has become known as the *alcohol restrictions* for the community.

Aurukun was the first community to have alcohol restrictions put in place in December 2002. Palm Island was the last in June 2006.

(c) demand reduction initiatives: the Alcohol Demand Reduction Program, which commenced distribution of grants in 2006, has provided funding for projects, programs and services which assist a community to:

- provide appropriate activities and supports for young people and families to enhance culture, education and recreation; and
- develop strategies with government and non-government agencies for alcohol and other substances treatment services.

Recent developments

In early 2007 the Office for Aboriginal and Torres Strait Islander Partnership, Department of Communities, commenced a whole-of-government review of alcohol and other substances policy, programs and service settings in the MCMC communities (the review).

The review findings indicated that, to date, there has not been a sufficient or sustained improvement in the level of harms which are alcohol-related and a more concerted, intensive and sustained program of action is needed across four key themes: strengthening supply restrictions; strengthening demand reduction; strengthening individual, family and community; and strengthening service delivery.

The government response has been to commit to: an incentive package to encourage communities to be as alcohol-free as they can be; enhancement of acute alcohol rehabilitation and treatment services; diversionary services and programs; as well as the legislative and enforcement measures contained in this Bill. The State Government has committed $66 million and the Commonwealth Government $36 million to service and program enhancement.

Policy rationale
The alcohol restrictions, and the measures to enforce them, are therefore only part of the broader plan to address alcohol-related harm, in particular to reduce alcohol-related violence, and thereby improve the health and well-being of all community members, especially children.

However, the review found that there are currently gaps in the legislative response which means that the policy intent of the restrictions, namely limiting access to, or availability of, alcohol in order to reduce alcohol-related harms, cannot be fully realised. For example, the restrictions currently only apply to public places in the communities. The result is that, if people are able to get illicit alcohol through the community and into a house, the ability of the police to act is limited.

It is anticipated that, if in due course there is a sufficient decline in alcohol-related harms, restrictions can change, with an eventual goal of no restrictions, although it is acknowledged that this may take years rather than months.
…

How objectives are achieved
The objective of ensuring that the full policy intent of the alcohol restrictions in discrete Indigenous communities is achieved by amending the appropriate legislation to ensure that all parts of the restricted area are subject to the restrictions; the police have appropriate powers to enforce the restrictions; drinking in public places in the MCMC communities is prohibited in the same way as the rest of Queensland; home-brew is automatically banned where there is a zero carriage limit; and councils are finally divested of their general liquor licences.
…

Alternative method of achieving the policy objectives
There is no alternative method of achieving the policy objectives as all require amendment of existing legislation.

> ...
> *Appeal and compensation*
> The Bill does not provide for an appeal, and specifically provides that compensation will not be payable, as a result of councils no longer being able to hold general liquor licences or a transfer application lapsing.
>
> The divestment of canteens from local governments is a policy decision based on the inappropriateness of local government social services being reliant on the level of profit from a business whose purpose is to sell alcohol, particularly when alcohol-related harm is driving the need for those services. An appeal is not relevant in this situation as there is no discretion in relation to the cancellation. It is possible for the chief executive of Queensland Treasury, as the department which currently has responsibility for the *Liquor Act 1992*, to continue the licence for a limited period to enable the coordination of health and other services and diversionary activities at the time the licence is cancelled. Again, an appeal is not relevant in these circumstances.
>
> As part of the alcohol reforms, the Government has committed $14 million as revenue replacement over the next 4 years for canteen profits to the extent they have been used to provide social services. This is not direct compensation, but is to ensure that there is no loss in services as a result of councils no longer having canteens as a source of revenue.
>
> With respect to licence transfer applications, following the introduction of this Bill, councils will be provided with information on the Government's intentions in relation to transfers of canteens. This will ensure that anyone who lodges an application for transfer is aware of the relevant provisions."

[8] It is clear from these extracts that the legislature intended the impugned provisions to reduce "alcohol-related violence, and thereby improve the health and well-being of all [Indigenous] community members, especially children",[15] by imposing alcohol restrictions in the relevant Indigenous communities, restrictions which did not exist in the broader Queensland community. In explaining that legislative intent, the explanatory notes cite and rely upon the 1999 Aboriginal and Torres Strait Islander Women's Task Force on Violence Report[16] (which I shall call the Task Force Report) and the 2001 Cape York Justice Study[17] (which I shall call the Study). To fully comprehend the legislative intent behind the impugned provisions, it is therefore sensible to next set out relevant extracts from the Task Force Report and the Study.

[9] The membership of the Task Force which compiled the Report included Aurukun woman Elder, Ms Edwina Toikalkan and Kowanyama woman Elder, Mrs Evelyn Josiah. The Task Force Report emphasised the need to include Indigenous people in

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15 Explanatory notes, 3.

16 Queensland Department of the Premier and Cabinet & Tony Fitzgerald, 2001, *Cape York Justice Study*.

17 Aboriginal and Torres Strait Islander Women's Task Force on Violence & Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, 2000, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report.*

all collaborations with service agencies involved in strategies aimed at terminating the illicit alcohol trade.[18] The Task Force Report noted that, although there were many responsible Indigenous social drinkers:

> "… both the consultations and the submissions generally focussed on alcohol as featuring prominently in violence and its use therefore must be addressed as a priority.[19]
> … During the consultative process in Indigenous Communities informants indicated the extent of the damage being caused through the abuse of alcohol.[20] …
> Submissions in the consultations forc[efully] stated that if the issue of alcohol were addressed, violence would decrease.[21] … The summary of the report on alcohol-related violence in Aboriginal and Torres Strait Islander Communities found:
>
> - violence is pervasive;
> - women are more likely to be victims and men perpetrators;
> - violent episodes are often associated with drinking.
>
> The relationship between drinking and violence is not directly causal, but alcohol may facilitate or incite violence by providing a socially acceptable excuse for the negative behaviour. Indigenous women associate violence with alcohol, often seeing it as a contributing factor or a cause, or listing it as one of the reasons for increased violence.[22]

Noel Pearson has written that: '… surely the fact that the per capita consumption of alcohol in Cape York is the highest in the world says something about our dysfunction.' In every document or study on violence within Aboriginal and Torres Strait Islander situations, the issue of alcohol and its effects are raised. In fact, most of the women in Cape York say alcohol causes violence. Canteens on Communities are a continuing source of contention. There are calls to 'close the canteens'. While this opinion was expressed through the consultations, a more powerful call was for the canteens to be properly run. It is important to recognise that not all canteens were put into place by the will of the Community.

> *For years the people of Aurukun said no to a canteen at public meetings and in a referendum. However, after Aurukun received Local Government status, the then Local Government Minister, Mr Russ Hinze, decided it was discriminatory for the Aurukun Community not to have a canteen like other Queenslanders. A canteen was built in the middle of Centenary Park, in the midst of the children's playground equipment! Great role modelling for the children as they play around the canteen at night.*
>
> *I've seen children in school holidays hanging around outside the canteen … in the middle of the day drinking glasses of*

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18 Task Force Report at 146.
19 Task Force Report at 64-65.
20 Task Force Report at 67.
21 Task Force Report at 68.
22 Task Force Report at 71.

> *beer. Some children roam around until the early hours of the morning. Neglect is the real problem ... and this lack of supervision leaves opportunities for children to be sexually abused.*[23]

[10] Later, the Task Force Report relevantly continued:

> "Throughout the consultations informants constantly raised both the human and the social costs of alcohol. They were also concerned about the level of revenue being generated by both Councils and the Government from the sale of alcohol, with few, if any, benefits being given back to the Communities.[24] …
>
> Many Community Councils must rely on the income derived from the canteens that they operate for the delivery of essential services.
>
> …
>
> … the strongest voice for banning alcohol completely came from women at Kowanyama. They spoke too of their fear that, if the canteen was closed, the sly grog trade would increase. The problem would not go away. Kowanyama has a population of approximately 1200 people. Of this population, it was estimated that about 600 people drink 'seriously'.
>
> …
>
> In 1988, the Report of the Queensland Domestic Violence Task Force recommended:
>
> > *… that the sly grog trade be brought to the attention of the Ministers responsible for Police, Justice and Community Services with a view to developing strategies including legal remedies to eliminate the practice of the supply of sly grog.*
>
> Eleven years on and the sly grog continues to be a major problem within the DOGIT Communities. It is being brought in by plane and road, and local Aboriginal people and white service workers/contractors have been identified as the main offenders.[25]
>
> …
>
> The Task Force was advised of Community concerns about the benefits obtained by both the Community Councils and Government from the sale of alcohol. A large number of Community representatives felt that the human costs resulting from the sale of alcohol are of little concern to the sly grog distributors, canteen operators or the external world.
>
> Some responsible Councils channel funds back into Community services. For example, Kowanyama Council returns all its canteen profits to the Community to fund facilities for childcare, aged care, the women's shelter and the mother-child program. In other Communities, however, there was little evidence that funds from liquor sales were being used for the direct benefit of community welfare agencies. Ironically, these agencies are left to deal with the problems caused by alcohol consumption."

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23 Task Force Report at 71-72.

24 Task Force Report at 135.

25 Task Force Report at 138-139.

[11] The Study reported into issues including the causes, nature and extent of alcohol and substance abuse in the Cape York Indigenous communities and reached the following relevant conclusions:

> "Aboriginal children are over-represented in child protection cases. Child abuse, including sexual abuse and neglect, is linked to heavy drinking …"[26] …
>
> Perhaps the worst instance of rigid adherence to theory in the face of proven failure concerns the supply of alcohol. … alcohol is their common curse. In practice, the 'right' to drink and, indeed, to drink to excess, dominates all other considerations. A right to drink is effectively treated as paramount to the right of other people to safety, the right of families to food and shelter, the right of children to nutrition, sleep, education and innocence and the right of a community to peace and order.[27]

[12] The Study's recommendations included the following damning statements about the adverse impact of alcohol in communities like the appellants':

> "There are considerable practical difficulties, much increased if, as some suggest, … as a result of section 109 of the Commonwealth Constitution, the State cannot enact valid legislation which is inconsistent with the Commonwealth legislation, including social welfare legislation and the *Racial Discrimination Act, 1975*. State laws which sought to prohibit or restrict the supply or use of alcohol in the Cape York communities (because of their problems with alcohol abuse and violence) … might be invalid. The Human Rights and Equal Opportunities Commission report 'Race Discrimination, Human Rights and Distribution of Alcohol' discusses these issues. Subject to those considerations, these recommendations proceed on the basis that the Queensland Parliament will enact any necessary legislation.[28] …
>
> Alcohol abuse and alcohol-related violence and other offences are central to the problems in the communities. There is an urgent need for a simple community action plan on alcohol management in each community which is immediately implemented. That should be the first priority.
>
> A significant number of people in the communities drink alcohol to harmful and even hazardous levels. Life for those who don't drink to excess, including children, is spoiled by those who do. Alcohol abuse and associated violence are so prevalent and damaging that they threaten the communities' existence and obstruct their development.
>
> The point has been reached at which the reasons for the crisis in the communities are of limited significance except in so far as knowledge of the causes helps to identify possible changes.
>
> The position is so serious that, despite constitutional obstacles, unless significant improvement is reported within three years

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26 Cape York Justice Study at 50-51.

27 Cape York Justice Study at 53.

28 Cape York Justice Study at 56.

consideration should be given to a prohibition on the supply and consumption of alcohol. However, for the moment, it is preferable for the Government to work with the communities to achieve local solutions. Nonetheless, if any community is uncooperative or is obviously failing to curb alcohol abuse and violence at any time during the three-year period indicated, the Coordination Unit should immediately report that to the Deputy Director-General for the Government to adopt a more drastic approach."[29]

[13] In terms of structural changes and interventions the Study recognised that:

"Alcohol consumption and its consequences have severely compromised the capacity of Cape York communities to exercise self-management and self-determination.

- Councils and council officials should not be associated with, or profit from, the supply of alcohol. The present arrangements with respect to community canteens place an intolerable burden on councils and council officials in those communities. Those councils and officials are subject to financial as well as social pressures not to discourage the excessive consumption of alcohol. The Coordination Unit should assume responsibility for the supply of alcohol in the community canteens. Proper compensation must be paid to the communities. The Coordination Unit should be required to enter into suitable arrangements concerning the supply of alcohol at the canteens and to suspend or cancel those arrangements in appropriate circumstances. The Executive Director of the Coordination Unit should also be given power to terminate contractual arrangements which are considered unsatisfactory and pay fair compensation.[30]

… Strong leadership and example are needed to set expectations. Women have been speaking out about violence for some time. The men of the communities, both elders and the younger adult males, need to be asked and encouraged in their leadership roles to speak out against alcohol and violence, and to advocate a positive future for their children."[31]

[14] The relevant explanatory notes and related background material make clear that the legislature intended the impugned provisions to help combat endemic alcohol-related violence within Queensland Indigenous communities, including the appellants'. The legislature intended that the impugned provisions achieve this by taking away all liquor licences in specified Indigenous communities, like the appellants', thereby stopping the sale of all liquor in those communities for an indefinite period. If and when liquor licences were re-issued in the communities like the appellants', the appellants as local governments would be ineligible to hold a liquor licence. This was because the legislature intended, consistent with the recommendations of the Task Force Report and the Study, to remove the conflict between on the one hand local governments profiting from the sale of alcohol which contributes to alcohol-related violence and, on the other, the duty of local governments to provide sound governance of their communities.

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29 Cape York Justice Study at 60.

30 Cape York Justice Study at 61.

31 Cape York Justice Study at 63.

The relevant provisions of the Liquor Act, including the impugned provisions

[15] Under s 3 of the *Liquor Act*, the Act's objects relevantly provide:

> (a) to regulate the liquor industry in a way compatible with minimising harm caused by alcohol abuse and misuse; and
> *Examples of harm—*
> • adverse effects on a person's health
> • personal injury
> • property damage
> • violent or anti-social behaviour
>
> (b) to facilitate and regulate the optimum development of the tourist, liquor and hospitality industries of the State having regard to the welfare, needs and interests of the community and the economic implications of change; and
>
> (c) to provide for the jurisdiction of the tribunal to hear and decide appeals authorised by this Act; and
>
> (d) to provide for a flexible, practical system for regulation of the liquor industry of the State with minimal formality, technicality or intervention consistent with the proper and efficient administration of this Act; and
>
> (e) to regulate the sale and supply of liquor in particular areas to minimise harm caused by alcohol abuse and misuse and associated violence; and
> … ; and
>
> (g) to provide revenue for the State to enable the attainment of this Act's objects and for other purposes of government.
>
> **3A Principle underlying this Act for facilitating and regulating the liquor industry**
>
> (1) The underlying principle of this Act in relation to the sale and supply of liquor is—
>
> (a) a person may obtain a licence to sell or supply liquor as part of conducting a business on premises; and
>
> (b) liquor may only be sold or supplied on the licensed premises as part of the person conducting a business, on the licensed premises, that is the principal activity under the licence.
>
> (2) This Act states the principal activity of a business that may be conducted under each type of licence.
>
> (3) This Act must be administered in accordance with the underlying principle of this Act.
>
> (4) This section applies subject to this Act's object mentioned in section 3(a)."

[16] The impugned provisions are contained in s 106(4) and the transitional provisions, s 278 and s 279, of the *Liquor Act*. Section 106(4) is in Pt 5 (*Grant, variation and transfer of licences and permits*), Div 1 headed (*Applications*) and relevantly provides:

> **106 Who may apply for licence or permit**
>
> …

> (4) Also, a local government, corporatised corporation or relevant public sector entity may not apply for or hold a commercial hotel licence."

[17] Section 278 and s 279 are contained in Div 7 (*Transitional provisions for Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act 2008*), subdiv 1 (General licence held by a local government, corporatised corporation or relevant public sector entity, other than the Torres Strait Island Regional Council). The transitional provisions provide for a general licence held by local governments like the appellants to lapse from 1 July 2008 but allow the respondent to continue the licence in force no later than 31 December 2008.

[18] Despite the impugned provisions, it presently remains possible under the *Liquor Act* for a liquor licence to be issued to an entity or entities within the appellants' shires, as long as the entity is not a "local government, corporatised corporation or relevant public sector entity". The appellants are, of course, local government authorities. The passages I have set out from the explanatory notes to the Bill introducing the impugned provisions make clear the legislative intent. Consistent with the recommendations of the Task Force Report and the Study, it was to permanently stop the sale of liquor by councils like the appellants which provide local governance in Indigenous communities. This was to remove the conflict between a local government's responsibility to provide sound governance on the one hand, and a local government profiting from the sale of alcohol which often caused or fuelled community violence on the other. The legislature also intended to stop completely and for an indefinite period the sale of all liquor within specific Indigenous communities, including the appellants'. The legislature did this by removing the right of all Queensland local governments, not just Indigenous local governments like the appellants, from applying for or holding a commercial hotel licence or permit.[32] But prior to the enactment of the impugned provisions, in Indigenous communities like the appellants', the local government held the only liquor licence in the community. This meant that the practical and true effect of the impugned provisions has been and is as follows. At least for the time being, in taking away the appellants' liquor licences, the overwhelmingly Indigenous residents of the appellants' shires cannot purchase alcohol from and consume alcohol in licensed premises located within their shires.

The relevant provisions of the Racial Discrimination Act

[19] The preamble to the RDA relevantly states:

> "WHEREAS a Convention entitled the 'International Convention on the Elimination of all Forms of Racial Discrimination' (being the Convention a copy of the English text of which is set out in the Schedule) was opened for signature on 21 December 1965:
>
> AND WHEREAS the Convention entered into force on 2 January 1969:
>
> AND WHEREAS it is desirable, in pursuance of all relevant powers of the Parliament, including, but not limited to, its power to make laws with respect to external affairs, with respect to the people of any race for whom it is deemed necessary to make special laws and with respect to immigration, to make the provisions contained in this Act

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32 *Liquor Act*, s 106(4).

for the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to the Convention:".

[20] That preamble makes clear that the RDA is Australia's legislative response to the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination which I shall refer to as the Convention.[33] The Convention is contained in the RDA's schedule. The preamble to the Convention relevantly provides:

"*The States Parties to this Convention,*

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, … ,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, … ,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination … ,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, … ,

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced … that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, … is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on

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33 The Convention entered into force in Australia on 30 October 1975.

racial superiority or hatred, such as policies of *apartheid*, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

…

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,

Have agreed as follows:
…"

[21] The RDA binds the Crown in right of the Commonwealth and of each of the States.[34] It does not "exclude or limit the operation of a law of a State … that furthers the objects of the Convention and is capable of operating concurrently with this Act".[35] The provisions directly pertinent to these appeals are contained in Part II of the Act, headed "Prohibition of Racial Discrimination", and contains s 8 to s 18A. Section 8 is directly concerned in these appeals and relevantly provides:

"**8 Exceptions**

(1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

…

[22] The RDA does not discretely define "special measures". But, Art 1 of the Convention relevantly provides that:

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

…

4. 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 shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not

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34 *Racial Discrimination Act* 1975 (Cth), s 6.

35 *Racial Discrimination Act* 1975 (Cth), s 6A.

be continued after the objectives for which they were taken have been achieved."

[23] Also relevant in the context of understanding the parties' contentions as to "special measures" is Art 2 of the Convention which relevantly provides:

> 1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
>
> …
>
> (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
>
> …
>
> 2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

[24] Section 9 of the RDA provides:

> **9 Racial discrimination to be unlawful**
>
> (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race … which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.
>
> (1A) Where:
>
> (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
>
> (b) the other person does not or cannot comply with the term, condition or requirement; and
>
> (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race … as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race … .

(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.

(3) This section does not apply in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia.

(4) The succeeding provisions of this Part do not limit the generality of this section.

[25] Section 10 of the RDA is central to these appeals and relevantly provides:

"**10 Rights to equality before the law**

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race … do not enjoy a right that is enjoyed by persons of another race …, or enjoy a right to a more limited extent than persons of another race …, then, notwithstanding anything in that law, persons of the first-mentioned race … shall, by force of this section, enjoy that right to the same extent as persons of that other race … .

(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.

…"

[26] Article 5 of the Convention relevantly provides:

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake 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:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;

…

(d) Other civil rights, in particular:

…

(v) The right to own property alone as well as in association with others;

…

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

…

(vi) The right to equal participation in cultural activities;

...

(f) The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks."

[27] Sections 11-15 of the RDA make racial discrimination unlawful in various specified areas of public life: Access to places and facilities (s 11); Land, housing and other accommodation (s 12); Provision of goods and services (s 13); A right to join trade unions (s 14); Employment (s 15) and Advertisements (s 16). It is unlawful to incite the doing of acts which are unlawful (s 17). If an act is done for two or more reasons, one of which is based on racial discrimination, then the act is taken to be done for the reason of racial discrimination (s 18). A person is vicariously liable for the acts of their employee or agent unless they take all reasonable steps to prevent the employee or agent from doing the act (s 18A).

Do the impugned provisions offend s 10 of the Racial Discrimination Act?

(a) Police officer Alexander's evidence

[28] Before turning to the question whether the impugned provisions offend s 10, it is necessary to briefly refer to the evidence of police officer Ross Alexander upon which the appellants place considerable emphasis. His evidence was contained in a submission to the respondent in support of the appellant, the Aurukun Shire Council, maintaining its liquor licence. Police officer Alexander's evidence was to the following effect. The cancellation of the liquor licence would invoke a real risk to that appellant's community through "sly-grogging".[36] Since the Aurukun Alcohol Management Plan came into effect on 1 January 2003, the only area where alcohol could be legally consumed within the Aurukun Shire was at the tavern in respect of which the appellant, the Aurukun Shire Council, held the licence. The tavern ordinarily served only beer with an alcohol content of less than four per cent. Pre-mixed spirits were available only with meals. Take-away alcohol was prohibited. Anti-social behaviour and "sly-grogging" had decreased since the implementation of the alcohol management plan. The Queensland Police Service supported the appellant, the Aurukun Shire Council, in maintaining its liquor licence for the tavern because of the potential for community backlash and violence were the tavern to close. The tavern was no longer a direct contributor to community disturbances. The extension of tavern trading hours in Aurukun may actually assist in the reduction of "sly-grogging". If the tavern were closed, "sly grogging" would adversely increase with a related increase in anti-social behaviour. Police officer Alexander noted that:

> "members of the community have stated that they believe that they have the right to drink and are unhappy with the pending decision to remove the license."

(b) The applicable principles in identifying whether a right is within the scope of s 10

[29] Section 10 does not replicate any specific provision of the Convention. It should be construed in accordance with its clear terms, in its context within Pt II of the RDA in juxtaposition with the relevant provisions of the Convention, and consistent with binding case law.

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[36] The sale of liquor illegally, *The Macquarie Dictionary Online*.

[30] Unlike s 9, s 10 creates a general personal right, regardless of race, to enjoy all rights enjoyed by persons of another race. As Mason J (as he then was) explained in *Gerhardy v Brown*,[37] s 10:

> "… is expressed to operate where persons of a particular race, colour or origin *do not enjoy* a right that is enjoyed by persons of another race, colour or origin, or do not enjoy that right to the same extent. Some question as to the validity of s. 10 might be thought to arise because it fails to follow the language of Art. 2 of the Convention. The exclusion of persons of a race, colour or origin from the enjoyment of a relevant right by reason of a law does not necessarily involve 'racial discrimination' in that it may not amount to a distinction, exclusion, restriction or preference 'which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise' of the right 'on an equal footing'. Consequently, s. 10 should be read in the light of the Convention as a provision which is directed to lack of enjoyment of a right arising by reason of a law whose purpose or effect is to create racial discrimination." (original emphasis)

[31] More recently, in *Western Australia v Ward*, Gleeson CJ, Gaudron, Gummow and Hayne JJ cited with approval some of Mason J's observations set out in the preceding paragraph and noted:

> "In determining whether a law is in breach of s 10(1), it is necessary to bear in mind that the sub-section is directed at the enjoyment of a right; it does not require that the relevant law … makes a distinction based on race. Section 10(1) is directed at 'the practical operation and effect' of the impugned legislation and is 'concerned not merely with matters of form but with matters of substance'." (footnotes omitted).[38]

[32] Section 10(2) in its terms states that the reference in s 10(1) to "a right" includes those rights set out in Art 5 of the Convention. But, importantly, s 10(2) does not limit the operation of s 10(1) to those rights. Section 10 also includes the enjoyment of human rights such as those expressed in the United Nations Universal Declaration of Human Rights (which I shall call the Declaration): see *Gerhardy v Brown*.[39] This conclusion is consistent with the broad terms of the preamble to the Convention which specifically refer to the Declaration. It is also consistent with General Recommendation number 20: Non-Discriminatory Implementation of Rights and Freedoms of the Office of the High Commissioner for Human Rights 48th session 1996,[40] para 1 of which notes that:

> "1. Article 5 of the Convention contains the obligations of State Parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination. Note should be taken that the rights and

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37 (1985) 159 CLR 70, Mason J at 99.

38 (2002) 213 CLR 1 at 103. See also *Jango v Northern Territory* (2006) 152 FCR 150, Sackville J at 324.

39 (1985) 159 CLR 70, Mason J at 101.

40 Art 8 of the Convention provides for the establishment of a committee on the elimination of racial discrimination consisting of 18 experts elected by States Parties. The committee is required to report annually to the United Nations on its activities and may make suggestions and general recommendations: Art 9(2). Such general recommendations or comments have been cited in Australian case law, for example, *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, Kirby J at 603-605.

> freedoms mentioned in article 5 do not constitute an exhaustive list. At the head of these rights and freedoms are those deriving from the Charter of the United Nations and the Universal Declaration of Human Rights, as recalled in the preamble to the Convention. Most of these rights have been elaborated in the international covenants on human rights."

[33] The rights to be enjoyed under s 10 are not limited, however, to those in the Convention or the Declaration. In my view, they are capable of including those human rights set out in other international conventions to which Australia is a party, such as, but not limited to, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Declaration of the Rights of Indigenous People. Relevantly, Art 26 of ICCPR provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race … ."

[34] The Human Rights Committee, an expert committee established under Art 28 of ICCPR, has confirmed the breadth of the international human right to be free of discriminatory provisions in stating that Art 26's guarantee of equal protection requires that laws not be discriminatory in purpose or effect; Art 26 exists as a free standing right against discriminatory laws in "any field regulated and protected by public authorities".

[35] Australian courts have recognised the need to construe international obligations more liberally than domestic statutes, unconstrained by technical local rules or precedent: *Pilkington (Australia) Ltd v Minister for Justice and Customs*.[41] A human right is not necessarily a legal right enforceable under local or national law: *Mabo v Queensland*.[42] Courts should favour a construction of legislation enacted in accordance with international obligations consistent with those international obligations: *Plaintiff S157/2002 v Commonwealth*.[43] Courts should not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clear from unmistakeable and unambiguous language: *Plaintiff S157/2002 v Commonwealth*.[44] Mason J in *Gerhardy v Brown*[45] stated that s 10 requires courts to look to the purpose and effect of the impugned legislation rather than to concentrate on its provisions in isolation. The legislative intention stated in the second reading speech of the Racial Discrimination Bill[46] and the terms of the preambles to the RDA and to the Convention are in the widest of terms. For all these reasons, I accept HREOC's contention that this Court should take a broad approach in identifying whether a right is within the terms of s 10.

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41 (2002) 127 FCR 92 at 100 [26].

42 (1988) 166 CLR 186, Brennan, Toohey and Gaudron JJ at 217.

43 (2003) 211 CLR 476, Gleeson CJ at 492, [29].

44 (2003) 211 CLR 476 at 492 [30].

45 (1985) 159 CLR 70 at 101-103.

46 "The Bill will guarantee equality before the law without distinction as to race." Commonwealth, Parliamentary Debates, Senate, 15 April 1975, 999 (the Hon Mr J J McClelland, Minister for Manufacturing Industry).

(c) Can s 10 apply to the appellants which are local governments, not individuals?

[36] A preliminary issue in construing s 10 is whether the appellants as local governments can rely on and invoke s 10. The respondent contends they cannot.

[37] It is true that s 10(1) in its terms refers to a right belonging to "persons of a particular race" and the appellants as local governments are not persons in the ordinary sense of that word. Under s 36(1) of the *Local Government Act* 1993 (Qld), however, the appellants as local governments have "all the powers of an individual" and can sue in their own names. Further, under s 22(1)(a) of the *Acts Interpretation Act* 1901 (Cth):

> "… unless the contrary intention appears:-
>
> (a) expressions used to denote persons generally (such as 'person' …), include a body politic or corporate as well as an individual."

[38] Each appellant as a local government is plainly a "body politic". I do not accept the respondent's contention that the "contrary intention" referred to in the opening words of s 22(1)(a) of the *Acts Interpretation Act* is manifest in s 10(1). Such a conclusion is contrary to the broad approach that courts must take in construing s 10. Although the appellants may not be "persons of a particular race" in the ordinary sense of those words, they are the bodies politic for communities overwhelmingly comprising Indigenous people. Non-Indigenous people are restricted from residing in the appellants' shires. The elected councillors of the appellants are all Indigenous. The Indigenous nature of the appellants has an historical basis.[47] The appellants are local government councils with all Indigenous councillors representing almost entirely Indigenous constituents. Adopting the appropriately broad approach based on substance rather than form when interpreting international obligations and provisions like s 10 enacted in pursuance of them, I can see no reason to deny standing to the appellants to apply for declarations that the impugned provisions are invalid as offending s 10. This approach is consistent with *Koowarta v Bjelke-Petersen*:[48]

> "[Whilst] generally speaking, human rights are accorded to individuals, not to corporations, 'person' [need not] be confined to individuals. … the object of the Convention being to eliminate all forms of racial discrimination and the purpose of s 12 being to prohibit acts involving racial discrimination, there is a strong reason for giving the word its statutory sense so that the section applies to discrimination against a corporation by reason of the race … of any associate of that corporation."[49]

[39] It is also consistent with the approach taken in *Woomera Aboriginal Corporation v Edwards*[50] and in *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*.[51] It is consistent with the broadly stated purpose of the *RD Act* articulated in the preambles to both the RDA and the Convention, namely, to eliminate all forms of racial discrimination, not merely racial discrimination against individuals.

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47 See [1] of these reasons.
48 (1982) 153 CLR 168.
49 (1982) 153 CLR 168, Mason J at 236.
50 [1994] EOC 92-653.
51 (2007) 162 FCR 313 at 329-330 [46].

[40] The appellants have standing to apply for the declarations they seek on two bases. The first is on the basis that they do not enjoy, in their own capacity, a s 10 right to the same extent as the non-Indigenous. The second is on a representative basis: that their Indigenous constituents do not enjoy a right to the same extent as the non-Indigenous. The appellants are entitled as bodies politic to take a public interest role on behalf of their Indigenous constituents and to apply to the court to declare invalid, laws infringing s 10 of the RDA. Their representative role in pursuing the rights of their constituents appears especially prudent in light of a recent survey on racial discrimination which showed that 28 per cent of all Indigenous people had recently experienced some form of racial discrimination, but only 17 per cent of that 28 per cent made a complaint or sought legal advice or redress.[52]

(d) Do the impugned provisions compromise the enjoyment of a s 10 right or rights?

[41] The next step in determining these appeals is to identify any human right or human rights which arise under s 10 in the present circumstances. In undertaking this task, courts must focus on the impugned provisions and the impact they will have on "persons of a particular race". The appellants identify these rights as the rights to equal treatment before the law;[53] to own property;[54] to peaceful assembly and association;[55] to equal participation in cultural activities;[56] and of access to any place or service intended for use by the general public such as hotels.[57]

(i) The right to equal treatment before the law

[42] True it is that s 106(4) of the *Liquor Act* applies equally to all Queensland local governments, not just Indigenous local governments like the appellants. Nor do the impugned provisions stop the appellants' Indigenous constituents from leaving their communities to drink alcohol in licensed premises outside the appellants' shires in the same way as other Queenslanders. But in construing whether s 10 has application to the impugned provisions, I consider that courts must adopt a liberal construction of s 10 and look to the purpose and effect of the impugned legislation rather than taking a narrow legalistic approach by focusing on the impugned provisions in isolation. Otherwise, a cynical legislature through clever legal drafting might evade its obligations under the RDA to the detriment of unpopular racial minorities. This approach seems consistent with the legislative intent of the RDA discernible from its preamble and its scheme. It is clear from the explanatory notes to the amending Act introducing the impugned provisions that their purpose and effect is to impose a regime of alcohol regulation on Indigenous people residing in the appellants' shires, different from the regime of alcohol regulation applying to non-Indigenous Queenslanders residing outside the appellants' communities. As HREOC set out in its written submissions:

> "The practical operation and effect of the [impugned provisions] is that that limitation [on licensed premises within the appellants'

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52 Chris Cuneen, "Criminology, Criminal Justice and Indigenous People: A Dysfunctional Relationship?" The John Barry Memorial Lecture, University of Melbourne, 25 November 2008 at 329.

53 International Convention on the Elimination of All Forms of Racial Discrimination, Art 2(a).

54 International Convention on the Elimination of All Forms of Racial Discrimination, Art 2(d)(v).

55 International Convention on the Elimination of All Forms of Racial Discrimination, Art 2(d)(ix).

56 International Convention on the Elimination of All Forms of Racial Discrimination, Art 2(e)(vi).

57 International Convention on the Elimination of All Forms of Racial Discrimination, Art 2(f).

> communities] exists until such time as a new licence is granted. The limitation is a complete one and for an uncertain period of time."

[43] I consider that this racially discriminatory regime of alcohol regulation remains racially discriminatory even though it also has a socio-economic or geographical basis: cf s 18 of the RDA. It is not contended in these appeals that there is a human right or fundamental freedom to drink alcohol. As Keane JA demonstrates in his reasons, there are difficulties with such a proposition. But it is contended, rightly in my view, that there is a human right and fundamental freedom to enjoy equal treatment before the law, regardless of race. This right encompasses equal treatment before the law regulating the availability and service of alcohol in public. Indigenous Queenslanders residing in the appellants' shires are entitled under s 10 to enjoy the same treatment under the laws relating to the regulation of alcohol as non-Indigenous Queenslanders. The heading to and terms of s 10 state as much. The impugned provisions interfere with that right.

[44] In terms of Art 1(1) of the Convention which discusses the meaning of racial discrimination,[58] the impugned provisions make a "distinction [or] restriction based on race which has the … purpose and effect of … impairing the … enjoyment or exercise, on an equal footing, of" the human right of the appellants' constituents to the same regime of alcohol regulation as applies to non-Indigenous Queenslanders. Queensland's liquor licensing laws are part of Queensland's "organs administering justice" under the Convention, Art 5(a).[59] In terms of Art 26 ICCPR,[60] the impugned provisions stop the appellants' almost entirely Indigenous constituents from "being equal before the law" and from enjoying "effective protection against discrimination on any ground such as race".

[45] As HREOC submitted in its written submissions, this Court should:

> "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."

It follows that the primary judge was wrong in considering that, because the few non-Indigenous people visiting or residing within the appellants' shires would be subject to the same alcohol regulation as the appellants' Indigenous constituents, the impugned provisions were not racial discrimination. In my view, subject to the application of *Bropho v Western Australia*[61] which I shall discuss shortly,[62] the impugned provisions infringe s 10 in that the appellants' Indigenous constituents do not enjoy "the right to equal treatment before … all … organs administering justice",[63] and the right to be "equal before the law"[64] and to "effective protection against discrimination on any ground such as race"[65] to the same extent as non-Indigenous Queenslanders.

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58 See these reasons at [22].

59 Set out in these reasons at [26].

60 Set out in these reasons at [33].

61 (2008) 169 FCR 59.

62 See these reasons [59]-[65] and [70].

63 International Convention on the Elimination of All Forms of Racial Discrimination, Art 5(a).

64 International Covenant on Civil and Political Rights, Art 26.

65 International Covenant on Civil and Political Rights, Art 26.

(ii) The right to own property

[46] Another right identified in the Convention is the "right to own property alone as well as in association with others".[66] The Declaration also provides that: "No one shall be arbitrarily deprived of his property."[67] In identifying whether in these appeals this human right is within s 10, courts should adopt a broad approach, looking at the real effect of the impugned provisions. It is true that both non-Indigenous local governments, as well as Indigenous local governments like the appellants, cannot hold liquor licences under the *Liquor Act*. In this respect, the appellants are no different from other Queensland local governments. But the practical impact of the impugned provisions is to take away each appellant's liquor licence without direct compensation, not because either appellant had infringed the terms or conditions of the licence, but to prevent, at least for the time being, each appellant's Indigenous constituents from lawfully drinking alcohol in public within their communities. At the same time, appropriately qualified entities with a liquor licence in non-Indigenous communities who complied with the terms of their licence did not have it taken away without compensation.

[47] But is a liquor licence "property" within the terms of Art 5(d)(v) of the Convention? The term "property" is defined in s 36 of the *Acts Interpretation Act* 1954 (Qld) as meaning:

> "any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action."

[48] At common law there are competing arguments as to whether an interest, such as a liquor licence of the kind enjoyed by the appellants before the impugned provisions were enacted, is property. The common law concept of property is broad. It includes every type of right or claim recognised by law including any interest which is legally capable of ownership and which has a value. Interests that are less than ownership may be property. Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*[68] noted:

> "… Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."

[49] In determining whether an interest is property, there is no absolute or unqualified test capable of application in all circumstances: *Australian Capital Television Pty Ltd v The Commonwealth*;[69] *R v Toohey; Ex parte Meneling Station Pty Ltd*;[70] *St Vincent de Paul Society Qld v Ozcare Limited*.[71] The learned authors of *Principles of the Law of Trusts*[72] considered that a licence may be transferable (for the purpose of assisting its characterisation as property as discussed by Lord Wilberforce) if there is no

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66 International Convention on the Elimination of All Forms of Racial Discrimination, Art 5(d)(v).

67 United Nations Universal Declaration of Human Rights, Art 17(2).

68 [1965] AC 1175 at 1247-1248.

69 (1992) 177 CLR 106, Brennan J at 165-166.

70 (1982) 158 CLR 327, Mason J at 343.

71 [2009] QCA 335 at [36]-[38].

72 Ford & Lee, 3rd ed, 1995 at [4020]; cited with approval in *St Vincent de Paul Society Qld v Ozcare Limited* [2009] QCA 335 at [38].

prohibition on creating an equitable interest in it, even if there is a prohibition on the transfer of the legal title. This Court in *Sorrento Medical Service Pty Ltd v Chief Executive, Department of Main Roads*,[73] held that car parking rights arising from a contractual licence amounted to an interest in land entitling a compensation claim under the *Acquisition of Land Act* 1967 (Qld). In *Hewlett v Minister of Finance*,[74] in happier times when the independence of the Zimbabwean Supreme Court was not questioned, that court held that a liquor licence was "a valuable asset and may be regarded as property" which should not be taken by the government without compensation.

[50] It is common ground that the appellants did not receive any compensation for the withdrawal of their liquor licences. The explanatory notes recorded, however, that:

> "As part of the alcohol reforms, the Government has committed $14 million as revenue replacement over the next 4 years for canteen profits to the extent they have been used to provide social services. This is not direct compensation, but it is to ensure that there is no loss in services as a result of councils no longer having canteens as a source of revenue."[75]

[51] Adopting the broad approach appropriate in construing a provision like s 10, I consider that the appellants' liquor licences are property for the purposes of the Convention, the Declaration and s 10. The impugned provisions have deprived the appellants of that property without direct compensation. In my view, it follows that, but for the application of *Bropho* which I discuss later in these reasons,[76] the impugned provisions stop the appellants, as Indigenous bodies politic holders of liquor licences, from enjoying a right enjoyed by non-Indigenous holders of liquor licences not to be arbitrarily deprived of their property (their liquor licences) without compensation.

(iii) The right to freedom of peaceful assembly and association

[52] The appellants contend that the effect of the impugned provisions is to interfere with the right referred to in Art 5(d)(ix) of the Convention (the right to freedom of peaceful assembly and association).

[53] No matter how broad an approach is taken in construing that right, I am simply unable to see how, in the present circumstances, the effect of the impugned provisions is to interfere with the right of the appellants or their constituents to freedom of peaceful assembly and association. The impugned provisions do not stop any person or group of people from assembling and associating with another or others. This aspect of the appellants' contentions fails.

(iv) The right to equal participation in cultural activities

[54] The appellants contend that the impugned provisions interfere with the right of their Indigenous constituents to equal participation in cultural activities under Art 5(e)(vi) of the Convention. As I apprehend their submission, it is that their constituents have been deprived of the Australian custom of "going to the pub" and, by inference, the right to equal participation in cultural activities enjoyed by non-Indigenous Queenslanders.

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73 [2007] 2 Qd R 373. The High Court refused an application for special leave to appeal.

74 (1982) (1) SA 490 (ZS) 490 at 502.

75 Set out in these reasons at [7].

76 *Bropho v Western Australia* (2008) 169 FCR 59 at 76-79 [59]-[68].

[55] The term "culture" is relevantly defined in the Macquarie Dictionary as "1. *sociology* the sum total ways of living built by a group of human beings, which is transmitted from one generation to another". Judicial notice could be taken of the fact that the convivial and moderate consumption of alcohol in public, especially at times of celebration, has a centuries-long history in the Judeo-Christian and European social tradition. Many Queenslanders, whether or not Indigenous, presently share that tradition. But the appellants have called no evidence to establish that the right to drink alcohol in a licensed public place is an Australian, a Queensland or an Indigenous cultural activity. The paucity of evidence in the present appeals means that the appellants have not made out their contention that the impugned provisions deprive their Indigenous constituents from enjoying equal participation in cultural activities.

(v) The right of access to a service intended for use by the general public, such as hotels

[56] The appellants also contend that the effect of the impugned provisions is to interfere with their Indigenous constituents' right under Art 5(f) of the Convention of access to a service intended for use by the general public, such as hotels.

[57] The practical effect of the impugned provisions is to deny the appellants' constituents access to the service of liquor in licensed premises within their communities. This is a right ordinarily enjoyed by non-Indigenous Queenslanders. But for the impugned provisions, the appellants would have provided that service to their Indigenous constituents under their general liquor licence. It is clear from the explanatory notes and background material to the impugned provisions that the legislature enacted them intending them to affect only constituents of Indigenous communities like the appellants'. Dysfunctional, non-Indigenous communities with problems of alcohol-related violence were not included in this scheme of which the impugned provisions were part. It follows that the impugned provisions stopped the appellants' Indigenous constituents from enjoying a right enjoyed by non-Indigenous Queenslanders, namely, the right to the service of liquor in a public place within their communities.

[58] Subject to the application of *Bropho*, the appellants' contention that the impugned provisions stop their Indigenous constituents from enjoying the right described in Art 5(f) of the Convention when that right is enjoyed by non-Indigenous Queenslanders, is made out.

(e) The construction of s 10 taken in *Bropho*

[59] The construction of s 10 has been considered recently by the Full Federal Court in *Bropho*, a case with some features in common with the present appeals. Bella Bropho, an Indigenous woman resident and member of the Swan Valley Nyungah community, contended that the *Reserves (Reserve 43131) Act* 2003 (WA) interfered with the enjoyment and exercise of her human rights and fundamental freedoms under s 10, including the right to own property. Under the *Reserves Act* the appointed administrator could both prohibit the entry of Ms Bropho and others to the community where they had previously lived and also order residents to leave. The *Reserves Act* was the Western Australian legislature's response to concerns about sexual and other abuse of women and children on the reserve. The primary judge held that the *Reserves Act* did not breach s 9, s 10 or s 12 of the RDA. On appeal, the Full Federal Court[77] took a broad view of the right to own property under the Convention, Art 5(d)(v), and

[77] Ryan, Moore and Tamberlin JJ.

the Declaration, Art 17. The court held that, in context, the right to property should not be construed as analogous to forms of property inherited and adapted from the English system of property law or conferred by statute: *Western Australia v Ward*.[78] Property encompasses Indigenous forms of property holdings.[79] Their Honours continued:

> "… However, although the right to own property alone or in association with others is a customary rule of international law, the right to own property, like all rights, is not absolute in nature.
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> …
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> It has long been recognised in human rights jurisprudence that all rights in a democratic society must be balanced against other competing rights and values, and the precise content of the relevant right or freedom must accommodate legitimate laws of, and rights recognised by, the society in which the human right is said to arise.
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> …
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> The overwhelming evidence of the Gordon Inquiry and the Hooker Inquiry was that sexual and other forms of violence were pervasive at Reserve 43131 (findings to this effect were made by the primary judge) and, it is plain that the revocation of the 2002 management order was effected to obviate the risks to the safety and welfare of (particularly) women and children residing at Reserve 43131. On that basis, the act of the Western Australian Parliament revoking the 2002 management order would inform the content of the human right being asserted by [Ms Bropho]. That is, the right to occupy and manage the land conferred by statute was subject to the contingency that the right would be removed or modified if its removal or modification was necessary to protect vulnerable members of the community enjoying the right of occupation and management. We accept that it will always be a question of degree in determining the extent to which the content of a universal human right is modified or limited by legitimate laws and rights recognised in Australia. We also emphasise that these observations are not intended to imply that basic human rights protected by the RD Act can be compromised by laws which have an ostensible public purpose but which are, in truth, discriminatory. …
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> … To the extent that the rights in question (which were derived from a mix of statutory instruments) were property rights, such rights were not absolute in nature given the general recognition 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. It follows that any interference with the enjoyment of the right, provided that such interference is effected in accordance with the legitimate public interest (in this case to protect the safety and welfare of inhabitants at Reserve 43131), will not be inconsistent with s 10 of the RD Act. Indeed, although the authorities on s 10 of the RD Act recognise that there is no basis for distinguishing between different species of ownership of property, no property right, regardless of its source or genesis, is absolute in nature, and no invalid diminution of property

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78 (2002) 213 CLR 1 at 105.

79 *Bropho v Western Australia* (2008) 169 FCR 59 at 82-82 [77]-[79].

> rights occurs where the State acts in order to achieve a legitimate and non-discriminatory public goal."[80]

[60] Special leave to appeal to the High Court of Australia was refused,[81] French CJ and Kiefel J noting that:

> "This case involves the application of sections 9 and 10 of the *Racial Discrimination Act* to a statutory intervention into the management of a reserve occupied by an Aboriginal community in the interests of children on the reserve. In our opinion, the decision of the Full Court of the Federal Court dismissing a challenge to that intervention is not attended by sufficient doubt to warrant the grant of special leave."[82]

[61] The construction adopted in *Bropho* of balancing competing rights in determining whether s 10 is infringed does not immediately seem to marry with the ordinary meaning of the terms of s 10 in its context in Pt II of the RDA. The clear terms of Pt II envisage that, if a provision stops a person of a particular race from enjoying a right enjoyed by persons of another race, or from enjoying the right to a more limited extent than persons of another race, then s 10 has operation unless the provision is within the exceptions in s 8. *Bropho* places another layer in s 10 not apparent from the terms of Part II, at least in respect of property rights which are not absolute in nature. Property rights must be balanced against other competing human rights and are subject to legislative regulation with legitimate public interest and non-discriminatory public goals. *Bropho* requires courts, in construing whether, under s 10, the enjoyment of a property right has been diminished, to first determine whether the property right has been diminished to achieve a legitimate and non-discriminatory public goal. If so, then s 10 has no application and it is unnecessary to consider the exceptions referred to in s 8.

[62] Had I been determining this question before *Bropho*, I would not have construed s 10 in this way. In my view, the strong stand against any form of racial discrimination taken in the Convention and other international conventions, the scheme of the RDA and the approach taken by the High Court in *Gerhardy* all tend to favour the following approach in construing s 10. But for *Bropho,* I would have first determined under s 10 whether:

> "by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race … do not enjoy a right that is enjoyed by persons of another race … , or enjoy a right to a more limited extent than persons of another race".

If so, they "shall, by force of … s [10], enjoy that right to the same extent as persons of that other race" unless the provision amounts to "special measures" within the exceptions under s 8.

[63] It is desirable, however, that Australian intermediate appellate courts ordinarily construe legislation, especially Commonwealth legislation, in a uniform manner and not depart from decisions of intermediate appellate courts in another jurisdiction on the interpretation of Commonwealth legislation unless convinced that the interpretation is

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80 *Bropho v Western Australia* (2008) 169 FCR 59 at 82-84 [80]-[83].

81 *Bropho v State of Western Australia* [2009] HCATrans 170.

82 *Bropho v State of Western Australia* [2009] HCATrans 170 at 8.

plainly wrong: *Australian Securities Commission v Marlborough Gold Mines Ltd*[83] and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*.[84] But a court's role is ultimately to give effect to the intent of the legislature so that an intermediate appellate court will depart from the decision of another intermediate appellate court in construing Commonwealth and national uniform legislation where it is necessary in order to do this: *Neutral Bay Pty Ltd v DCT*.[85] With considerable reservations, I am not persuaded that the construction of s 10 taken in *Bropho* is so plainly wrong that this Court should not follow it in construing s 10 and deciding whether the impugned provisions infringe the appellants' enjoyment of the right to property under s 10.

[64] This means that, in deciding that question, this Court must take into account the legislature's legitimate public interest, clear from the relevant explanatory notes,[86] in protecting members of the appellants' communities, particularly women and children, from endemic alcohol-fuelled violence. The apparent need for such protection was supported by the Task Force Report and the Study.[87] Adopting the *Bropho* approach, the appellants' property rights in their liquor licences must be balanced against other competing rights and values, including the right to security of person and protection by the state against violence or bodily harm.[88] The Queensland government has not offered direct compensation to the appellants for the loss of their liquor licences, but it has made available to those councils affected by the impugned provisions, including the appellants, several million dollars over four years to ensure the continuity of community services previously funded from profits generated by the licensed premises.[89] The Queensland legislature, in enacting the impugned provisions which deprive the appellants of property rights, has sought to achieve a legitimate and non-discriminatory public goal, namely, the right to security of person and protection by the state of the appellants' constituents from alcohol-fuelled violence. It follows that the impugned provisions do not offend s 10 insofar as they stop the appellants from enjoying the right not to be arbitrarily deprived of property (a liquor licence).

[65] But should courts also undertake this balancing exercise between competing rights when the human right to which s 10 is said to apply is other than a property right? There is, after all, nothing remarkable in local, state or national legislatures removing property rights from those they govern, usually with adequate compensation, when to do so is for a legitimate public purpose.[90] I am extremely reluctant to extend that concept to the removal of other human rights which relate so closely to "the dignity and equality inherent in all human beings".[91] Nothing in the terms of s 10 or Pt II of the RDA favours this construction. Nor does the broad approach taken in identifying international human rights and in construing statutes like the RDA and the Convention. Extending the ratio of *Bropho* beyond property rights to balancing all competing human rights at the preliminary level of construing s 10 has some initial attraction. It

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83 (1993) 177 CLR 485, Mason CJ, Brennan, Dawson, Toohey, Gaudron JJ at 492.

84 (2007) 230 CLR 89, Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ at 151-152.

85 [2007] QCA 312, Keane JA at [73]-[75], Holmes and Muir JJA agreeing,.

86 Set out in these reasons at [7].

87 See these reasons [9]-[13].

88 International Convention on the Elimination of All Forms of Racial Discrimination, Art 5(b)).

89 Letter from the respondent to the solicitors acting for the Aurukun Shire Council, AB 159 and the extract from the relevant explanatory notes set out at [7] of these reasons and referred to again at [50].

90 See for example *Land Acquisition Act* 1989 (Cth); *Acquisition of Land Act* 1967 (Qld); *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193.

91 International Convention on the Elimination of All Forms of Racial Discrimination, preamble set out at [20].

may produce a more immediate result that accords with common sense and fairness. But the RDA protects against racial discrimination by specifically providing for that common sense and fairness to be applied at a secondary level under s 8. In my view, the better construction of s 10 and Pt II of the RDA is that, where a provision infringes the enjoyment of a human right under s 10 other than a property right, that provision will be invalid to the extent of the infringement, unless it is within the exceptions referred to in s 8. This construction favours an approach to human rights that makes legislators and those they govern conscious of human rights and the need not to infringe them. In particular, it makes absolutely clear to legislators and their constituents that legislation cannot be racially discriminatory unless it amounts to the exceptional special measures referred to in s 8 and explained in the Convention.

(f)The application of *Bropho* to s 10 in this case

(i) The enjoyment of the right to own property

[66] Adopting that construction of s 10, the impugned provisions have compromised the appellants' enjoyment of their right to not have their liquor licences, which they had not contravened, taken from them without direct compensation. This right is a property right which is not absolute in nature.

[67] The extracts from both the Task Force Report and the Study give support to the legitimacy of the policy rationale behind the impugned provisions which is clear from the explanatory notes.[92] There is no apparent cause for concern that the Queensland legislature enacted the impugned provisions other than in good faith, consistent with current, apparently sound, policy rationale and in accordance with the objects of the *Liquor Act*.[93] The role of the court in determining whether the impugned laws offend s 10 is not to decide whether the laws are the most appropriate to the political purpose, or even whether they will in fact achieve that purpose.[94] Significantly, the impugned provisions, in taking away the appellants' property rights, separate local government councils in Indigenous communities from profiting by the supply of liquor, a key recommendation of both the Task Force Report and the Study. Whilst not directly compensating the appellants for their loss of property, the legislature has provided significant funding to the appellants' communities to ensure the continuation of community services previously provided from the profits of the appellants' licensed premises.[95]

[68] It is relevant that the *Liquor Act* does not prohibit an appropriately qualified entity in either of the appellants' communities from applying for and obtaining a liquor licence. If and when the alcohol-related problems in the appellants' communities abate, and sufficient of their responsible members wish to have licensed premises in their shire, there is no legislative prohibition on a suitable entity obtaining a liquor licence, although it cannot be either appellant.

[69] The legislature enacted the impugned provisions in accordance with the legitimate public interest of protecting members of the appellants' communities, especially women, children and the vulnerable, from endemic alcohol-induced violence. Their human right to security of person and protection by the state[96] is far weightier than the

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92 At [7] of these reasons.

93 See *Liquor Act* 1992 (Qld), s 3(a), (b) and (e) and s 3A(4).

94 *Gerhardy v Brown* (1985) 159 CLR 70, Deane J at 149.

95 See fn 89.

96 International Convention on the Elimination of All Forms of Racial Discrimination, Art 5(b).

appellants' enjoyment of the right not to be arbitrarily deprived of property. Section 10 has no application to the appellants' property rights.

(ii) The enjoyment of the right to equal treatment before the law and of access to a service intended for use by the general public, such as hotels

[70] But the impugned provisions also diminish the enjoyment by the appellants' constituents of human rights other than property rights, namely, the rights to equal treatment before the law and of access to a service intended for use by the general public, such as hotels. The approach taken in *Bropho* to the enjoyment of property rights under s 10 is not apposite when considering the enjoyment of these non-proprietorial human rights under s 10. It follows that the impugned provisions are inconsistent with s 10 unless they fall within the exceptions as special measures under s 8.

(g) Conclusion on s 10

[71] The appellants, although local governments, are entitled to bring applications for declarations that the impugned provisions are inconsistent with s 10, both as to their own rights and on behalf of their constituents. A liquor licence is property for the purposes of Art 5(d)(v) of the Convention. The impugned provisions do not compromise the appellants' enjoyment of the right to own property as that right is not absolute in nature. The legislature enacted the impugned provisions for the legitimate public purpose of protecting vulnerable members of the appellants' communities from alcohol-related violence and to ensure their human right to security of person and protection by the state. Nor have the appellants established on the evidence that the impugned provisions compromise their Indigenous constituents' rights either to freedom of peaceful assembly and association, or to equal participation in cultural activities. The construction of s 10 taken in *Bropho* does not apply to a provision which compromises the enjoyment of a human right under s 10 other than a property right. The appellants have established that the impugned provisions compromise the enjoyment of their Indigenous constituents of the rights to equal treatment before the law; and of access to a service intended for use by the general public, such as hotels. It follows that the impugned provisions must be struck down under s 109 of the *Commonwealth Constitution* unless they come within the special measure exceptions to Pt II under s 8 of the RDA.

Are the impugned provisions special measures under s 8 of the Racial Discrimination Act?

[72] The relevant provisions pertaining to special measures in these appeals are contained in s 8(1) and Art 1(4) and Art 2(2) of the Convention.[97] Article 2(2) obliges States to take special measures to guarantee the full and equal enjoyment of human rights. A special measure is necessarily racially discriminatory in its operation but, under s 8(1) and Art 1(4), it is deemed not to be racial discrimination: see *Gerhardy*.[98] Broadly speaking, special measures in this context are distinctions, exclusions, restrictions and preferences based on race which deny formal equality before the law for the purpose of achieving effective and genuine equality by alleviating the conditions of a

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97 See these reasons at [19]-[23].

98 (1985) 159 CLR 70, Mason J at 96, 104; Wilson J at 112, 114; Brennan J (as he then was) at 130-132, 133; Deane J at 147-148; Dawson J at 156-157.

disadvantaged class.[99] They should be temporary measures which cease effect once "the objectives for which they were taken have been achieved".[100]

[73] Brennan J in *Gerhardy v Brown* identified that a special measure:

> "(1) confers a benefit on some or all members of a class, (2) the membership of which is based on race …, (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms."[101]

[74] Mason J[102] and Deane J[103] observed in *Gerhardy* that special measures invoking the exemption under s 8(1) must be capable of being reasonably considered to be appropriate and adapted to achieving the purpose of securing an objective of the kind described in Art 1(4) of the Convention.

[75] Subject to that consideration, it is essentially a political question for the legislature to determine whether a racial group or individuals need protection in order to ensure their equal enjoyment or exercise of human rights and fundamental freedoms.[104] If it is reasonably open to the legislature to make such a political assessment, a court will not interfere. But a court must not hesitate to strike down a law which amounts to a clearly manifested unauthorised exercise of power.[105]

[76] The respondent contends the impugned provisions, if they offend s 10, are special measures. The appellants contend the impugned provisions are not special measures for three reasons. First, they confer no concrete benefit on Indigenous people. Second, the appellants' communities did not give informed consent to the impugned provisions. Third, the impugned provisions are not appropriate and adapted to the purpose of securing the advancement of the Indigenous people in the appellants' communities.

(a) Do the impugned provisions confer a concrete benefit on the appellants' Indigenous constituents?

[77] As to the appellants' first contention, they rely on the evidence of police officer Alexander.[106] For legislative measures to be special measures and exempt from Pt II of the RDA under s 8, it is not necessary for the legislature to demonstrate that the special measures positively confer a concrete benefit on the appellants' Indigenous constituents. As the High Court identified in *Gerhardy*, the issue is whether it is reasonably open to the legislature to make such a political assessment. The extracts from the Task Force Report[107] and the Study[108] to which I have referred and upon which the legislature relied in enacting the impugned provisions amply demonstrate the

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99 *Gerhardy v Brown* (1985) 159 CLR 70, Brennan J at 131.

100 International Convention on the Elimination of All Forms of Racial Discrimination, Art 1(4).

101 (1985) 159 CLR 70 at 133.

102 *Gerhardy v Brown* (1985) 159 CLR 70 at 105.

103 *Gerhardy v Brown* (1985) 159 CLR 70 at 149.

104 *Gerhardy v Brown* (1985) 159 CLR 70, Brennan J at 137-138; Dawson J at 161-162.

105 *Gerhardy v Brown* (1985) 159 CLR 70, Brennan J at 139, 141; Dawson J at 161-162.

106 Set out at [28] of these reasons.

107 See [9] and [10] of these reasons.

108 See [11]-[13] of these reasons.

reasonableness of the legislature's political assessment, despite police officer Alexander's competing view. The appellants' first contention, that the impugned provisions so obviously confer no concrete benefit on Indigenous people that they are not special measures, must fail.

(b) Is it necessary for the appellants' communities to give informed consent to the impugned provisions?

[78] The appellants' second contention is that the impugned provisions are not special measures because the appellants' communities did not give informed consent to them. They rely on Brennan J's observations in *Gerhardy* highlighting the importance, in securing "advancement", of consulting with those for whom the special measure is being implemented:

> "The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them."[109]

[79] The respondent to these appeals expressed reservations about the correctness of this aspect of Brennan J's observations, relying on the following passage of the Full Federal Court in *Bropho*:

> "His Honour considered the dicta of Brennan J in *Gerhardy* 159 CLR 70 to the effect that the wishes of the intended beneficiaries are of great importance in determining whether a measure is to be characterised as a special measure. His Honour noted that the beneficiaries of the Reserves Act included a large number of adult women who disagreed with the measure. However, his Honour declined at [570] to place any weight on the dicta of Brennan J in *Gerhardy* 159 CLR 70, as it had no apparent judicial support and was not supported by the other judgments in that case or the general principles expressed in the case."

[80] It is important to note that the Full Federal Court in *Bropho* merely referred to, without endorsing, those observations of the primary judge. I consider there is considerable force in Brennan J's dicta.[110] There is also merit in HREOC's submissions that Brennan J's dicta is consistent with Art 1 ICCPR which provides:

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109 (1985) 159 CLR 70 at 135.

110 The desirability for consultation with the beneficiaries of the special measure was recently noted by James Anaya, the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People:

"Affirmative measures by the government to address the extreme disadvantage faced by indigenous peoples and issues of safety for children and women are not only justified, but they are in fact required under Australia's international human rights obligations. However, any such measure must be devised and carried out with due regard of the rights of indigenous peoples to self-determination and to be free from racial discrimination and indignity.

In this connection, any special measure that infringes on the basic rights of indigenous peoples must be narrowly tailored, proportional, and necessary to achieve legitimate objectives being pursued." (United Nations Commission for Human Rights, Statement of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (27 August 2009)).

> '1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.'

And Art 27 provides:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[81] Whilst Brennan J recognised that in many situations the wishes of the beneficiaries may be essential in determining whether a racially discriminatory enactment is a special measure, his Honour did not state that this must always be so. There will often be competing views within a group of intended beneficiaries as to whether proposed special measures are appropriate. Some of the intended beneficiaries may be unable to express an informed and genuinely free opinion as to the desirability of a special measure. In the present appeals, the legislature relied on the Task Force Report and the Study to inform its intent. Those documents were prepared after wide consultation within the communities, including with some of the intended beneficiaries. There is no evidence in these appeals that the impugned provisions conflict with the informed and free views of the majority of the intended beneficiaries of the impugned provisions.

[82] The material before this Court suggests that there is a strong body of informed support within the appellants' communities for the impugned provisions and the scheme of which they form part. The appellants' second contention, that the impugned provisions are not special measures as the appellants' communities did not give informed consent to them, is not made out.

(c) Are the impugned provisions appropriate and reasonably adapted to their purpose?

[83] The appellants' third contention is that the impugned provisions are not appropriate and adapted to their purpose of securing the advancement of the appellants' Indigenous constituents.

[84] The legislature plainly intended, in enacting the impugned provisions, to reduce alcohol-related violence through "finally divest[ing] councils [of their] general liquor licences".[111] It considered that there was no alternative method of achieving the policy

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[111] Explanatory notes, 6.

objectives other than by enacting the impugned provisions.[112] Although the Queensland government did not compensate the appellants for the removal of their general liquor licences, the relevant explanatory notes recorded:

> "[t]he divestment of canteens from local governments is a policy decision based on the inappropriateness of local government social services being reliant on the level of profit from a business whose purpose is to sell alcohol, particularly when alcohol-related harm is driving the need for those services.
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> …
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> As part of the alcohol reforms, the Government has committed $14 million as revenue replacement over the next 4 years for canteen profits to the extent that they have been used to provide social services. This is not direct compensation, but is to ensure that there is no loss in services as a result of councils no longer having canteens as a source of revenue."[113]

[85] Under Art 5 of the Convention, States Parties are obliged to guarantee without distinction as to race "the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual [or] group." The relevant explanatory notes made clear that the legislature's primary concern in enacting the impugned provisions was to lessen the level of alcohol-fuelled violence, especially against women and children in Indigenous communities including those under the appellants' administration.

[86] The explanatory notes also state that:

> "It is anticipated that, if in due course there is a sufficient decline in alcohol-related harms, restrictions can change, with an eventual goal of no restrictions, although it is acknowledged that this may take years rather than months."

[87] It is necessary to balance any competing human rights in determining the operation of s 8 in these appeals. On the one hand, some of the appellants' constituents understandably wish to be subject to the same regime of licensing laws as non-Indigenous Queenslanders and to drink alcohol in a licensed public place within their communities, socially and in moderation, as other Queenslanders are free to do. On the other hand, some of the appellants' constituents, many of whom are women, children and the vulnerable, wish or need to be protected from the ravages of alcohol-induced violence and have a "right to security of person and protection by the State against violence or bodily harm".[114] As the legislature has recognised, the latter right is unquestionably more compelling than the former.

[88] The impugned provisions confer a benefit on some or all members of a class, membership of which is based on race (the appellants' Indigenous constituents who are at risk from alcohol-induced violence). The sole purpose of the impugned provisions is to secure adequate advancement of the members of that class so that they may enjoy and exercise, equally with others, human rights and fundamental freedoms, namely, "the right to security of person and protection by the State against violence or bodily harm".[115] The circumstances referred to in the explanatory notes, independently supported by the Task Force Report and the Study, demonstrate that the protection

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112 Explanatory notes, 6.

113 Explanatory notes, 9.

114 International Convention on the Elimination of All Forms of Racial Discrimination, Art 5(b).

115 International Convention on the Elimination of All Forms of Racial Discrimination, Art 5(b).

given to the beneficiaries by the special measure enacted in the impugned provisions is necessary so that they may enjoy and exercise equally with others that human right and fundamental freedom: cf Brennan J's observations in *Gerhardy*.[116]

[89] The legislature has recognised that in enacting these special measures it must consult with those affected by them: cf Brennan J's observations in *Gerhardy*.[117] As in any community on any topical issue there will be competing views to be considered and balanced. The relevant explanatory notes suggest the legislature has genuinely attempted to legitimately tackle this difficult task. The impugned provisions have the potential to confer a real benefit on the appellants' Indigenous constituents, namely, better social cohesion and the protection of the vulnerable from alcohol-related violence. Neither the appellants nor their communities as a whole apparently gave formal consent to the impugned provisions before their enactment. But the legislature, before enacting the impugned provisions, consulted the appellants' communities and independent experts, through the Task Force and the Study, and in other ways. The state has a legitimate role in the proactive protection of vulnerable victims of alcohol-related violence who may be unable to give informed consent to special measures. The impugned provisions appear consistent with the recommendations of the Task Force Report and the Study and were prepared in consultation with members of the appellants' communities, many of whom supported the measures taken.

[90] The impugned provisions appear appropriate and adapted to their purpose of securing the advancement of the appellants' Indigenous constituents. The legislature in the explanatory notes has specifically referred to the need to allow for liquor licences in the appellants' communities, once the position has improved. Whilst not providing direct compensation for the appellants' loss of their general liquor licences, the legislature has provided for substantial funding over four years to ensure the continuity of community services previously funded from profits generated by the licensed premises.

[91] The appellants' third contention, that the impugned provisions are not appropriate and adapted to their purpose of securing the advancement of the appellants' Indigenous constituents, is not made out.

(d) Conclusion on s 8

[92] The impugned provisions were a special measure within s 8 and Art 1(4) of the Convention. They were enacted with the clear legislative intention of protecting the more vulnerable of the appellants' constituents from violence and bodily harm inflicted by others of their members when heavily intoxicated. The impugned provisions were part of a broader scheme to reduce alcohol-related harm within isolated Indigenous communities like the appellants'. Many members of the appellants' communities were responsible drinkers who will find the impugned provisions an offensive, racially discriminatory inconvenience. But before enacting them the legislature consulted widely, both within the appellants' communities and amongst experts.[118] The impugned provisions were an appropriate response to the various grave concerns raised in and the recommendations of the Task Force Report and the Study.

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116 (1985) 159 CLR 70 at 133.

117 (1985) 159 CLR 70 at 135, set out in these reasons at [73].

118 The members of the Task Force included representatives from the appellants' communities: see [9] of these reasons.

[93] The material before the primary judge and this Court does not establish that the impugned provisions were contrary to the views of the majority of the appellants' constituents. Even if there were such evidence, it would not necessarily be decisive. Great care must be taken when ascertaining the real needs of the most vulnerable: the children, victims of domestic violence, the weak, the elderly and the physically and mentally frail. The Task Force Report and the Study provide strong support for the legitimacy of the impugned provisions.

[94] Importantly, the impugned provisions do not prohibit a person or entity (other than the appellants) from holding, at some undefined future time, a liquor licence in the appellants' communities. But, consistent with the recommendations of the Task Force and the Study, the impugned provisions separate this function from the communities' local governments. Community schemes in the appellants' shires previously funded from the appellants' profits from their liquor licences will be funded by the government. The explanatory notes to the impugned provisions anticipate that, as soon as social conditions improve, a suitable entity in the appellants' communities will be able to again hold a liquor licence. If that does not happen, the impugned provisions could then cease to be a special measure. As Mason J observed in *Gerhardy*:

> "… 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."[119]

[95] I am satisfied the impugned provisions amount to a special measure within s 8 of the RDA and Art 1(4) and Art 2(2) of the Convention. It follows that s 10 of the RDA has no application to the impugned provisions and the appeals must be dismissed.

Summary

[96] The respondent sought leave to rely on affidavit material not before the primary judge, as to the possibility of what might happen in the future in respect of liquor licensing in the appellants' communities. The Court reserved its decision as to whether it would accept that material. As these appeals are being dismissed on a basis which does not require a consideration of that material, the respondent's application to adduce further evidence in these appeals should be refused.

[97] *Bropho* requires that, in deciding whether legislation compromises the enjoyment of a property right under s 10, it is first necessary to determine whether the legislature has diminished the property right to achieve a legitimate and non-discriminatory public goal. This approach does not apply in deciding whether a provision infringes s 10 by compromising the enjoyment of a human right other than a property right. The impugned provisions contravene s 10(1) of the RDA in that they stop the appellants' Indigenous constituents from enjoying the access enjoyed by non-Indigenous Queenslanders to "equal treatment before … organs administering justice", namely, the system of administration of liquor licensing laws. They also contravene s 10(1) in that they stop the appellants' Indigenous constituents, unlike non-Indigenous Queenslanders, from enjoying the lawful service of alcohol in a public area within their communities.[120]

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[119] (1985) 159 CLR 70 at 106.

[120] International Convention on the Elimination of All Forms of Racial Discrimination, Art 5(f).

[98] The impugned provisions are, however, special measures under s 8(1) of the RDA and Art 1(4) and 2(2) of the Convention so that s 10(1) does not apply to them. It follows that they do not offend Pt II of the RDA and s 109 of the *Commonwealth Constitution* has no application. The appeals must be dismissed.

Costs

[99] The appellants have been unsuccessful in these appeals as they were before the primary judge. The material before this Court does not set out the costs orders, if any, made at first instance. The respondent, in its outline of argument in these appeals, did not ask for its costs if it were successful. As the successful party in each appeal, the respondent would ordinarily be entitled to its costs of each appeal. These are, however, extraordinary appeals. The human rights legal issues they raise are of considerable public interest, and in a new and developing area of jurisprudence in Australia. The appellants, as Indigenous councils, were understandably concerned about the lawfulness of the impugned provisions. To some extent their decision to apply for declarations has been vindicated in that I have found the impugned provisions at a preliminary level offended s 10 of the RDA, although ultimately exempt under s 8. Many of the appellants' constituents and members of the broader community would expect the appellants to take a leadership role in testing the impugned provisions, both before the primary judge and at appellate level. For these reasons, my preliminary view is that it is appropriate that there be no order for costs in these appeals. If any party contends otherwise, I would give leave to make submissions as to the appropriate costs orders in accordance with para 37A of Supreme Court Practice Direction No 1 of 2005 (Court of Appeal).

Orders

1. Application to adduce further evidence refused.

2. Appeals dismissed.

[100] **KEANE JA:** The issue which arises for consideration in these appeals is whether s 10 of the *Racial Discrimination Act* 1975 (Cth) ("the RDA") denies legal effect to amendments made in 2008 to the *Liquor Act* 1992 (Qld). By those amendments, the general liquor licence held by each of the appellants was brought to an end on 1 July 2008, and the appellants, together with all other local government authorities in Queensland, were barred from applying for or holding such a licence.

[101] Each of the appellants is a local government authority constituted under the *Local Government Act* 1993 (Qld) for a local government area within Queensland.[121] Before

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[121] Section 6 of the *Local Government (Aboriginal Lands) Act* 1978 ("AL Act") declares the delineated area of Queensland as the Shire of Aurukun, which is a "local government area" and a "shire" within the meaning of the *Local Government Act* 1993 ("LG Act"). Section 3 provides for a lease of the whole of the land comprising the shire of Aurukun to be granted by the Governor in Council to the Council of the Shire of Aurukun on the terms set out in Schedule 1 of the AL Act. Section 9 of the AL Act provides:

> "… the Council of the Shire of Aurukun … shall be a local government within the meaning of the *Local Government Act 1993*, shall be deemed to be constituted under that Act and, subject to this Act, shall have the functions, powers, duties and obligations of a local government under that Act in respect of its area."

Section 10 of the AL Act expressly applies the LG Act to the local government area and shire declared to be the Shire of Aurukun, and to the council constituted for that shire and to the body

1 July 2008, each of the appellants held a general liquor licence under the *Liquor Act* whereby it was authorised to sell alcohol from premises within its local government area.

[102] The *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Act* 2008 (Qld) ("the amending Act") amended s 106 of the *Liquor Act* by the introduction of s 106(4) which is in the following terms:

> "(4) Also, a local government, corporatised corporation or relevant public sector entity may not apply for or hold a general licence."

[103] The amending Act also introduced into the *Liquor Act* certain transitional provisions. The effect of s 278 was to cause the general licences held by "a local government, corporatised corporation or relevant public sector entity, other than the Torres Strait Island Regional Council" to lapse at the beginning of 1 July 2008. The operation of s 278 was, by virtue of s 278(2) and s 279, subject to the decision of the Chief Executive, to continue the licence in force until 31 December 2008 but no later.

The proceedings at first instance

[104] The appellants commenced proceedings in which they challenged the efficacy of the amending Act to terminate their general licences. The appellants also sought judicial review of decisions by the Chief Executive in relation to the continuation of their licences, but the challenges to the decisions of the Chief Executive have now been subsumed in their challenge to the validity of the amending Act.

[105] Before the learned primary judge, the appellants argued that the amending Act was calculated to affect only "Indigenous councils". By "Indigenous councils" the appellants meant local authorities governing local government areas with mainly Indigenous residents. These local authorities were said to be the target of the amending Act because they were the only "local government, corporatised corporations or relevant public sector entities" in Queensland which in fact held general licences under the *Liquor Act* prior to the amending Act.

[106] The appellants argued at first instance that it is apparent that, as a matter of fact, they and their Indigenous constituents were the target of the amending Act. The learned primary judge accepted this contention, observing: "There can be no doubt that the trigger for the amending legislation was an attempt to minimise the harmful effects of alcohol abuse as had been observed in Aboriginal Council lands …"[122]

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corporate deemed to be that council. Section 12 of the AL Act provides that the Council of the Shire of Aurukun may be dissolved pursuant to s 146 of the LG Act "only after consultation between appropriate State and Commonwealth Ministers".

By virtue of s 70 of the *Local Government (Community Government Areas) Act* 2004 ("CGA Act") the Kowanyama Aboriginal Shire Council, which was formerly an Aboriginal council under the *Community Services (Aborigines) Act* 1984, continues in existence as a local government as defined in the LG Act. Section 11(1) of the CGA Act provides that the LG Act applies to "a community government area and the community government for the area". "Community government" is defined in the Dictionary to the CGA Act as the local government for a community government area, which is in turn defined as its local government area under the LG Act.

Therefore, both the Aurukun Shire Council and the Kowanyama Aboriginal Shire Council constitute local governments under the LG Act and, subject to their establishing statutes, are subject to that Act.

[122] *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2008] QSC 305 at [41].

[107] The appellants argued before the learned primary judge that s 10 of the RDA denies effect to the amending Act on the basis that its effect was racially discriminatory.

The decision of the learned primary judge

[108] The learned primary judge rejected the appellants' argument for two reasons. The first was that the amending Act treated all persons, of whatever race, alike. In this regard, his Honour said:[123]

> "The right which could not be enjoyed, either by the applicants or persons associated with it, seems to me to be simply that Aboriginal people at Aurukun upon the lapsing of the licence, would not have the opportunity to purchase alcohol at the tavern. The evidence shows that the tavern was frequented also by non-Aboriginal persons, particularly workers employed at a nearby mine site. They too would be denied that access to alcohol service. So the prohibition is effectively a blanket ban and does not result in a person of a particular race not being able to enjoy a right that is enjoyed by persons of another race."

[109] The second reason given by the learned primary judge for holding that s 10 of the RDA did not nullify the amending Act was that no "right" of the kind protected by s 10 of the RDA, that is to say, a "human right or fundamental freedom" of the kind referred to in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") was affected by the amending Act. In this regard, his Honour said:[124]

> "More significantly, I have difficulty in conceptionalising how this regulatory prohibition has anything to do with any of the specific rights identified in Article 5. There is no discrimination affecting freedom of assembly nor participation in cultural affairs. As mentioned above, denial of access to the tavern brought by the prohibition is the same as for the general public … [N]ot every human right is protected by the statute. As sections [sic] are limited to protecting those particular rights and freedoms with which the Convention is concerned …"

[110] Before one can discuss the contentions advanced on the appeal by way of challenge to his Honour's conclusions, it is necessary to set out the relevant provisions of the RDA and CERD which relate to the case advanced under s 10 of the RDA.

Section 10 of the Racial Discrimination Act

[111] It is desirable to set out both s 9 and s 10 because the differences in the terms of these provisions are important:

> "**9 Racial discrimination to be unlawful**
>
> (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental

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123 [2008] QSC 305 at [25].

124 [2008] QSC 305 at [26].

freedom in the political, economic, social, cultural or any other field of public life.

…

10 Rights to equality before the law

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that:

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

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

not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person."

[112] It is of fundamental importance to an understanding of s 10 of the RDA to appreciate the difference between the operation of s 9 of the RDA (and other provisions which operate in a way similar to s 9, such as s 12, s 13, s 14 and s 15) which proscribes racially discriminatory conduct by persons, and the operation of s 10 which nullifies differentiation in the operation of laws on the ground of race between persons. Section 9 proscribes acts of racial discrimination by persons which have the "purpose or effect of nullifying or impairing the … enjoyment … on an equal footing, of any human right or fundamental freedom". Section 10, on the other hand, operates where "persons of a particular race" do not enjoy a right that is enjoyed by persons of another race or do not enjoy that right to the same extent "by reason of a law" of a State or the Commonwealth. In such circumstances, the "persons of a

particular race" shall, by force of the operation of s 10 of the RDA, enjoy that right to the same extent as "persons of that other race".

[113] If the point were free from authority, there might have been something to be said for the view that the "rights" protected by s 10(1) of the RDA do not need to fall within "human rights" or "fundamental freedoms" of the kind protected by CERD and the RDA. Section 10(1) does not refer expressly to "human rights" or "fundamental freedoms": in this respect the terms of s 10(1) are in stark contrast to the terms of s 9. Further, s 10(2) shows that the rights referred to in s 10(1) "include", and so are not limited to, rights of a kind referred to in Article 5 of CERD.[125]

[114] It might have been thought that there was no need for s 10 to specify the kinds of rights which it protects because its function is to ensure that, whatever rights of whatever kind and however derived are enjoyed by persons, no law of a State or the Commonwealth may have effect to allow a difference in the enjoyment of those rights on the ground of racial difference.[126] On this view, s 10(1) could be understood as securing, in the most comprehensive way, equality before the law for people of all races, thus giving direct effect to Article 2 of CERD the terms of which I set out below. But that is not the view which has been taken.

[115] In *Gerhardy v Brown*[127] and *Mabo v Queensland*,[128] it was established that s 10 protects human rights and fundamental freedoms of the kind described in CERD. In *Gerhardy v Brown*,[129] Mason J said:

> "What then are the other rights, if any, to which s 10(1) relates? The answer is the human rights and fundamental freedoms with which the Convention is concerned, the rights enumerated in Art 5 being particular instances of those rights and freedoms, without necessarily constituting a comprehensive statement of them."

[116] It was common ground between the parties that this view continues to prevail, but the appellants and the Australian Human Rights Commission ("AHRC") (formerly the Human Rights and Equal Opportunity Commission ("HREOC")), which was given leave to appear in this Court as *amicus curiae*, are at pains to insist that CERD does not contain an exhaustive list of the "rights" protected by s 10 of the RDA. They argue that s 10 of the RDA protects human rights and fundamental freedoms of the kind

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125 In *YZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395, at 398, McTiernan J, with whom Kitto, Taylor, and Windeyer JJ concurred, endorsed the approach of Lord Watson in *Dilworth v Commissioner of Stamps* [1899] AC 99, where his Lordship said:

> "The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions ([1899] AC 99 at 105 -106)."

126 Cf *Western Australia v Ward* (2002) 213 CLR 1 at 99 – 100 [106] – [107]; *Vanstone v Clarke* (2005) 147 FCR 299 at 353 [203].

127 (1985) 159 CLR 70 at 86, 125 – 126.

128 (1988) 166 CLR 186 at 198, 216, 229.

129 (1985) 159 CLR 70 at 101.

referred to in CERD. This argument must be accepted on the authorities. It is convenient now to refer to the relevant terms of CERD.

Convention on the Elimination of All Forms of Racial Discrimination

[117] The RDA is intended to give effect to Australia's obligations under CERD,[130] the terms of which are set out as a schedule to the RDA.

[118] Article 1(1) of CERD defines "racial discrimination" in the following terms:

> "[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

[119] Article 2 of CERD requires Australia to take effective measures "to … nullify any laws … which have the effect of creating or perpetuating racial discrimination wherever it exists."

[120] Article 5 of CERD is introduced by the following words:

> "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake 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 …"

[121] Article 5 then goes on to refer in general terms to, inter alia, political rights, economic, social and cultural rights, and the right of access to any place or service intended for use by the general public such as hotels. It provides, relevantly, as follows:

> "(a) The right to equal treatment before the tribunals and all other organs administering justice;
>
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group, or institution;
>
> …
>
> (d) Other civil rights, in particular:
>
> (i) The right to freedom of movement and residence within the border of the State;
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> …
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> (v) The right to own property alone as well as in association with others;
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> …
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> (ix) The right to freedom of peaceful assembly and association;
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> (e) Economic, social and cultural rights, in particular:
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> …
>
> (vi) The right to equal participation in cultural activities;

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130 *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 362 [19].

(f) The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks."

The arguments of the parties

[122] Mr Campbell SC, who appeared with Mr Del Villar of counsel, on behalf of the appellants, argues that the learned primary judge erred in treating as decisive a comparison of the effect of the amending Act upon Indigenous and non-Indigenous people within Aurukun or Kowanyama: such a comparison was erroneous because it was too narrow, and concerned with the form rather than the effect of the amending Act. The appellants point out that the learned primary judge accepted that the amending Act was aimed explicitly at the sale by the appellants of alcohol to Indigenous residents of their local government areas. The appellants also argue that while s 106(4) of the *Liquor Act* as amended by the amending Act is perfectly general in its application to all local governments, the undisputed fact is that the only local governments which actually held licences under the *Liquor Act* to sell alcohol were councils such as the appellants, which constituted the local government authorities for areas where the resident population was entirely, or almost entirely, Indigenous. Accordingly, so it is said, the effect of the amending Act was relevantly to differentiate on racial grounds between the residents of these Indigenous communities and the residents of local government areas in the rest of the State.

[123] The appellants say that the circumstance that the reason for the enactment of this legislation was a concern by the Queensland Parliament to attempt to reduce the social harm caused by alcohol in these small communities is not a sufficient basis to displace the operation of s 10 of the RDA. The appellants argue that the amending Act is not a reasonably adapted and proportionate attempt to address the social problems resulting from alcohol consumption in these Indigenous communities. In this regard, particular reliance is placed upon two points. First, it is pointed out that third parties are at liberty to apply for licences under the *Liquor Act* in the appellants' local government areas. Secondly, there is evidence from a local police officer at Aurukun to the effect that the problem of sly-grogging was likely to be exacerbated by the removal of the Aurukun Council's licence. Accordingly, the social problem of alcohol-fuelled violence at which the amending Act was directed was unlikely to be ameliorated by it.

[124] Ms Eastman of counsel made submissions on behalf of the AHRC which was given leave to appeal as *amicus curiae*. Ms Eastman's submissions were largely concerned with the proper approach to the resolution of the issues which arise rather than with the actual resolution of those issues. In this regard, Ms Eastman directed the Court to the approach of the Full Court of the Federal Court to similar issues in *Bropho v Western Australia*.[131] Ms Eastman also argued for a broad view of the rights said to be protected by s 10 of the RDA. Indeed, as will be seen, Ms Eastman argued for a broader view of those rights than Mr Campbell.

[125] Mr Hinson SC, who appeared with Mr Plunkett of counsel for the respondent, argued that the RDA and CERD afford no protection to a right the practical content of which consists of the opportunity to have access to and use a facility provided by the local government authority for the legal supply of alcohol. Further, the amending Act operates generally to deny to all local government authorities in Queensland the

131 (2008) 169 FCR 59.

possibility of holding a liquor licence: the amending Act does not differentiate between residents of local government areas in any way much less on the ground of race. Accordingly, s 10 of the RDA is not engaged.

[126] As to a right of the breadth ultimately propounded by Ms Eastman, viz the opportunity to have access to and use a local facility for the supply of alcohol, Mr Hinson argues that such a right is also not a right of the kind protected by the RDA and CERD. Further, it is not by reason of the amending Act that the residents of the appellants' local government areas do not enjoy the opportunity lawfully to acquire alcohol locally to the same extent as other Queenslanders. Rather, it is by reason of the fact of the (perhaps temporary) absence of other licensees in Aurukun and Kowanyama. That state of affairs is not a consequence of the amending Act.

[127] Mr Hinson also argues that s 10 of the RDA is not engaged by a legislative measure which strikes a balance between the rights for which the appellant contends and other countervailing rights, such as the right referred to in Article 5(b) of CERD.

[128] Finally, Mr Hinson argues that the amending Act is justifiable as a special measure under s 8 of the RDA. The balance struck by the amending Act is not so unreasonable as to deny the application of s 8 of the RDA.

The learned primary judge's comparison

[129] There is force in Mr Campbell's argument that the comparison involved in the first of the learned primary judge's grounds for decision was not that required or authorised by s 10 of the RDA.

[130] In *Western Australia v Ward*,[132] Gleeson CJ, Gaudron, Gummow and Hayne JJ explained a number of relevant aspects of the operation of s 10(1) of the RDA. Their Honours said:[133]

> "… First, the sub-section does not use the word 'discriminatory' or cognate expressions. Yet these terms are used throughout the authorities in which s 10(1) has been considered. **That to which the sub-section in terms is directed is the *enjoyment* of rights by some but not by others or to a more limited extent by others**; there is an unequal enjoyment of rights that are or should be conferred irrespective of race, colour or national or ethnic origin. 'Enjoyment' of rights directs attention to much more than what might be thought to be the purpose of the law in question. Given the terms of the Convention which the RDA implements (the International Convention on the Elimination of all Forms of Racial Discrimination) that is not surprising. The Convention's definition of racial discrimination refers to any distinction, exclusion, restriction or preference based (among other things) on race which has the purpose *or effect* of nullifying or impairing (again among other things) the enjoyment of certain rights. Further, the basic obligations undertaken by States party to the Convention include taking effective measures to nullify laws which have *the effect* of creating or perpetuating racial discrimination (Art 2, s 1(c)). **It is therefore wrong to confine the relevant operation of the RDA to laws**

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132 (2002) 213 CLR 1.

133 (2002) 213 CLR 1 at 99 [105] (citation footnoted in original).

> **whose purpose can be identified as discriminatory** (cf *Waters v Public Transport Corporation* (1991) 173 CLR 349)." (emphasis added)

[131] In *Bropho v Western Australia*,[134] the Full Court of the Federal Court of Australia said:[135]

> "In general terms, s 10(1) of the RD Act is engaged where there is unequal enjoyment of rights between racial or ethnic groups: see *Western Australia v Ward* (2002) 213 CLR 1. **Section 10(1) does not require the Court to ascertain whether the cessation of rights is by reason of race, with the clear words of s 10 demonstrating that the inquiry is whether the cessation of rights is 'by reason of' of the legislation under challenge.** Further, s 10 operates, not merely on the intention, purpose or form of legislation but also on the practical operation and effect of legislation (*Gerhardy* 159 CLR at 99; *Mabo v Queensland* (1988) 166 CLR 186 at 230–231; *Western Australia v Ward* 213 CLR at 103)." (emphasis added)

[132] In addition to the factual trigger adverted to by the learned primary judge, the Explanatory Notes to the Bill for the amending Act make it plain that the immediate target of the amending Act were the licences held by local government authorities like the appellants whose residents were Aboriginal people. Non-Indigenous people who might, unusually, seek to buy alcohol at a canteen in one of these local government areas would only be incidentally affected by the closing of the appellants' canteens. It may, I think, be accepted that the comparison undertaken by the learned primary judge was not in conformity with the settled understanding as to the operation of s 10 of the RDA so that this ground of his Honour's reasons is not able to be sustained. On the other hand, for the reasons which I set out below, I consider that his Honour was correct to conclude that the amending Act is not concerned with rights of the kind protected by s 10 of the RDA.

What "rights" are affected?

[133] As to the second ground of the decision below, the appellants argue that his Honour failed to appreciate that the amending Act has the "purpose or effect of limiting the enjoyment of at least four rights of Aboriginal people in terms of CERD and the RDA". These rights are said to be:

> "(a) the right to equal protection of the laws without discrimination;
> (b) the right to equal participation in cultural activities;
> (c) the right to access places and services used or intended for use by the general public; and
> (d) the right not to be arbitrarily deprived of property."

[134] According to the appellants, s 10 of the RDA operates to prevent the amending Act having the effect of adversely affecting Indigenous persons resident in their local government areas in their enjoyment of these rights. In terms of the rights referred to in (a), (b) and (c) of the preceding paragraph, the appellants argue in their written submissions that:

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134 (2008) 169 FCR 59.

135 (2008) 169 FCR 59 at 80 [73].

(a) the amending Act singles out members of the Indigenous communities in these local government areas as people who may no longer drink under supervision in a tavern;

(b) it restricts the ability of local residents "to participate in the very Australian custom of going to the pub" because alternative sources of licensed alcohol supplies are not readily available in these isolated communities at least in the short term; and

(c) it curtails the rights of Indigenous residents to have access to a place intended to supply a service to the general public.

[135] The appellants' argument in relation to the right referred to in sub-paragraph [133](d) rests upon the notion that the appellants as legal "persons" enjoy the right not to be arbitrarily deprived of their property in the licences held by them under the *Liquor Act*. This right is said to be supported by Article 5(d)(v) of CERD. It is also said to be supported by Article 17 of the Universal Declaration of Human Rights ("UDHR").

[136] In applying s 10 of the RDA one must first determine whether the right said to engage s 10 of the RDA is, by virtue of its content, a manifestation of a right referred to in CERD or of a right akin to that right. In *Gerhardy v Brown*,[136] Mason J said:

> "In deciding whether the right [conferred by the State law there in question] is a human right or fundamental freedom we encounter the ever present problem of defining or describing the concept of human rights. The expression 'human rights' is commonly used to denote the claim of each and every person to the enjoyment of rights and freedoms generally acknowledged as fundamental to his or her existence as a human being and as a free individual in society. The expression includes claims of individuals as members of a racial or ethnic group to equal treatment of the members of that group in common with other persons and to the protection and preservation of the cultural and spiritual heritage of that group. As a concept, human rights and fundamental freedoms are fundamentally different from specific or special rights in our domestic law which are enforceable by action in the courts against other individuals or against the State, the content of which is more precisely defined and understood. The primary difficulty is that of ascertaining the precise content of the relevant right or freedom. This is not a matter with which the Convention concerns itself."

[137] As Mason J said in giving effect to the RDA and CERD "[t]he primary difficulty is that of ascertaining the precise content of the relevant right or freedom."[137] While "there may be no universal or even general agreement on the content of [a] right", it remains necessary for the court to come to grips with the "precise content of the relevant right or freedom" in order to determine whether it is such as to engage s 10 of the RDA.

[138] The amending Act abolishes the function of local governments as licensed suppliers of alcohol. It may be accepted that the legislative removal of the supply of alcohol from the functions of local government in Queensland will have the effect of restricting the local availability of alcohol in the appellants' communities – at least for so long as other licensed suppliers of alcohol do not seek to meet local demand for alcohol. One

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136 (1985) 159 CLR 70 at 101 – 102.

137 (1985) 159 CLR 70 at 102.

may accept as well that no narrow approach should be taken to applying s 10 of the RDA or to the identification of the rights equal enjoyment of which it seeks to guarantee. But to say these things is not to demonstrate that s 10 of the RDA is engaged to preserve the functions of the appellants as local governments licensed to supply alcohol against the operation of the amending Act. There are, broadly speaking, two reasons why this is so. First, the amending Act operates, as a matter of form and substance, throughout Queensland. The effect of the amending Act is that no-one in Queensland has a right to obtain alcohol from one's local government. Section 10 of the RDA operates by ensuring that a provision of a State law which denies a right which is available to people of one race but not to people of another does not have that effect: people of both races enjoy the right equally by virtue of the operation of s 10 of the RDA and s 109 of the *Commonwealth Constitution.* The amending Act simply does not engage the operation of s 10 of the RDA. The operation of s 10 was explained in *Western Australia v Ward* by Gleeson CJ, Gaudron, Gummow and Hayne JJ. Their Honours said:[138]

> "… [O]n its face, s 10(1) operates by force of federal law to extend the enjoyment of rights enjoyed under another federal law or a Territory or State law … [A]s Mason J pointed out in *Gerhardy*, different considerations arise in two kinds of case. His Honour said (*Gerhardy* (1985) 159 CLR 70 at 98):
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> > 'If racial discrimination arises under or by virtue of State law because the relevant State law merely omits to make enjoyment of the right universal, ie by failing to confer it on persons of a particular race, then s 10 operates to confer that right on persons of that particular race. In this situation the section proceeds on the footing that the right which it confers is complementary to the right created by the State law. Because it exhibits no intention to occupy the field occupied by the positive provisions of State law to the exclusion of that law the provisions of the State law remain unaffected.'
>
> This may be contrasted with the case where the State law in question imposes a discriminatory burden or prohibition. As Mason J said in *Gerhardy* ((1985) 159 CLR 70 at 98-99):
>
> > 'When racial discrimination proceeds from a prohibition in a State law directed to persons of a particular race, forbidding them from enjoying a human right or fundamental freedom enjoyed by persons of another race, by virtue of that State law, s 10 confers a right on the persons prohibited by State law to enjoy the human right or fundamental freedom enjoyed by persons of that other race. This necessarily results in an inconsistency between s 10 and the prohibition contained in the State law.'
>
> …"

[139] Secondly, as is clear from the decisions of the High Court in *Gerhardy v Brown,*[139] *Mabo v Queensland*[140] and *Western Australia v Ward,*[141] the application of s 10

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138 (2002) 213 CLR 1 at 99 – 100 [106] – [107] (citations footnoted in original).

139 (1985) 159 CLR 70 at 86, 125 – 126.

requires the identification of a right enumerated in Article 5 of CERD or a right of that kind as expressly contemplated by s 10(2) of the RDA. Once such a right has been identified, s 10 of the RDA operates to ensure that it is enjoyed equally by all persons regardless of race. In this way s 10 of the RDA creates, as its heading suggests, "Rights to equality before the law". Section 10 of the RDA is thus the Australian legislative statement of "The right to equal treatment before … all … organs administering justice" referred to in Article 5(a) of CERD, and the rights to be "equal before the law" and to "effective protection against discrimination on any ground such as race" referred to in Article 26 of the ICCPR. Section 10 of the RDA is the statement as to how under Australian law the right of equal protection before the law is to be vindicated. That vindication requires the identification of a right in respect of which equal enjoyment is denied "by reason of … a law".

[140] It is not a sufficient statement of the content of the right protected by s 10 of the RDA to say that there is a human right and fundamental freedom to enjoy equal treatment before the law, regardless of race. To say that is simply to assert the general effect of s 10 of the RDA without engaging in the analysis which s 10 of the RDA, as it has been expounded by the High Court, requires in order to determine whether s 10 equalises the enjoyment of the right conferred by some other law. To say that the amending Act denies Indigenous Queenslanders residing in the appellants' communities the same rights under the law relating to the regulation of alcohol as non-Indigenous Queenslanders is to fail to recognise that the amending Act operates in precisely the same terms throughout Queensland. If the amending Act engages s 10 of the RDA to preserve the appellants' entitlement to sell alcohol that can only be because s 10 of the RDA is to be understood as operating to ensure equality of advantage to all persons wherever resident in Queensland, however different the applicable facts of economy and geography may be. As I will explain in due course, I do not consider that s 10 of the RDA operates according to that understanding.

[141] In order to clarify the issues for decision by this Court, one may summarise here what does **not** arise for decision in this case. This case does **not** give rise to any question about what might be described simply as an individual's "right to have a drink". Under the laws of Queensland all adults, of whatever race, are at liberty to drink alcohol. Indigenous persons are also at liberty, equally with adult Queenslanders of other races, to buy alcohol from licensed premises. It may also be accepted that these liberties are aptly described as rights for the purposes of s 10 of the RDA.[142] No party argues that the amending Act operates to deny these liberties to Indigenous persons. Such an argument could not be maintained: the amending Act, neither alone nor in combination with other legislation, provides that Indigenous persons in Queensland may not purchase or consume alcohol. The appellants do not put such an argument. It must be borne in mind here that the appellants' interest is in seeking to preserve their entitlement to sell alcohol as organs of local government. For that reason the right which the appellants propound, as the right to which s 10 of the RDA assures equal enjoyment to their local residents, is the right to acquire alcohol from one's local government.

[142] It was also not argued by any party that the general prohibition in the *Liquor Act* on the unlicensed sale of alcohol in Queensland was apt, by itself or in combination with the

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140 (1988) 166 CLR 186 at 198, 216, 229.

141 (2002) 213 CLR 1 at 99 – 100 [106] – [107].

142 Cf *York v The Queen* (2005) 225 CLR 466 at 473 [22].

amending Act, to engage the operation of s 10 of the RDA so as to render lawful unlicensed sales of alcohol in the appellants' local government areas. To the extent that the *Liquor Act* denies the liberty of an individual to buy a drink from an unlicensed supplier, it operates generally throughout Queensland without regard to race. No party sought to argue that s 10 of the RDA would be engaged by the general statutory prohibition throughout the State on unlicensed sales of alcohol simply because some communities within the State are too remote or economically disadvantaged to attract licensed suppliers of alcohol. If one were to argue that the amending Act engages the operation of s 10 of the RDA because the amending Act has the effect of removing from residents of the appellants' local communities the possibility of obtaining supplies of alcohol locally which was available under the law prior to the amending Act, that argument might be met by the answer that, to the extent that the pre-existing law made provision peculiar to Indigenous local authorities in an endeavour to ameliorate the geographic and economic disadvantages peculiar to those Indigenous communities, the pre-existing law itself could be reconciled with the RDA only on the basis that it was a "special measure" under the RDA; and if the pre-existing law was a "special measure", the decision of the High Court in *Kartinyeri v The Commonwealth of Australia* suggests that the RDA would not stand in the way of the legislature repealing a special measure which it has previously enacted – "what the Parliament may enact it may repeal".[143]

[143] Mr Campbell argued in his oral submissions that the content of the right manifest in the Article 5 rights said to be protected by s 10 of the RDA is the opportunity to have access to, and use, a facility provided by the local government authority to residents for the supply of alcohol. Mr Hinson argued that there is no support in authority, or in CERD, or in any of the conventions to which the Court was referred, for the view that an opportunity of that description is regarded as a human right or fundamental freedom of the kind which engages s 10 of the RDA.

[144] Mr Campbell eschewed a wider formulation of the content of the right relevant for the purposes of s 10 of the RDA, viz the opportunity to have access to, and use a facility for, the local supply of alcohol. Ms Eastman propounded, in her written submissions, the formulation which Mr Campbell eschewed. Mr Campbell accepted and, for the purposes of his "reasonable proportionality" argument, made a point of the circumstance that third parties are, and have been, at liberty to apply for and take up licences to sell alcohol within the local government areas in question. Mr Campbell's point was that the amending Act was not apt to prevent access by local residents to the supply of alcohol because nothing in the *Liquor Act* or the amending Act prevents third parties from seeking and obtaining a licence to sell alcohol.

[145] Mr Hinson argued that, because nothing in the amending Act or the *Liquor Act* prevents third parties from obtaining licences in Aurukun and Kowanyama, a right, whether expressed in the terms urged by Mr Campbell or Ms Eastman, was not enjoyed differently by residents of the appellants' local government areas and residents of other local government areas in the State "by reason of" the amending Act.

[146] I turn now to discuss the specific rights said by the appellants to be affected by the amending Act. I shall discuss the individual rights asserted by the appellants, leaving for later consideration the argument based on the appellants' rights of property in their licences.

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143 (1998) 195 CLR 337 at 376 [72]. See also at 356 – 357 [15], 370 [49], 379 [84].

[147] The "right to equal protection of the laws without discrimination" asserted in the appellants' formulation in sub-paragraph [133](a) above is not a right referred to in Article 5 of CERD. It is a right mentioned in Article 26 of the International Covenant on Civil and Political Rights ("ICCPR"); but in the present context it is simply a paraphrase of the purpose of s 10 of the RDA. As I have said, to assert this "right" is not to identify the content of the right said to be protected by s 10 of the RDA. To rely upon the purpose and effect of s 10 of the RDA as itself the "right" protected by it is to fail altogether to address the need to identify the content of the "right" protected by s 10 of the RDA.

[148] In my respectful opinion, however broad a view one takes of the sources which might instruct the Court as to the content of human rights and fundamental freedoms of the kind referred to in CERD, the opportunity to have access to a licensed source of alcohol supply provided by local government as suggested by Mr Campbell has not been recognised as such a human right or fundamental freedom.

[149] Similarly, the "right lawfully to buy alcohol" urged by Ms Eastman in her written submissions is not encompassed in the list of rights in Article 5 of CERD. It may be accepted that the list in Article 5 of CERD is not exhaustive, and that one should not take a narrow view of the extent of the rights protected by CERD and the RDA. In this field of discourse one is not "engaged in an exercise in analytical jurisprudence, or with the classification, expressed in terms of correlatives and opposites, that delights and attracts both disciples and critics to Hohfeld".[144] That having been said, the "rights" conferred in Article 5 of CERD go nowhere near propounding a "right to buy alcohol locally".

[150] The "right of access" referred to in Article 5(f) of CERD, upon which the appellants placed particular reliance, is expressed in terms which assume the existence of various kinds of facilities which are generally available to the public. Article 5(f) seeks to ensure that such facilities are made equally available to persons of all races, but it does not oblige the States Parties to CERD to take action to procure the establishment of such facilities in order to ensure that all residents of the State, wherever they may be resident, enjoy the same living conditions.

[151] The appellants cast their net wider than Article 5 of CERD and seek to assert rights "of the kind" referred to in Article 5 of CERD. That having been said, even if one is prepared to take an expansive view of the scope of human rights and fundamental freedoms, and is willing to have recourse to international instruments such as the UDHR and the ICCPR as well as CERD, one looks in vain for an expression of an international consensus that the opportunity to acquire alcohol from an arm of government, or even to have local sources of alcohol lawfully available, has been recognised as a species of fundamental freedom or human right. In many human communities the selling and consumption of alcohol is not permitted by law. Where a system of liquor licensing exists, a liquor licence is a statutory right which of its nature is apt to be qualified, modified or removed by statute. In many human communities the idea of a statutory licence to sell alcohol, with all the rights and duties which that entails, is unheard of. In other human communities it is a monopoly of the State. The point is that a licence to sell alcohol and the opportunity to have access to and use a local supplier of alcohol is simply not a human right or fundamental freedom of the kind described in CERD.

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144 Cf *Mathieson v Burton* (1971) 124 CLR 1 at 12.

[152] Ms Eastman sought to address the difficulty for the appellants that nothing in CERD, or indeed any other international human rights instrument to which reference was made in the course of argument, suggests that there is an international consensus that there is a fundamental human right to have access to a local supplier of alcohol. Ms Eastman urged the Court in her oral submissions to:

> "start at a more general level … the focus shouldn't be on looking at what the person is doing but rather, in this case, how the relevant law has an impact on that person living their [sic] life, and all human rights law is concerned with ensuring that a person can live their [sic] life with dignity and respect and they are very broad concepts … the Convention helps you get, in a sense, to the first base of bringing you within the rubric of the human right. The next question then is the characterisation and the precise content of that right."

[153] The first problem with this approach is that it mistakes the broad objective of international instruments to ensure "that a person can live [his or her] life with dignity and respect" in accordance with the terms of the agreements which have actually been hammered out by negotiation in respect of particular issues. One does not seek to abstract from the terms of CERD an even more general human right "to live with respect and dignity" or to individual or collective self-determination and then ask whether the law in question is concerned with that right. In one way or another, of course, all laws are concerned with that right. The approach of Mason J in *Gerhardy v Brown* does not start from this high level of abstraction. Rather, the approach of Mason J is to take the particular, albeit general, expressions in CERD or like expressions of fundamental human rights and then to determine whether the content of the law in question is such as to trench upon that particular right.

[154] It is, in my respectful opinion, quite wrong to argue that the human rights stated in Article 5 of CERD are particular expressions of a much broader human right protected by s 10 of the RDA "to live with respect and dignity" or to individual or collective self-determination. There are reasons in principle and authority for rejecting the approach urged by Ms Eastman. In point of principle this approach debases the language of the international covenants by draining them of much of their content. In so doing, it also diminishes the achievement of those who have laboured long and hard to achieve even a modest measure of international consensus on the content of fundamental human rights and freedoms. In point of authority this approach is inconsistent with *Gerhardy v Brown* under which a court is obliged to seek to determine whether domestic laws said to attract the operation of s 10 of the RDA are concerned with human rights of the kind referred to in CERD. The international instruments cannot be approached as invitations to domestic courts to synthesise "more fundamental" human rights than those which have actually been the subject of agreement.

[155] In my respectful opinion, there is no way of avoiding the conclusion that the opportunity for an individual to buy alcohol from his or her local government (assuming that such an entity exists in any particular case), or even simply to acquire alcohol from a local source, is not a right which can sensibly be described as a human right or fundamental freedom of the kind which attracts the protection of s 10(1) of the RDA.

Bropho v Western Australia **and Article 5(b) of the Convention on the Elimination of All Forms of Racial Discrimination**

[156] Even if the view which I have taken of the scope of rights protected by s 10 of the RDA is too narrow, so far as the appellants' formulations in sub-paragraphs [133](b) and (c) above are concerned, the decision of the Full Court of the Federal Court in *Bropho v Western Australia*,[145] which Ms Eastman urged this Court to follow, confirms that where human rights and fundamental freedoms of the kind referred to in CERD are in tension it is for the local legislature to give expression to the appropriate balance.

[157] In *Bropho v Western Australia*, Ms Bropho, an Aboriginal person who had been an inhabitant of a reserve designated for the use and benefit of Aboriginal persons including herself, sought to invoke s 10 of the RDA to defeat a statute, enacted as a result of concern for the safety of women and children on the reserve, which authorised the making of directions by an administrator that prevented her entry onto the reserve.

[158] While the Full Court of the Federal Court accepted that rights to property protected by s 10(1) of the RDA included Indigenous forms of property holdings,[146] it held that no property right of the kind protected by CERD and the RDA is absolute, and in that case, the Indigenous right of property conferred by statute was "subject to the contingency that the right would be removed or modified if its removal or modification was necessary to protect vulnerable members of the community".[147] In that case, the legislation under challenge was enacted in order to achieve a legitimate and non-discriminatory public goal, and accordingly did not amount to a contravention of s 10 of the RDA.[148] The Full Court of the Federal Court said:[149]

> "… We accept that it will always be a question of degree in determining the extent to which the content of a universal human right is modified or limited by legitimate laws and rights recognized in Australia. We also emphasise that these observations are not intended to imply that basic human rights protected by the RD Act can be compromised by laws which have an ostensible public purpose but which are, in truth, discriminatory. However, we doubt very much that this is such a case."

[159] Their Honours held that, where the rights in question derive from statutory instruments, those rights cannot be seen as:[150]

> "absolute in nature given the general recognition 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. It follows that any interference with the enjoyment of the right, provided that such interference is effected in accordance with the legitimate public interest (in this case to protect the safety and welfare of inhabitants [of the Reserve]), will not be inconsistent with s 10 of the RD Act. Indeed, although the authorities on s 10 of the RD Act recognise that there is no basis for distinguishing between different species of ownership of property, no property right, regardless of its source or genesis, is absolute in nature, and no invalid diminution of property

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145 (2008) 169 FCR 59 at 81 [76].
146 (2008) 169 FCR 59 at 81 – 82 [78] – [79].
147 (2008) 169 FCR 59 at 83 [82].
148 (2008) 169 FCR 59 at 83 – 84 [82] – [83].
149 (2008) 169 FCR 59 at 83 [82].
150 (2008) 169 FCR 59 at 83 – 84 [83].

> rights occurs where the State acts in order to achieve a legitimate and non-discriminatory public goal."

[160] If this reasoning be applied to the present case, it may be said that the Queensland legislature was entitled, if not obliged, to address the claims of women and children in Aurukun and Kowanyama under Article 5(b) of CERD. No-one disputes the connection between alcohol consumption and the notorious domestic violence in Aurukun and Kowanyama; that connection is substantiated in the studies to which I will refer in detail in due course.[151] Domestic violence against women and children is an issue of fundamental concern in terms of human rights involving as it does concerns as to human dignity and freedom from fear.[152] The point for present purposes is that the pursuit of legislative amelioration of the position of women and children in these communities is a "legitimate and non-discriminatory public goal". The appellants' argument fails to recognise the implications of its own starting point. In emphasising that the trigger for the amending Act was a legislative intention to ameliorate domestic violence in the appellants' communities, the appellants seek to make the point that the legislation is directed at their Indigenous residents even though the amending Act is, in terms, of general application to local government authorities throughout Queensland. But once it is accepted that the purpose of the amending Act is to ameliorate violence against women and children in Indigenous communities, then it can be seen that the amending Act is a legislative expression of the human right referred to in Article 5(b) of CERD.

[161] It may be said immediately that it is difficult to accept that the opportunity to buy alcohol from a licensed local government authority can rationally be placed on the same level of importance in any frame of reference with the right of women and children to live free of alcohol-fuelled violence. But even if one assumes that the appellants are able to point to a fundamental freedom or human right with an equal claim to protection with the fundamental human right of women and children to be protected against personal violence, the striking of the balance between these competing human rights is, as *Bropho v Western Australia* shows, a matter for the legislature.

[162] As the statements in the Explanatory Notes to the amending Act (to which I will refer in due course) make clear, the legislature has struck a balance which accords priority to the reduction of alcohol-related violence in order to improve the health and safety of all members of these Indigenous communities, especially women and children. The legislative policy judgment which informs the amending Act is that, without the amending Act, the fundamental human right of women and children in these Indigenous communities to protection against violence will continue to be enjoyed by them to a lesser extent than this right is enjoyed by residents of other parts of Queensland. Nothing in s 10 of the RDA, or for that matter in CERD or the UDHR or the ICCPR, is apt to deny the legislature of the State the power and responsibility to strike the balance of priority between human rights and freedoms where those rights are in competition with each other. That this should be so is hardly surprising given that, if the setting of the balance of priority between human rights where those rights are in conflict in any given situation was intended to be a matter for the exercise of judicial judgment, then the instruments or statutes which establish the content of

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151 See also *R v KU & Ors; ex parte A-G (Qld)* [2008] QCA 154.

152 Cf Thomas and Beasley, "Domestic Violence as a Human Rights Issue", (1993) 15 Human Rights Quarterly 36.

human rights or provide for their enforcement might have been expected to provide a hierarchy of these rights. Absent some statement of priority in the instruments which establish the rights and freedoms protected by s 10 of the RDA, a decision-maker forced to choose between right and right is left to make an intuitive value judgment between incommensurable values.[153] This kind of judgment is readily seen to be the province of the legislature rather than the judiciary.

[163] The limitations upon judicial power as a mechanism to strike the effective balance between competing rights of the kind specified in Article 5 of CERD can be illustrated in another way by reference to the adversarial nature of judicial proceedings. The women and children whose right to personal freedom from violence apparently motivated the enactment of the amending Act were not represented as parties in this Court. This Court's attention was focused, inevitably, upon the parties before it and their arguments in support of their rights and interests. It is, I think, salutary to reflect upon the possibility that had the women and children of Aurukun and Kowanyama the means and opportunity to make their voices heard in litigation, their argument might have been that, prior to the enactment of the amending Act, the law which then permitted the appellants to act as licensed suppliers of alcohol infringed s 10 of the RDA in that, the then law, by permitting local authorities to act as licensed suppliers of alcohol, their rights under Article 5(b) of CERD were enjoyed by them to a lesser degree than by other residents of Queensland. The 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. The Court should recognise that its ability responsibly to set aside the balance struck by the legislature between competing human rights is limited by the very nature of the judicial process. The Courts' ability to set aside the political judgment of the legislature is necessarily confined to cases where the balance struck by the legislature is demonstrably unreasonable in the sense that no reasonable legislature could have struck that balance. In saying this I am not suggesting that the evident need for political value judgments in the making of statutes means that questions as to the operation of s 10 of the RDA upon a statutory law are not justiciable.[154] The point I seek to make is more specific: it is that where a law to which s 10 of the RDA is said to apply expresses a political value judgment as to the balance to be struck between competing claims of human rights, such as those recognised in Article 5 of CERD, then the scope for the exercise by the courts of a supervisory jurisdiction in the course of enforcing s 10 of the RDA is limited to cases of manifest unreasonableness and does not extend to the substitution of the court's view of a more reasonable balance for the balance struck by the legislature.[155]

[164] Mr Campbell argued that a legislative judgment by the Queensland Parliament to give effect to the "rights" of women and children in those areas to protection from violence and abuse can be effective only if it is demonstrated to the satisfaction of the court that the amending Act is "reasonably proportionate and adapted" to achieve its stated objective. On this argument, it must be demonstrated that the amending Act is apt to achieve its goal and further that it trenches upon the opportunity of residents of these

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153 Waldron, "Security and Liberty: The Imagery of Balance", (2003) 11 Journal of Political Philosophy 191 at 196 – 199; Mather, "Law-making and Incommensurability", (2002) 47 McGill Law Journal 345; Wright, "The Role of Intuition in Judicial Decisionmaking", (2005 – 2006) 42 Hous L Rev 1381; Aleinikoff, "Constitutional Law in the Age of Balancing", (1987) 96 Yale Law Journal 943.

154 Cf *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 460; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 364 -365 [37].

155 Cf *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 460.

communities to acquire alcohol from a licensed local government authority no more than is reasonably necessary to achieve the objective of lessening the deleterious effects of alcohol consumption within those communities. Mr Campbell argued to the effect that the amending Act is not reasonably adapted to achieve its legitimate object of reducing the social problems resulting from alcohol consumption and is not reasonably proportionate in its pursuit of that goal. Mr Campbell says that third party licensees can be expected, by reason of the operation of the economic forces of supply and demand, untrammelled by any provision of the *Liquor Act* or the amending Act, to replace the appellants as licensed sellers of alcohol. Accordingly, so it is said, the legitimate object is not apt to be achieved by the amending Act.

[165] This submission does not come to grips with the point that one of the central purposes of the amending Act is to remove the conflict of interest inherent in the dual function of each of the appellants as a vendor of alcohol and as an organ of local government having a responsibility for the safety of their residents. As will be seen directly, the "contradictions" inherent in those functions of the appellants have long been at the forefront of the concerns which the amending Act sought to remedy.

[166] Mr Campbell also relies on the evidence of the local police officer at Aurukun that the problem of sly-grogging will become worse by the termination of the appellants' licences. That evidence is not apt to demonstrate bad faith or unreasonableness in respect of the legislative judgment made by the Parliament. The relative extent of the problem of sly-grogging, its likely persistence, and the relative weight of such considerations are properly matters for legislative judgment rather than the judgment of a police officer. To say this is not to deny that there may be cases where, to adapt the words of the Federal Court in *Bropho v Western Australia*, basic human rights protected by the RDA are compromised by laws which have an ostensible public purpose but which are, in truth, discriminatory. At the highest for the appellants in this case, however, the protection of the rights of local women and children under Article 5(b) of CERD cannot be regarded as other than a legitimate and non-discriminatory public goal.

[167] Mr Campbell's "reasonable proportionality" argument draws no support from the reasons of the Full Court of the Federal Court in *Bropho v Western Australia* to which I have referred. It may be noted that an application was made to the High Court of Australia for special leave to appeal against the decision of the Full Court of the Federal Court in *Bropho v Western Australia*. The basis of that application was that the Full Court of the Federal Court had erred in not accepting that a "reasonable proportionality" test applied to s 10 of the RDA. The application for special leave was refused on 31 July 2009.[156]

[168] It may also be said that this test for the validity of legislation seems to have been derived, so far as Australian constitutional jurisprudence is concerned, from attempts to reconcile express or implied limitations on legislative power derived from the Commonwealth Constitution with the pursuit of legitimate legislative purposes.[157] It is doubtful, to say the least, whether an approach to the determination of the validity of legislation which must pass muster in terms of constitutional limits on legislative

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156 [2009] HCATrans 170.

157 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473 – 474; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50, 76 – 77, 88 – 89 and 94 – 95; *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 575 – 578; *Vanstone v Clark* (2005) 147 FCR 299 at 340 – 343 [158].

power has anything useful to say about the scope of operation of s 10 of the RDA in respect of State legislation which represents a rational attempt to resolve a competition between human rights.

[169] In summary in relation to this aspect of the case, s 10 of the RDA is not concerned to impose limits on the power of the States to legislate in relation to matters of legitimate concern to the States. Rather, s 10 is concerned to ensure that the rights and duties created by such legislation apply generally, without distinction on the ground of race.[158] There is no support in the authorities for the application of the test proposed by Mr Campbell to a case concerned with the application of s 10 of the RDA to a statute which seeks to balance competing human rights. And, as I have noted, that test does not reflect the approach taken by the Full Court of the Federal Court in *Bropho v Western Australia*. This Court is obliged to follow that decision unless convinced that it is clearly wrong.[159] As will be apparent from what I have written, I am not convinced that that is the case.

The comparison required by s 10 of the Racial Discrimination Act

[170] I turn now to consider more closely the comparison which s 10 of the RDA requires. In my respectful opinion, Mr Hinson's contentions on this point should be accepted.

[171] The first point to be made here is that the amending Act has the effect that no resident of any local government area in Queensland enjoys the opportunity to have access to a licensed local government authority to obtain alcohol. To that extent s 10 of the RDA is not engaged. And it is to be emphasised that it is with the operation of the RDA, a domestic statute, with which we are concerned. In *Muslimin v The Queen*,[160] French CJ observed in the course of argument on the application for special leave that:

> "[t]here is unfortunately a chronic problem in advocacy in areas involving international law that people seem to want to enter the debate at the level of international law when they are talking about domestic statutes. That is an inversion."

[172] Speaking more broadly, to the extent that, for so long as no third party suppliers licensed to sell alcohol operate in Aurukun and Kowanyama, Indigenous persons resident in those areas will not have access to a local licensed supplier, that state of affairs does not obtain "by reason of" the amending Act. Rather, it is a consequence of the historical fact of the absence of other licensees in those areas. The amending Act does not prevent the existence of licensed premises in Aurukun or Kowanyama: it simply provides that the licensed supply of alcohol shall no longer be a function of local government. The alcohol supply regulation regime under the amending Act applies in the same terms throughout the State: under that regime only licensed persons may sell liquor to the public and no local authority may hold a licence to sell alcohol. It is no part of that regime to provide for the supply of alcohol to any person. The regime assumes the existence of vendors of alcohol and regulates the sale of alcohol by them. As a matter of law, the presence or absence of other licensees in Aurukun or Kowanyama is not a consequence of the terms of the amending Act or, for that matter, of the terms of the *Liquor Act* prior to the passage of the amending Act.

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158 *Vanstone v Clark* (2005) 147 FCR 299 at 353 [203].

159 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492.

160 [2009] HCATrans 240.

[173] Underlying the appellants' argument seems to be the assumption that s 10 of the RDA is apt to guarantee the same level of opportunity or advantage between all residents of the State, regardless of their economic or geographical circumstances. That assumption is explicit in Ms Eastman's written submissions:

> "The practical operation and effect of the [impugned provisions] is that the limitation [on licensed premises within the appellants' communities] exists until such time as a new licence is granted. The limitation is a complete one and for an uncertain period of time."

[174] That assumption is erroneous. Section 10 of the RDA gives to a person who claims to have been discriminated against on the ground of race the same rights as are conferred by the Act in question on a comparator of a different race.[161] But s 10 of the RDA does not seek to ensure equality of opportunity where differences in the opportunity are not attributable to a discriminatory effect of a law but to economic and geographical differences.

[175] It is, in my respectful opinion, not open to this Court to approach the analysis required by s 10 of the RDA on the basis that the right protected by s 10 of the RDA is a human right to enjoy equal treatment before the law, regardless of race, consisting of equal treatment before the law regulating the availability and service of alcohol in public. To frame the issue in this way is to assume, without foundation, that s 10 of the RDA is concerned to ensure equality of advantage, whether in terms of the availability and service of alcohol in public or indeed in terms of any other form of human activity.

[176] Contrary to the underlying assumption to which I have referred, s 10(1) of the RDA does not require a simple comparison, at a given point in time, of the rights enjoyed by persons of one race, or the extent of that enjoyment, with the rights enjoyed by persons of another race anywhere else in the State. Section 10(1) requires a comparison of the extent to which persons of one race enjoy a right to a different extent to other persons by "reason of the law" which is said to be affected by s 10 of the RDA.

[177] As the Full Court of the Federal Court explained in *Bropho v Western Australia*,[162] the application of s 10(1) of the RDA requires the court to consider whether there is a relevant "right" that is affected by "a law", and whether persons of a particular race enjoy that "right" only to a more limited extent than a person of another race by reason of that law. The question which must be addressed is whether a limitation upon the enjoyment of a right by people of a particular race, occurs by reason of a law of the State. It is such a law which engages the operation of s 10(1) of the RDA. As I have earlier noted, but repeat here for emphasis, as the Full Court of the Federal Court explained:[163]

> "In general terms, s 10(1) of the RD Act is engaged where there is unequal enjoyment of rights between racial or ethnic groups: see *Western Australia v Ward* (2002) 213 CLR 1. **Section 10(1) does not require the Court to ascertain whether the cessation of rights is by reason of race, with the clear words of s 10 demonstrating that the inquiry is whether the cessation of rights is 'by reason of' of the legislation under challenge.** Further, s 10 operates, not merely on the intention, purpose or form of legislation but also on the practical operation and effect of legislation (*Gerhardy* 159 CLR

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161 *Vanstone v Clark* (2005) 147 FCR 299 at 353 [203].

162 (2008) 169 FCR 59 at 83 [81] – [83].

163 (2008) 169 FCR 59 at 80 [73].

at 99; *Mabo v Queensland* (1988) 166 CLR 186 at 230–231; *Western Australia v Ward* 213 CLR at 103)." (emphasis added)

[178] I respectfully agree with the Full Court of the Federal Court that the focus of attention must be upon the effect of the State law by reason of which the adverse effect upon the enjoyment of a right by persons of a particular race is said to have been brought about. If this focus is lost, the purpose of s 10(1) may be misunderstood as I respectfully think that it has been misunderstood in this case by the appellants. The purpose of s 10(1) is, in conformity with Article 2 of CERD, to nullify laws the effect of which is to deny the people of one race the same lawful opportunities as are enjoyed by persons of other races. It cannot be understood as an "Act of Parliament for the displacement of old conditions and the substitution of new ones, which can be so applied as to prevent hardship."[164]

[179] It may be accepted that s 10 is concerned with the practical effect, rather than the formal expression, of the law in question. But the practical effect of the *Liquor Act*, as altered by the amending Act, is that no resident of any local government area anywhere in Queensland now enjoys any opportunity to acquire alcohol from their local government. To the extent that, in practical terms, Indigenous residents of the appellants' local government areas now enjoy the opportunity to acquire alcohol from a licensed local source to a lesser extent than persons who live elsewhere in Queensland, that difference in opportunity is a consequence of the different geographical and socio-economic conditions which obtain, and which have obtained for many years, in different areas of the State. Whether or not third party licensees might have displaced the appellants in the past as local sources of alcohol, or might now replace them, does not depend on the terms of the amending Act.

[180] Whether or not the residents of Aurukun and Kowanyama have access to a local licensed supplier of alcohol to the same extent as other Queenslanders depends on the forces of supply and demand. These forces are in no way inhibited by the amending Act. It may be accepted that the effect of the amending Act was to cause the appellants to cease to be eligible to hold a licence to sell alcohol, and in consequence, it may be that residents of the appellants' local government areas will not be able, for some time, to acquire alcohol locally. But to say that is simply to acknowledge that there is, at least at present, no other local licensed supplier of alcohol in these areas. That is a consequence, not of the amending Act or of any other law of the State of Queensland, but of the economic facts of supply and demand in remote areas of the State. That being so, it cannot be said that a right the content of which is described in either of the ways contended for by Mr Campbell or Ms Eastman is enjoyed to a different extent by the residents of the appellants' communities than other residents of Queensland "by reason of" the amending Act.

[181] This analysis is not intended to downplay the serious level of relative socio-economic disadvantage which affects the appellants' communities. Rather, I am concerned to make the point that the remedy for that disadvantage is not provided by s 10 of the RDA.

[182] Section 18 of the RDA does not provide an answer to the point that the disadvantage suffered by Indigenous communities in terms of access to a licensed supplier of alcohol is a consequence of economic and geographic facts rather than the operation of the amending Act. Section 18 of the RDA is in the following terms:

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[164] Cf *State of Tasmania v The Commonwealth of Australia and State of Victoria* (1904) 1 CLR 329 at 358.

"**Acts done for 2 or more reasons**
Where:
(a) an act is done for 2 or more reasons; and
(b) one of the reasons is the race, colour, descent or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);
then, for the purposes of this Part, the act is taken to be done for that reason."

[183] As is apparent from the language of s 18 of the RDA, it is concerned to supplement the provisions of s 9 of the RDA in relation to acts or omissions by persons; it is in no way concerned with s 10, which operates to equalise the operation of laws.

The appellants' licences as property rights

[184] With the exception of the right referred to in paragraph [133](d) above, the rights identified by the appellants are rights which pertain to an individual as a human being.[165] Such rights stand in marked contrast with the functions of government and artificial entities such as the appellants which are charged with the performance of the functions of government.

[185] Mason J suggested in *Koowarta v Bjelke-Petersen* that corporations may be regarded as "persons" by virtue of s 22(1)(a) of the *Acts Interpretation Act* 1901 (Cth) so as to attract the operation of at least some of the provisions of the RDA in relation to their human membership.[166] But Mason J was there concerned with the meaning of the expression "second person" in s 12 of the RDA. That section proscribed conduct affecting a "second person" if the conduct occurred by reason of the race of an associate of that second person. Section 10(1) of the RDA is concerned with the effect of laws upon persons of a particular race. It can only be concerned with natural persons. The appellants are thus outside the scope of s 10(1) of the RDA.

[186] Even if it were to be accepted that local government corporations such as the appellants are entitled to be regarded as a person for the purposes of s 10 of the RDA, a licence under the *Liquor Act* is not a property right in the nature of a "human right or fundamental freedom" of the kind referred to in the RDA. The appellants' statutory right of property in their license was at least as susceptible to effective statutory abrogation as the rights of the appellant in *Bropho v Western Australia*. And, of course, the appellants, as local governments, were treated no differently by the amending Act than any other local government in the State.

[187] In any event, as will be seen when reference is made to the Explanatory Notes to the Bill for the amending Act, there was nothing arbitrary about the abrogation of the appellants' rights as licensees under the *Liquor Act*. The amending Act was made for the legitimate purpose of vindicating the right referred to in Article 5(b) of CERD. On the approach taken by the Full Court of the Federal Court in *Bropho v Western Australia*, s 10 of the RDA has no application to the amending Act.

A special measure?

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165 Cf *Ebber v Human Rights and Equal Opportunities Commission* (1995) 129 ALR 455 at 476 – 477.

166 (1982) 153 CLR 168 at 236.

[188] Quite independently of the arguments I have discussed, however, the amending Act can be seen to be a special measure within the meaning of s 8 of the RDA. This provision is in the following terms:

> "**Exceptions**
>
> (1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).
>
> (2) This Part does not apply to:
>
> (a) any provision of a deed, will or other instrument, whether made before or after the commencement of this Part, that confers charitable benefits, or enables charitable benefits to be conferred, on persons of a particular race, colour or national or ethnic origin; or
>
> (b) any act done in order to comply with such a provision.
>
> (3) In this section, ***charitable benefits*** means benefits for purposes that are exclusively charitable according to the law in force in any State or Territory."

[189] Article 1(4) of CERD is also relevant here. It provides:

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups of 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 shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved."

[190] In *Gerhardy v Brown*,[167] Brennan J (as his Honour then was) explained the operation of s 8 of the RDA by reference to the *Pitjantjatjara Land Rights Act* 1981 (SA). His Honour said:

> "Although the Land Rights Act is a measure which effects formal discrimination, it may yet be a special measure to which Art 1(4) applies. If it is such a measure, Pt II of the *Racial Discrimination Act* has no application. Article 1(4) provides:
>
> '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 shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.'

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[167] (1985) 159 CLR 70 at 132 – 133.

'Special measures', deemed not to be racial discrimination, are not the subject of the obligation imposed on States Parties by Art 5 of the Convention 'to prohibit and to eliminate racial discrimination in all its forms'. Indeed, Art 2(2) imposes an obligation on States Parties to take special measures. It provides as follows:

> 'States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.'

The Convention does not use precisely the same words in Art 1(4) and in Art 2(2), but those provisions are complementary and their expressions should be consistently construed. A 'special and concrete' measure taken by a State Party in performance of an obligation under Art 2(2) is a 'special measure' within the meaning of that term in Art 1(4). The class to be benefited by a special measure must be a racial or ethnic group or individuals belonging to the group. The sole purpose of a special measure is to secure such 'adequate advancement' or 'adequate development and protection' of the benefited class as is necessary to ensure 'equal enjoyment or exercise of human rights and fundamental freedoms'. The occasion for taking a special measure is that the circumstances warrant the taking of the measure to guarantee that the members of the benefited class shall have 'the full and equal enjoyment of human rights and fundamental freedoms'. From these conceptions, the indicia of a special measure emerge. A special measure (1) confers a benefit on some or all members of a class, (2) the membership of which is based on race, colour, descent, or national or ethnic origin, (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.

…

The second indicium: although Art 1(4) refers to 'racial or ethnic groups', it should be understood as referring to the several categories of race, colour, descent or national or ethnic origin mentioned in Art 1(1) in order to make Art 1(4) read symmetrically with Art 1(1). The manifest purpose of Art 1(4) is to exempt from the definition of 'racial discrimination' those distinctions, exclusions, restrictions or preferences which are made for the sole purpose stated in that paragraph. It would not accord with the object of the Convention to

> construe the Art 1(4) exemption as limited to distinctions, etc. based on race or ethnic origin and to leave within the definition of racial discrimination those distinctions, etc. based on colour, descent or national origin. In the present case, for reasons earlier stated, the criterion of membership of the benefited class is racial."

The need for consultation

[191] The appellants argue in this Court that the amending Act cannot be characterised as a special measure because of the absence of evidence of a request from the affected Indigenous people for the enactment of the amending Act or consultation with them in relation to its terms.

[192] In this regard, in *Gerhardy v Brown*, Brennan J said:[168]

> "The third indicium: the purpose of a legislative measure can be collected from its terms and from the operation which it has in the circumstances to which it applies, but international law does not require that these be regarded as the only sources from which the purpose of a measure can be collected: see Ramcharan, *International Law and Fact-Finding in the Field of Human Rights* (1982), Ch III. Of course, not all special measures are legislative. Any fact which shows what the persons who took or who promoted the taking of a measure intended it to achieve casts light upon the purpose for which it was taken provided the measure is not patently incapable of achieving what was so intended. The intention of those persons is a matter of fact. The finding of facts in order to determine the scope or validity of a law raises a particular problem that does not arise on the finding of the facts in issue between litigating parties ... [F]or the moment, it suffices to say that the purpose of a measure may not be, or may not be merely, a question of construction.
>
> A special measure must have the sole purpose of securing advancement, but what is 'advancement'? To some extent, that is a matter of opinion formed with reference to the circumstances in which the measure is intended to operate. 'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. **The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.** The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them. An Aboriginal community without a home is advanced by granting them title to the land they wish to have as a home. Such a grant may satisfy a demand for land rights. But an Aboriginal community would not be advanced by granting them title to land to which they would be confined against their wishes. Such a grant would be a step towards apartheid.

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168 (1985) 159 CLR 70 at 135 – 136 (citation footnoted in original).

> Even if the promoters of the measure had the purpose of promoting the interests of the residents of that land, the measure would deny the residents' human rights and fundamental freedoms: see pars 128-131 of the *Namibia (S W Africa) Advisory Opinion* of the International Court of Justice ([1971] ICJ R 16, at pp 56-57) …'" (emphasis added)

[193] The view expressed by Brennan J as to the possibly crucial importance of the wishes of the beneficiaries of a measure to its characterisation as a special measure commands great respect, both because of the eminence of its author and because it is inherently compelling. Nevertheless, as was noted in *Bropho v Western Australia*,[169] that view has "no apparent judicial support".

[194] It must also be recognised that ascertaining the wishes of the beneficiaries of a proposed measure may be fraught with difficulty: many divergent voices may claim to speak for a community. Further, attempts to accommodate those voices may prove to be impractical or fruitless. In such cases it may be necessary for governments and parliaments to take a lead. A consideration of the process of consultation suggests that this was the case with the amending Act.

The process of consultation

[195] There was extensive consultation with persons likely to be directly affected by the amending Act although that consultation has not led to a consensus as to the adoption of practical measures to deal with the problems which beset the appellants' communities. As the Explanatory Notes to the Bill for the amending Act record, extensive consultation with persons affected by the amending Act have occurred. This consultation included that which occurred in the course of the work of the Aboriginal and Torres Strait Islander Women's Task Force on Violence in 1998 and the Cape York Justice Study conducted by Fitzgerald QC in 2001.

[196] The report of the Aboriginal and Torres Strait Islander Women's Task Force referred to in the Explanatory Notes stated in part:[170]

> "The consultative process advanced alcohol as the most pressing concern of Indigenous people. Of the 43 submissions received from individuals and various agencies, 91% of the overall submissions, and 100% of those from Aboriginal and Torres Strait Islander peoples, including Community Councils and organisations, cited alcohol and other drugs as major factors for attention if the issue of violence is to be successfully addressed. This subsection reflects the voices and submissions that should be heard, in order to understand how people experiencing violence relate it to alcohol. The fact that they took the time to make submissions and attend consultations reinforces their call for immediate intervention.
>
> It is widely accepted that people drink alcohol for a variety of reasons, including as a way of coping with deep-seated, unresolved problems. While alcohol is regarded as a mitigating factor in violent

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169 (2008) 169 FCR 59 at 72 – 73 [42].

170 Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report (2000) s 2.7, s 2.7.1, s 2.7.2, s 2.7.3 (footnotes omitted).

circumstances, it should not be used as an excuse for the violence occurring. It is vital to recognise the role of alcohol in deaths and injuries through violence, in general ill-health, and also in family and Community breakdown. It is also important to acknowledge that many people do enjoy alcohol in moderation:

> *We have a lot of social drinkers who are responsible in the way they drink. The impression that all Aboriginal and Torres Strait Islander people are violent and are drunks must be changed.*

However, both the consultations and the submissions generally focused on alcohol as featuring prominently in violence and its use therefore must be addressed as a priority.

…

The image of the drunken Aboriginal is a colonial construction, predating the ready availability of alcohol to Indigenous people. Alcohol was used to engage Indigenous Australians in discourse, to pay for labour, to attract people into settlements and to lure people into assimilation. Indigenous Australian women were encouraged to consume alcohol, which was used by white men to barter for sex. Young girls and boys, well under the age of puberty, were fed alcohol and used for sexual gratification. This abhorrent type of behaviour was unheard of among Aboriginal people prior to invasion.

Alcohol is therefore part of Australian history, and both alcohol and opium are part of Queensland's history. The legacy of alcohol lives on to create abject misery. As recently as three years ago, Aboriginal artists reported being paid in cartons of beer by an art gallery proprietor in Alice Springs.

During the consultative process in Indigenous Communities, informants indicated the extent of the damage being caused through the abuse of alcohol:

> *One of the harshest realities for us as Aboriginal people is that we are letting the grog and drugs kill us. I don't think we know how to stop and we will mourn the many loved ones we have lost through grog and drugs. Some have been perpetrators. Some have been victims. Many have been both.*
>
> *One of the difficulties is dealing with the alcohol. The problem is that it is now so firmly entrenched. I worked for the Aboriginal Legal Service, and saw many examples of children as young as eight being alcohol-dependent and in some cases sniffing petrol and glue. The spiral of violence actually commences with children beginning to access alcohol and then becoming dependent upon it. In*

other words if something isn't done to save the children from alcohol by the time they're eight, then it's too late.

Alcohol is not the most important ingredient in the violence. The ingredients are complex – boredom – anxiety – insecurity. Who do our young people look up to? Alcohol is just a symptom.

In my opinion if you placed 1,200 or so European people on Mornington Island, housed within the same way in such proximity to the hotel on the hill, you would quickly have an identical situation of dependence upon alcohol, despair and violence. The people in the Communities are all poor. It is very difficult to be sophisticated when you have no money and little to look forward to in life. Motivation is a hard commodity to come by when you are dependent upon alcohol. Respect is hard to come by when young people in the Community see the older members of the Community behaving in a way that is guaranteed to engender disrespect. Once again, it is the alcohol.

The biggest problem in this town is there are no services for men. Aboriginal men need a crisis service – not just an alcohol service but a crisis service – often the violence occurs at a time of crisis – when the person has increased his alcohol intake.

Many of the women using the shelter have multiple problems – they are experiencing domestic violence – have alcohol and other drug problems – have mental illness – they have been sexually abused as a child, which is a contributing factor to domestic violence – alcohol abuse and mental illness.

I drink because I feel better. I feel good when I drink because I don't hurt so much and I am not frightened so much.

The last quote contains the words of a young mother from Mornington Island who was a regular victim of family violence but also stated that she felt 'no good'. She said her feelings came from her experiences as a child witness to violence. Indigenous informants stated clearly that alcohol and drugs helped people to cope with feelings of powerlessness, despair and helplessness. Informants also stated that few services were available to encourage users to free themselves of addiction. They needed worthwhile programs, rehabilitation and counselling services run by appropriately trained workers.

…

Submissions in the consultations forcibly stated that if the issue of alcohol were addressed, violence would decrease. Many people with severe alcohol addiction indicated they would like stop to drinking, [sic] but there are no services available to help them.

> *Alcohol and substance abuse are proven contributing factors in violence, suicide, murder and rape. The underlying issues which exacerbate the drinking of alcohol are controls external to the means of our people, dispossession, poor housing, poor health, education.*
>
> *The men say – 'We got nothing - can't get a job - so I'm fighting with my wife'. DV here is a lot to do with boredom. Nothing to do except go together all day, sleep together all night. A lot of DV happens where the person is sober, but it is easier to just talk about the alcohol.*
>
> *Men are largely in an alcohol spiral and have lost the self-respect that they ought to have….If the problem with alcohol abuse is tackled and beaten, then the incidents of violence and abuse against women and children will drop to a staggering extent. Offenders have indicated they wish to go to prison to get away from alcohol.*
>
> *Indigenous people say alcohol is a huge problem, but its use must be studied in the context of their situations. Alcohol consumption 'cannot be understood or given a meaning except in relation to the dependent situation of Aboriginal people within the Australian state'. Alcohol is used in a structured manner, to mitigate needs that have both positive and negative consequences. Alcohol enables anger and despair to be expressed without responsibility for the consequences. Alcohol provides a sense of belonging to a group, although it may be a social group of drinkers. When alcohol use increases with greater availability, children are at risk of being abused and neglected, and of witnessing of violence between adults, thus learning behaviour which may lead them to violence in turn.*

Alcohol is associated with getting drunk, feeling powerless, aggressively articulating feelings of anger and distress, and engaging in interpersonal violence. Because Indigenous people have a different cultural construction for alcohol use than other Australians, responsibility for violent behaviour can be easily attributed to alcohol. The excuse given is that 'it was the grog'. A clear message throughout the consultations was that blaming alcohol for violence is no longer acceptable. Alcohol-related deaths and injuries, and in particular violence against small children, must be condemned in the harshest terms, and those responsible must stand accountable.

…

In every document or study on violence within Aboriginal and Torres Strait Islander situations, the issue of alcohol and its effects are raised. In fact, most of the women in Cape York say alcohol causes violence. Canteens on Communities are a continuing source of contention. There are calls to 'close the canteens'. While this opinion was expressed throughout the consultations, a more powerful call was for the canteens to be properly run. It is important to recognise that not all canteens were put into place by the will of the Community.

> ***For years the people of Aurukun said no to a canteen at public meetings and in a referendum. However, after Aurukun received Local Government status, the then Local Government Minister, Mr Russ Hinze decided it was discriminatory for the Aurukun Community not to have a canteen like other Queenslanders. A canteen was built in the middle of Centenary Park, in the midst of the children's playground equipment! Great role modelling for the children as they play around the canteen at night.***
>
> *I've seen children in school holidays hanging around outside the canteen…in the middle of the day drinking glasses of beer. Some children roam around until the early hours of the morning. Neglect is the real problem…and this lack of supervision leaves opportunities for children to be sexually abused.*

As children use their playground in which the canteen is now located, they see their elders drinking, and they witness the violence that results from the grog. This influences social learning. The messages given to the adults and children of the Aurukun Community were clear. The State had power, and they were powerless. Their opinions and concerns were of no consequence. Both Hunter and Miller pointed out 'today's parents are the offspring of the first 'legal Aboriginal drinkers', many of whom have grown up in settings dominated by violence and alcohol. Role models for peaceful settlements of disputes are few'. Drinking and violence are both 'socially learned responses, maintained by a system of reinforcements or lack of intervention' and the direct intervention of the State into Indigenous lives." (emphasis added)

[197] I pause here to note that the report of the Task Force identified the "canteens" as a source of contention, with the consultative process identifying a need for the closure of the canteens or the taking of steps to ensure that they were "properly run". Further, the point needs to be emphasised that, at least at Aurukun, the original establishment of the canteen as a function of local government was not an act of local self-determination.

[198] It is also apparent that it is not surprising that the communities themselves were not able to present a clear and comprehensive plan of action to resolve the problems which were identified to the Task Force. The report of the Task Force went on to record:[171]

> "A number of submissions recommended that canteens should be dismantled and Councils funded 'properly' out of State revenue to deliver the essential services all Queensland citizens should receive. One submission suggested that canteens should be moved out of the Community, with a set of protocols put in place so that people could drink near, but not within, the Community. The revenue would still come to the Community Councils. On the other hand, people who lived within the DOGIT Communities, even those women who were the most outspoken against alcohol, listed a series of alternative approaches for those who had a need to access alcohol.
>
> These needs were not incompatible. For example, the strongest voice for banning alcohol completely came from women at Kowanyama. They spoke too of their fear that, if the canteen was closed, the sly grog trade would increase. The problem would not go away. Kowanyama has a population of approximately 1,200 people. Of this population, it was estimated that about 600 people drink 'seriously'. The women of Kowanyama made a number of critical points that should be seriously considered and could be implemented."

[199] Mr Campbell urged that the appellants, as the elected local councils, should be regarded as reliable spokespersons for their respective communities. The difficulty here is that the appellants speak from a position of conflict of interest as the licensed purveyors of alcohol to their communities. In this regard, it was the avowed purpose of those introducing the amending Act to bring this "contradiction" to an end.

[200] In the Explanatory Notes to the Bill for the amending Act, the policy rationale of the provisions relating to alcohol was stated in the following terms:

> "*Background*
>
> In December 1998 the then Minister for Women's Policy established the Aboriginal and Torres Strait Islander Women's Task Force on Violence. In July 2001 Justice Tony Fitzgerald, at the request of the Queensland Government, undertook the Cape York Justice Study in relation to Indigenous communities on the Cape. Both concluded that harmful levels of alcohol consumption in remote Indigenous communities were the chief precursor to violence, crime, injury and ill-health in these populations.
>
> The *Meeting Challenges, Making Choices* (MCMC) strategy was the Queensland Government's response to the Study in 2002 and aimed to improve the health and well-being of those people living in the 19 discrete Indigenous communities (the MCMC communities) with an immediate focus on addressing the level of alcohol use and related violence.

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[171] Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report (2000) s 4.3.1.

(The MCMC communities are: Aurukun, Bamaga, Cherbourg, Doomadgee, Hope Vale, Injinoo, Kowanyama, Lockhart River, Mornington Island, Mapoon, Napranum, New Mapoon, Palm Island, Pormpuraaw, Seisia, Umagico, Woorabinda, Wujal Wujal, and Yarrabah.)

Alcohol management under the MCMC strategy had three interdependent elements:

(a) separation of the management of canteens from councils: while legislation was passed to support the divestment of canteen licences, implementation proved to be problematic and divestment has not occurred to date.

(b) restriction of supply and availability of alcohol: broadly, the alcohol restrictions regime is implemented through legislation: the *Liquor Regulation 2002* has a schedule for each community which details the restricted area and the restrictions and the *Liquor Act 1992* provides that it is an offence to have more than the prescribed amount of liquor in a restricted area (section 168B).

In determining the restrictions on the type and amount of alcohol in individual communities, the Government considered the level of harm occurring in the community and the recommendations of the local community justice group. The outcome has become known as the *alcohol restrictions* for the community.

Aurukun was the first community to have alcohol restrictions put in place in December 2002. Palm Island was the last in June 2006.

(c) demand reduction initiatives: the Alcohol Demand Reduction Program, which commenced distribution of grants in 2006, has provided funding for projects, programs and services which assist a community to:

- provide appropriate activities and supports for young people and families to enhance culture, education and recreation; and

- develop strategies with government and non-government agencies for alcohol and other substances treatment services."

[201] It will have been noted that the amending Act was introduced following difficulties in the implementation of an earlier strategy designed to support the divesting of licences from local authorities and the vesting of this function in separate community liquor licence boards. This strategy had itself been the subject of lengthy consultation as will be seen in due course. Mounting concern on the part of the government with the lack

of progress being made in terms of this MCMC strategy is referred to later in the Explanatory Notes:

"*Recent developments*

In early 2007 the Office for Aboriginal and Torres Strait Islander Partnerships, Department of Communities, commenced a whole-of-government review of alcohol and other substances policy, programs and service settings in the MCMC communities (the review).

The review findings indicated that, to date, there has not been a sufficient or sustained improvement in the level of harms which are alcohol-related and a more concerted, intensive and sustained program of action is needed across four key themes: strengthening supply restrictions; strengthening demand reduction; strengthening individual, family and community; and strengthening service delivery.

The government response has been to commit to: an incentive package to encourage communities to be as alcohol-free as they can be; enhancement of acute alcohol rehabilitation and treatment services; diversionary services and programs; as well as the legislative and enforcement measures contained in this Bill. The State Government has committed $66 million and the Commonwealth Government $36 million to service and program enhancement.

Policy rationale

The alcohol restrictions, and the measures to enforce them, are therefore only part of the broader plan to address alcohol-related harm, in particular to reduce alcohol-related violence, and thereby improve the health and well-being of all community members, especially children.

However, the review found that there are currently gaps in the legislative response which means that the policy intent of the restrictions, namely limiting access to, or availability of, alcohol in order to reduce alcohol-related harms, cannot be fully realised. For example, the restrictions currently only apply to public places in the communities. The result is that, if people are able to get illicit alcohol through the community and into a house, the ability of the police to act is limited.

It is anticipated that, if in due course there is a sufficient decline in alcohol-related harms, restrictions can change, with an eventual goal of no restrictions, although it is acknowledged that this may take years rather than months.

Consultation

Community

Amendments relating to alcohol

> At the Indigenous Ministerial Roundtable held on 15 February 2008 (the roundtable) the main business of the day was how to address alcohol issues. The Premier gave communities until the end of May to advise government of their response to a proposal, which includes additional Government support, for communities to go as dry as possible.
>
> Senior Officers from the Department of Communities and Australian Government agencies, together with relevant Government Champions, the Minister for Aboriginal and Torres Strait Islander Partnerships, or the Premier, are visiting all 19 MCMC communities in April 2008 to talk with communities about their willingness to 'go as dry as possible' and how the Government might be able to support this.
>
> An information sheet was made available to communities which flagged the changes to be made by the legislation as well as explaining how the Government will support the communities to go drier."

[202] In 2001, Mr Fitzgerald QC had reported:[172]

> "It is important to understand, and to respond to, the perceptions of Aboriginal leaders like Noel Pearson who contend everyday with the challenges of development of the Aboriginal community in the face of obstacles such as the effect of alcohol abuse on Aboriginal communities. His views reiterate the fear, concern and alarm expressed in so many other submissions, especially that of the Commission for Children and Young People which provided this inquiry with the views of children on this matter. If the responsible leadership of the Aboriginal communities characterise the problem as a substance abuse epidemic, which results in crippling addiction among Aboriginal people, then this characterisation must be taken seriously. A realistic plan, as suggested by Pearson and many others who provided written submissions, is outlined at the conclusion of this chapter. It has several elements. First, both Government and the community must accept responsibility. Second, the availability of alcohol and drugs must be controlled. Third, an intolerance of cultural and social abuse must be developed. Fourth, treatment and rehabilitation services must be strengthened. And fifth, the susceptibility of the Aboriginal population to alcohol and drug use must be addressed through the range of interventions recommended below.
>
> Many Aboriginal people favour strategies of the kind that rely on various forms of 'prohibition' or limitation of supply of alcohol and illicit drugs. This preference is not unusual in the Aboriginal communities which have had the opportunity to consider the various options available for dealing with alcohol consumption at such dangerous levels as are common in Aboriginal communities.

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172 Tony Fitzgerald, Cape York Justice Study (2001) 42.

> The supply and distribution of alcohol to Aboriginal people in Cape York is achieved by both legal and illegal means. Canteens operated by Aboriginal community councils are the standard legal outlets, while some alcohol outlets such as hotels and licensed roadhouses also sell alcohol. The illegal sale of alcohol by individuals through the range of practices referred to as 'sly grog' is one of the patterns of alcohol supply that is discussed in this Study as a matter for urgent attention. Legal enforcement of existing laws that prohibit sale of alcohol is a matter of the highest priority.
>
> Community councils can make significant profits from the sale of alcohol. Canteen profits provide councils with a potentially significant source of supplementary income. At the very least, there are major contradictions between the commercial imperatives of running a liquor outlet, and the responsibilities of the councils relating to welfare and to law and order. There is an urgent need to limit the sale of alcohol and enforce limits."

[203] Mr Fitzgerald QC referred specifically to the circumstances of a number of Aboriginal communities including those of the appellants and the "contradiction" at which the amending Act was squarely aimed. He said:[173]

> "A number of Aboriginal communities have their own alcohol outlets, in the form of 'canteens', operated in all instances by their councils. Outside of the Northern Peninsula Area, Lockhart River, Napranum, Aurukun, Pormpuraaw and Kowanyama have canteens. While New Mapoon, Wujal Wujal and Hope Vale do not, their residents are able to purchase or order alcohol from nearby towns and return with it to their communities."

[204] The difficulty of achieving unanimity of views amongst the beneficiaries of the amending Act as to the measures necessary for the amelioration of the problem of alcohol abuse is apparent from the following passage of the report of Fitzgerald QC:[174]

> "Any implementation of the recommendations made here will not be without some difficulty. The literature on Aboriginal drinking reports that this is a highly contested and contentious arena. It is also reported that the consumption of alcohol is also a matter of great contention within Aboriginal societies, where there are often strong differences of opinion between drinkers and non-drinkers. This is no less so in the Cape York communities."

[205] It can be seen from this review that among the practical difficulties which confronted legislative attempts to ameliorate an undisputed social evil was the apparent lack of unanimity among those affected in relation to an acceptable program of reform.

[206] There was also a lack of enthusiasm for less drastic attempts to remove the "contradictions" to which Fitzgerald QC referred. In this regard, it is relevant to note that the Cape York Justice Study conducted by Fitzgerald QC led to the enactment of a legislative package comprising the *Community Services Legislation Amendment Act* 2002 (Qld) and the *Indigenous Communities Liquor Licences Act* 2002 (Qld). The Explanatory Notes to the Bill for the latter Act contained the following:

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173 Tony Fitzgerald, Cape York Justice Study (2001) 50.

174 Tony Fitzgerald, Cape York Justice Study (2001) 42 (endnotes omitted).

"**Objectives of the Bill**
The objective of the Bill is to prevent harm in Indigenous community areas caused by alcohol abuse and misuse and associated violence by:

- Establishing community liquor licence boards in community areas to manage alcohol canteens in a way that prevents harm caused by alcohol abuse and misuse and associated violence;
- Providing for the declaration, in consultation with community justice groups, of restricted areas for the purposes of minimising harm caused by alcohol abuse and misuse and associated violence and minimising alcohol related disturbances in a locality, by:
  (a) prescribing limits on the quantity of liquor that a person can have in their possession; and
  (b) placing conditions on licensed premises within the area.

Reasons for the Bill
The Bill is part of the Government's response to the Cape York Justice Study report, which was submitted to Government by Justice Tony Fitzgerald in November 2001. The Bill is part of a package of reforms to address the prevalence of alcohol abuse and violence in Indigenous communities in Cape York and other parts of Queensland. It complements the *Community Services Legislation Amendment Bill 2002*.

In the Cape York Justice Study Report, Justice Fitzgerald recommended that Indigenous community councils should not be associated with the operation of canteens, as this role conflicted with the councils' responsibilities for the welfare of the community. In all twelve Aboriginal and Torres Strait Islander communities on the mainland with a canteen licence, this licence is held by the council. The Bill seeks to break the nexus between the councils and the management of canteens by transferring canteen licences to newly established community liquor licence boards. The boards will be comprised principally of community members and will be required to manage the canteen in a way that prevents harm in community areas caused by alcohol abuse and misuse and associated violence. The boards will be required to implement certain recommendations about the operation of the canteen made by a community justice group established under the *Community Services Legislation Amendment Bill 2002*.

The Cape York Justice Study report highlighted the seriousness of the alcohol problem in Indigenous communities in clear and unequivocal terms:

> *Alcohol abuse and associated violence are so prevalent and damaging that they threaten the communities' existence and obstruct their development.*

> Justice Fitzgerald recommended immediate Government intervention and pointed out that unless the epidemic of alcohol abuse in Indigenous communities is addressed, reforms in social and economic development and education will not be sustainable. It was recommended that Government should first seek to work with and empower Indigenous communities to take action to address alcohol, but that if this community-based approach did not result in improvements within 3 years, the Government should consider prohibiting alcohol altogether.
>
> The Bill makes a range of amendments to the *Liquor Act 1992* to provide the mechanisms to implement the necessary controls on alcohol in Indigenous communities. The key mechanisms in the Bill are the declaration of limits on carrying and possessing alcohol in restricted areas, and the ability to impose new licence conditions on licensed premises in and adjacent to Indigenous communities. The advice of community justice groups will be central in determining the particular controls that will be put in place. It is anticipated that Alcohol Management Plans developed by community justice groups in conjunction with members of their communities will be the primary source of guidance in implementing the alcohol controls."

[207] It will be apparent from the foregoing that there was, in 2002, governmental support for a more community-based approach than is embodied in the amending Act. That approach found legislative expression in the *Indigenous Communities Liquor Licences Act* 2002. But the pursuit of the proposal depended upon the establishment of Indigenous community liquor licence boards to manage alcohol canteens. This condition was not satisfied. Accordingly, the reforms contemplated by the *Indigenous Communities Liquor Licences Act* 2002 did not come into operation. The enactment of the amending Act then ensued.

[208] In these difficult circumstances it was unlikely that any measure enacted to ameliorate the situation would accommodate all of the competing interests involved. Much less was it likely that such a measure would reflect what all interested parties would regard as the best or most reasonable accommodation of all competing interests. But does that mean that the amending Act fell outside of s 8 of the RDA?

Reasonably proportionate?

[209] Mr Campbell argues that the Court may uphold the amending Act as a special measure only if the Court is satisfied that it is reasonably proportionate and adapted to securing the adequate advancement of the kind mentioned in Article 1(4) of CERD.

[210] Nothing in CERD or the RDA manifests an intention to exalt judicial power over the legislature in the way advocated by Mr Campbell. The extent to which the appellants' submissions on this point stray from an orthodox understanding of the relationship between the courts and the other branches of government in relation to s 8 of the RDA can be seen from the following excerpt from the reasons of Brennan J in *Gerhardy v Brown*:[175]

> "In the first instance, of course, a political branch of government determines whether an occasion exists for taking a particular

[175] (1985) 159 CLR 70 at 138 – 139 (citations footnoted in original).

> measure. An obligation to take a special measure 'when the circumstances so warrant' is imposed by Art 2(2) of the Convention. That is an obligation in international law, and no municipal court has jurisdiction to enforce that obligation, or to determine 'when the circumstances so warrant'. The obligation to take special measures falls to be performed by a political branch of government. If a political branch of government decides that a racial group is in need of advancement to ensure that they attain effective, genuine equality and that a particular measure is likely to secure the advancement needed and that the circumstances warrant the taking of the measure, a municipal court has no jurisdiction under international law to determine whether those decisions have been validly made and whether the measure therefore has the character of a special measure under the Convention. But when the legal rights and liabilities of individuals are in issue before a municipal court and those rights and liabilities turn on the character of the [legislation] as a special measure, the municipal court is bound to determine for the purposes of municipal law whether it bears that character. But the character of a special measure depends in part on a political assessment that advancement of a racial group is needed to ensure that the group attains effective, genuine equality and that the measure is likely to secure the advancement needed. When the character of a measure depends on such a political assessment, a municipal court must accept the assessment made by the political branch of government which takes the measure. It is the function of a political branch to make the assessment. It is not the function of a municipal court to decide, and there are no legal criteria available to decide, whether the political assessment is correct. The court can go no further than determining whether the political branch acted reasonably in making its assessment: cf. *United States v Sandoval* ((1913) 231 US 28, at p. 46). In *R v Poole; Ex parte Henry* [No 2] ((1939) 61 CLR 634) where the validity of a rule made to carry out and to give effect to the convention for the Regulation of Air Navigation was in issue, Starke J said ((1939) 61 CLR., at p 648) that 'within reason it is or at least should be for the discretion of the rule-making authority to determine, in the particular case, what are the appropriate and effective means of carrying out and giving effect to the Convention'. To go further than deciding whether the assessment could reasonably be made would be to assume a function that is necessarily committed to another branch of government. In some cases, it may not be open to a court to act upon a political assessment made by another branch of government, but where it is open to a court to do so, the court does not itself undertake the making of the assessment … It is enough that the court determines no more than this: could the political assessment inherent in the measure reasonably be made? If the political assessment could not have been made reasonably, the measure does not bear the character of a special measure and the court must so hold …"

[211] The reasons of Brennan J in *Gerhardy v Brown* to which I have referred show that a court does not sit on appeal from the political judgment of the legislature as to the

appropriate content of a special measure for the purposes of s 8 of the RDA. It is only where a court is able to say that the political judgment is one that a reasonable legislature could not have made that a court may decline to give effect to the putative special measure.

[212] As has been seen, the amending Act was introduced only after extensive consultations with the affected parties. The idea that it would be desirable that local governments should be relieved of the conflict of interest and duty in which they find themselves was canvassed. The amending Act is a measure which may or may not ultimately contribute positively to the amelioration of domestic violence in the appellants' communities. But s 8 of the RDA allows the State legislature to pursue measures which, *ex hypothesi*, adversely affect human rights on the basis that those measures may, as a matter of reasonable judgment, contribute to an amelioration of a situation of disadvantage. No-one can deny the situation of disadvantage in which the residents of the appellants' communities find themselves. And as the reasons of Brennan J in *Gerhardy v Brown* show, a State legislature is allowed to pursue the possibility of improvement without having to satisfy a court on the balance of probabilities that the measure will be successful or that other measures would not be more likely to be successful or have a less adverse effect upon those whose vested interest is in maintaining the status quo.

[213] The question for this Court is whether the political assessment reflected in the amending Act is one which could reasonably be made. It is apparent from the foregoing discussion that there are compelling reasons why the political assessment involved in passing the amending Act could reasonably be made. A political judgment that if the local government authorities such as the appellants are to be part of the solution, they must not continue to be part of the problem is one which, in my respectful opinion, could reasonably be made by the Queensland legislature.

[214] Accordingly, if it were necessary to do so, I would uphold the amending Act as a special measure.

Conclusions and orders

[215] For the reasons set out above, I have concluded that:

(a) The opportunity for an individual to have access to and use a local facility provided by a local government authority for the supply of alcohol is not a "human right or fundamental freedom" of the kind with which s 10 of the RDA is concerned;

(b) The opportunity for an individual to have access to and use a local supplier of alcohol is not a "human right or fundamental freedom" of the kind with which s 10 of the RDA is concerned;

(c) In any event, the amending Act is not within the scope of s 10 of the RDA because the amending Act serves the legitimate and non-discriminatory public goal of protecting the human rights of the women and children of Aurukun and Kowanyama under Article 5(b) of CERD;

(d) The appellants' rights as licensees under the *Liquor Act* are not in the nature of a "human right or fundamental freedom" of the kind with which s 10 of the RDA is concerned;

(e) The level of enjoyment of the opportunity for residents of the appellants' local government areas to have access to alcohol supplied

by their local government is not different from that of persons of another race; the absence of such an opportunity is, by reason of the amending Act, the same for persons of all races throughout Queensland;

(f) The level of enjoyment of the opportunity for residents of the appellants' local government areas to have access to a licensed supplier of alcohol is not different in comparison to residents of other local government areas in Queensland by reason of the amending Act; and

(g) In any event, the amending Act is a special measure within s 8 of the RDA, and so is outside the operation of s 10 of the RDA.

[216] It follows that, in my opinion, each appeal must be dismissed.

[217] So far as the costs of this appeal are concerned, the question is whether there is good reason why the costs in this case should not follow the event. The issues which were agitated in this case are no doubt of interest to the public, but it cannot be said that the arguments advanced by the appellants had sufficient prospects of ultimate success that the agitation of these arguments was a matter of public interest. Moreover, the immediate interest which the appellants sought to vindicate in these proceedings was their interest in maintaining a commercial entitlement. For these reasons I am not persuaded that the usual rule that costs should follow the event should not apply. I would order that in each appeal the appellant pay the respondent's costs to be assessed on the standard basis.

[218] **PHILIPPIDES J:** These appeals concern amendments to the *Liquor Act* 1992 (Qld) by which the general liquor licence held by each of the appellants, the Aurukun Shire Council and the Kowanyama Shire Council, lapsed from 1 July 2008. In addition, pursuant to the amendments, local governments such as the appellants are precluded from applying for or holding such licences. The impugned provisions (s 106(4) and s 278 and s 279 of the *Liquor Act*) are outlined in the judgments of McMurdo P and Keane JA and do not require repetition.

[219] The question for determination concerns whether the impugned provisions are by virtue of s 10 of the *Racial Discrimination Act* 1975 (Cth) ("the RDA") rendered inoperative. The appellants contended that the impugned provisions compromise the enjoyment of indigenous persons' rights to equality before the law within the meaning of s 10(1) RDA. The respondent, which in each case is the Chief Executive, Office of Liquor Gaming and Racing in the Department of Treasury, disputed that contention, but also submitted that, if s 10(1) RDA was engaged, the impugned provisions constituted "special measures" within the exception provided by s 8 RDA.

[220] The challenge to the impugned provisions was dismissed at first instance, with the learned primary judge finding that they were not racially discriminatory and, additionally, that there was no impairment in the enjoyment of a right of a kind protected by s 10(1) RDA.

[221] The issues arising for determination require a consideration of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), which is given effect to by the RDA, and the scheme of the RDA, having regard to the principles applicable to the construction of s 10 RDA and the special measures exception in s 8 RDA.

CERD

[222] The preamble to CERD, in expressing its objectives cites, *inter alia*, the Charter of the United Nations, the Universal Declaration of Human Rights ("Universal Declaration") and the United Nations Declaration on the Elimination of All Forms of Racial Discrimination. It opens with the following:

> *"The States Parties to this Convention,*
> *Considering* that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race … "

[223] The preamble then embraces Arts 1, 2 and 7 of the Universal Declaration of Human Rights ("the Universal Declaration") proceeding as follows:

> *"Considering* that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race … ,
> *Considering* that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination …"

[224] The preamble also states:

> *"Considering* that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist … ,
>
> *Considering* that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,
>
> *Convinced* … that there is no justification for racial discrimination, in theory or in practice, anywhere,
>
> *Reaffirming* that discrimination between human beings on the grounds of race, … is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,
>
> *Convinced* that the existence of racial barriers is repugnant to the ideals of any human society,
>
> *Alarmed* by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of *apartheid*, segregation or separation,

> *Resolved* to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,
>
> …
>
> *Desiring* to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,
>
> *Have agreed* as follows:
>
> …"

[225] "Racial discrimination" is defined in Art 1 CERD which states:

> "1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. ..."

[226] Article 2(1) imposes obligations on States Parties to eliminate racial discrimination by a number of modes. It provides, *inter alia*:

> "1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
>
> (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
>
> …
>
> (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; ..."

[227] The approach taken in CERD, is one which, while imposing an obligation to eliminate racial discrimination, also permits, in certain specified circumstances, differential treatment by means of "special measures" for disadvantaged racial groups. For "it has long been recognized that formal equality before the law is insufficient to eliminate all forms of racial discrimination", as Brennan J stated in *Gerhardy v Brown*,[176] observing:

> "In its *Advisory Opinion on Minority Schools in Albania*, the Permanent Court of International Justice noted the need for equality in fact as well as in law, saying:

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176 (1985) 159 CLR 70 at 128.

> 'Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.
>
> It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact …'." (footnotes omitted)

[228] This duality of approach to the elimination of racial discrimination is seen in the nature of the fundamental obligations imposed on States Parties in Art 2 CERD. While Art 2(1) is directed towards promoting what might be referred to as "formal equality" before the law, Art 2(2) recognises the need for, and indeed imposes an obligation, in certain circumstances, to pursue differential treatment over a finite period in the interests of promoting ultimate equality in fact.[177]

[229] Article 2(2) thus obligates States Parties, "when the circumstances so warrant", to take "special and concrete measures" in "social, economic, cultural and other fields", so as "to ensure the adequate development and protection" of racial groups or individuals belonging to them, "for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms". Such measures are deemed by Art 1(4), which introduces an additional "sole purpose" requirement, not to be "racial discrimination". Both articles proscribe, in somewhat differently worded provisos, measures that establish the maintenance of unequal and separate rights for different racial groups after the objectives for which they were taken have been achieved.

[230] Article 5 CERD propounds the basic obligations placed on States Parties under Art 2. In compliance with their Art 2 obligations, States Parties "undertake 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 respect of the enjoyment of the rights listed therein. The principle of equality before the law is expressed both positively and negatively: discrimination is to be prohibited and eliminated and equality before the law is to be guaranteed.[178]

[231] In respect of the guarantee of the right of equality before the law, the rights enumerated in Art 5 are generally based on those set out in the Universal Declaration, but also include some of broader scope, and are provided by way of "particular" examples.[179]

Principles applicable to the construction of s 10 of the Racial Discrimination Act

[232] Section 10 RDA is contained in Part II of RDA, which is entitled "Prohibition of racial discrimination", and pursues a legislative method to eliminate racial discrimination in accordance with the undertaking in Art 2.1(c) CERD;[180] it is the only provision of the

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177 Such an approach is also adopted under the International Convention on Civil and Political Rights: see CCPR *General Comment No 18: Non-discrimination: 10/11/89*, para 10 in respect of the need to accord differential treatment by way of "affirmative action".

178 W McKean, "*Equality and Discrimination Under International Law*", Oxford, Clarendon, 1983, p 162.

179 *Gerhardy* (1985) 159 CLR 70 at 126, per Brennan J. See also *General Recommendation Number 20: Non-Discriminatory Implementation of Rights and Freedoms (Art.5):15/03/96"* issued by the Office of the High Commissioner for Human Rights, 48th session 1996.

180 *Gerhardy* (1985) 159 CLR 70 at 98, per Mason J.

RDA which deals with the effect of legislation which brings about discrimination.[181] Section 10 RDA thus implements Art 5 of CERD[182] and provides:

> "**10 Rights to equality before the law**
>
> (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race … do not enjoy a right that is enjoyed by persons of another race …, or enjoy a right to a more limited extent than persons of another race …, then, notwithstanding anything in that law, persons of the first-mentioned race … shall, by force of this section, enjoy that right to the same extent as persons of that other race … .
>
> (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.
>
> …"

[233] Unlike s 9 RDA, which prohibits acts that are racially discriminatory, s 10 does not, in terms, refer to racial discrimination.[183] For s 10(1) RDA to be engaged, it is not necessary that the impugned law explicitly makes a distinction based on race.[184] Rather, s 10(1) picks up the language of enjoyment of a right used in Art 5 CERD and is expressed to operate where persons of a particular race do not enjoy a relevant right that is enjoyed by persons of another race or at least not to the same extent.[185]

[234] "Enjoyment" of rights directs attention to much more than what might be thought to be the purpose of the law in question.[186] As Mason J stated in *Gerhardy,*[187] s 10 is to be read in the light of CERD as a provision directed to lack of enjoyment of a right arising by reason of a law whose purpose *or effect* is to create racial discrimination. Likewise, Deane J in *Mabo v Queensland,*[188] emphasised that s 10 RDA is not to be given a legalistic or narrow interpretation, observing:

> "As its opening words ('If, *by reason of* …') make clear, it is concerned with the operation and effect of laws. In the context of the nature of the rights which it protects and of the provisions of the International Convention which it exists to implement, the section is to be construed as concerned not merely with matters of form but with matters of substance, that is to say, with the practical operation and effect of an impugned law."

[235] The words of s 10(1) RDA are thus of wide import.[189] The "right" to which it refers is not necessarily a legal right enforceable under municipal law; so much is apparent

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181 *Gerhardy* (1985) 159 CLR 70 at 85, per Gibbs CJ.

182 *Mabo v Queensland [No 1]* (1988) 166 CLR 186 at 217, per Brennan, Toohey and Gaudron JJ.

183 *Gerhardy* (1985) 159 CLR 70 at 99, per Mason J; *Western Australia v Ward* (2002) 213 CLR 1 at 99, per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

184 *Gerhardy* (1985) 159 CLR 70 at 99, per Mason J; *Western Australia v Ward* (2002) 213 CLR 1 at 103, per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

185 *Gerhardy* (1985) 159 CLR 70 at 97, 99, per Mason J; *Mabo v Queensland* (1988) 166 CLR 186 at 216; per Brennan, Toohey and Gaudron JJ; *Western Australia v Ward* (2002) 213 CLR 1 at 99, per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

186 *Western Australia v Ward* (2002) 213 CLR 1 at 99, 103, per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

187 (1985) 159 CLR 70 at 99.

188 (1988) 166 CLR 186 at 230; see also *Western Australia v Ward* (2002) 213 CLR 1 at 103, per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

189 *Gerhardy* (1985) 159 CLR 70 at 85, per Gibbs J.

from the terms of s 10(2) which directs attention to rights "of a kind referred to in Article 5" of CERD, each of which may be a "right" for the purposes of s 10(1).[190] Moreover, as the inclusory terms of s 10(2) indicate, while s 10(1) includes rights of a kind referred to in Art 5, s 10(1) is not confined to the rights actually mentioned in Art 5. But what is the scope of the rights encompassed by s 10(1)?

[236] In *Gerhardy*,[191] Mason J identified the other rights to which s 10(1) RDA relates as "the human rights and fundamental freedoms with which the Convention is concerned", with the rights enunciated in Art 5 "being particular instances of those rights and freedoms, without necessarily constituting a comprehensive statement of them". His Honour noted[192] that the expression "human rights":

> "is commonly used to denote the claim of each and every person to the enjoyment of rights and freedoms generally acknowledged as fundamental to his or her existence as a human being and as a free individual in society. The expression includes claims of individuals as members of a racial or ethnic group to equal treatment of the members of that group in common with other persons …".

[237] In *Gerhardy*,[193] Brennan J also described the human rights with which Art 5 CERD is concerned in an expansive manner:

> "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 fundamental freedoms."

[238] In finding that, but for the application of s 8 RDA, the provision of the *Land Rights Act* before the Court in *Gerhardy* was discriminatory, Brennan J stated:[194]

> "The inequality of treatment is produced by the law itself, … A discriminatory law or a discriminatory act done in due obedience to the law denies the human right of equality before the law, referred to in the third preamble to the Convention. The right to equality before the law without distinction as to race is guaranteed by the States Parties to the Convention: Art 5. The claim to equality before the law is, as Sir Hersch Lauterpacht wrote (*An International Bill of the Rights of Man* (1945), p 115), 'in a substantial sense the most fundamental of the rights of man … It is the starting point of all other liberties'. A distinction etc based on race that is required by law

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190 *Mabo* (1988) 166 CLR 186 at 216 – 217.
191 (1985) 159 CLR 70 at 101.
192 (1985) 159 CLR 70 at 101 – 102.
193 (1985) 159 CLR 70 at 126 – 127.
194 (1985) 159 CLR 70 at 128.

> nullifies the enjoyment of the human right to equality before the law."

[239] In *Mabo*,[195] Deane J emphasised that the word "right" in s 10(1) RDA is used in the same broad sense in which it is used in CERD, "that is to say, as a moral entitlement to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights: cf, the preamble to [CERD]".

[240] Given the broad scope of the right to equality before the law with which Art 5 CERD is concerned, informed as it is by the preamble, the rights protected by s 10 RDA in my view extend to include human rights as elaborated in other international instruments to which Australia is a party which are directed to the same concerns as Art 5 CERD. I accept the appellants' contention that Art 26 of the International Covenant on Civil and Political Rights ("ICCPR") comes within this category. It provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race … ."

[241] The right to "equal protection of the law", which is the focus of Art 26 ICCPR, is derived from Art 7 of the Universal Declaration, and is also central to Art 5 CERD, being cited in the preamble to CERD and being consonant with its objective to eliminate racial discrimination "in all its forms and manifestations". The Human Rights Committee established under the ICCPR has observed [196] that Art 26 provides an autonomous right prohibiting discriminatory legislation, such that it prohibits discrimination in law or fact "in any field regulated and protected by public authorities". Thus, the application of the principle of non-discrimination contained in Art 26 is not limited to those rights which are expressly protected in ICCPR.

[242] Likewise, the protection against discriminatory legislation with which s 10 RDA is concerned, does not rest on a hierarchy of human rights, with the racially discriminatory regulation of "lesser rights" being outside the purview of s 10(1) RDA. Such an interpretation would have the perverse effect of construing s 10(2) in a manner inconsistent with the broad objectives sought to be achieved by the RDA. A broad interpretation of s 10 RDA, consistent with the beneficial purpose promoted by the RDA and the CERD, leads to the conclusion that the right to equality before the law includes, as a fundamental right, a right to "equal protection of the law", which operates to nullify legislation that is racially discriminatory "in any field regulated and protected by public authorities". Such a broad construction of s 10(1) RDA nevertheless recognises that the CERD does not seek to eliminate racial discrimination in every field of life, but rather that it is concerned with the protection against racial discrimination of rights "in some field of public life".[197]

The special measures exception in s 8 of the Racial Discrimination Act

[243] By s 8 of the RDA, legislative measures which constitute "special measures", to which Art 1(4) applies, are excluded from the operation of Part II of the RDA. The RDA

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195 (1988) 166 CLR 186 at 229.

196 CCPR *General Comment No 18: Non-discrimination: 10/11/89*, para 12.

197 *Gerhardy* (1985) 159 CLR 70 at 86, per Gibbs CJ; at 125, per Brennan J.

does not define "special measures". However, as Brennan J observed in *Gerhardy*,[198] from the conceptions enunciated in Arts 1(4) and 2(2), the indicia of a special measure may be gleaned. A "special measure" is thus one which:

> "(1) confers a benefit on some or all members of a class, (2) the membership of which is based on race …, (3) for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms, (4) in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms."

[244] As the obligation to take special measures falls to be performed by a political branch of government, the character of a special measure depends in part on a "political assessment" that advancement of a racial group is needed to ensure genuine equality and that the measure is required to secure that advancement. Such questions the courts are "ill-equipped to answer". [199] In those circumstances, the issue which arises for determination by the court is of narrow compass. It was identified by Brennan J in *Gerhardy* [200] as follows:

> "It is enough that the court determines no more than this: could the political assessment inherent in the measure reasonably be made? If the political assessment could not have been made reasonably, the measure does not bear the character of a special measure and the court must so hold."

[245] Deane J similarly observed:[201]

> "What is necessary for characterization of legislative provisions as having been 'taken' for a 'sole purpose' is that they can be seen, in the factual context, to be really and not colourably or fancifully referable to and explicable by the sole purpose which is said to provide their character. They will not be properly so characterized unless their provisions are capable of being reasonably considered to be appropriate and adapted to achieving that purpose. Beyond that, the Court is not concerned to determine whether the provisions are *the* appropriate ones to achieve, or whether they will in fact achieve, the particular purpose."

[246] In ascertaining whether a legislative measure is a special measure within Art 1(4) the purpose of the legislative measure must be identified.[202] As to whether a measure can be said to be taken for the purpose of advancement, Brennan J observed in *Gerhardy*[203] that "advancement" is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries, stating:

> "The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of

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198 (1985) 159 CLR 70 at 133.

199 *Gerhardy* (1985) 159 CLR 70 at 137 – 138, per Brennan J; at 161 – 162 per Dawson J.

200 (1985) 159 CLR 70 at 139.

201 *Gerhardy* (1985) 159 CLR 70, 149; at 105, per Mason J; at 113, per Wilson J; at 162, per Dawson J.

202 *Gerhardy* (1985) 159 CLR 70 at 135, per Brennan J.

203 (1985) 159 CLR 70 at 135, 139.

> the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them."

[247] In *Bropho v Western Australia*,[204] the Full Federal Court noted that the primary judge had declined to place any weight on the dicta of Brennan J, considering that it had no apparent judicial support and was not supported in the other judgments in *Gerhardy*. Because the Full Federal Court in that case held that s 10 RDA was not engaged, it did not proceed to consider the requirements of s 8 RDA and the correctness of the trial judge's approach.

[248] Counsel for the Commonwealth Human Rights and Equal Opportunity Commission ("HREOC"), who was given leave to appear, cited support for the view that the dicta of Brennan J is consistent with principles of international law.[205] In *Gerhardy* Brennan J provided an illustration of how the dignity of the intended beneficiaries is impaired and their position not advanced by having an unwanted material benefit foisted on them:[206]

> "An Aboriginal community without a home is advanced by granting them title to the land they wish to have as home. Such a grant may satisfy a demand for land rights. But an Aboriginal community would not be advanced by granting them title to land to which they would be confined against their wishes. Such a grant would be a step towards apartheid. Even if the promoters of the measure had the purpose of promoting the interests of the residents of that land, the measure would deny the residents' human rights and fundamental freedoms: see pars 128-131 of the *Namibia (S.W. Africa) Advisory Opinion* of the International Court of Justice ([1971] ICJ R 16, at pp. 56-57). The difference between land rights and apartheid is the difference between a home and a prison."

[249] I note however that Brennan J stopped short of holding that the consent of the intended beneficiaries was either essential or determinative in all cases. Clearly, the extent of consultation with the intended beneficiaries and the degree of consideration and accommodation of their views may reflect on whether a measure can be said to be appropriate and adapted to securing their advancement.

The construction of s 10 of the Racial Discrimination Act in *Bropho*

[250] As Mason J noted in *Gerhardy*,[207] "{a}lthough there may be universal agreement that a right is a universal right, there may be no universal or even general agreement on the content of that right"; that is not a matter with which CERD concerns itself. Thus, while the RDA seeks to eliminate racial discrimination and promote equality before the law, as was stated in *Bropho v Western Australia*,[208] it has "long been recognised in human rights jurisprudence, that all rights in a democratic society must be balanced

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204 (2008) 169 FCR 59 at 72 – 73.

205 In this respect HREOC referred to the CERD Committee, General Recommendation XXIII concerning Indigenous Peoples, (Fifty-first session) UN Doc A/52/18 (1997), [(4d)]; CERD Committee, General Recommendation XXI on the right to self-determination, (Forty-eighth session), UN DOC A/51/18 (1996), [2]. See also the European Union's Racial Equality Directive 2000/43/EC which provides for special measures (article 5) and the concept of social dialogue (article 11). See also W McKean, "*Equality and Discrimination Under International Law*", Oxford, Clarendon, 1983, pp 258 - 263.

206 (1985) 159 CLR 70 at 135 – 136.

207 (1985) 159 CLR 70 at 102.

208 (2008) 169 FCR 59 at 83.

against other competing rights and values, and the precise content of the relevant right or freedom must accommodate legitimate laws of, and rights recognised by, the society in which the human right is said to arise". That proposition accords with the position enunciated in Art 29(2) of the Universal Declaration, which provides:[209]

> "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

[251] Thus, in *Gerhardy*,[210] Mason J observed, in respect of the concept of freedom of movement which was central to the respondents' argument in that case, that while it embraced a claim to immunity from and protection by law from unnecessary restrictions on the freedom, it nevertheless was "subject to compliance with regulations legitimately made in the public interest … and subject to the private and property rights of others".

[252] Similarly, in *Bropho* a right to occupy and manage land conferred on Aboriginal people by statute was held to be subject to the contingency that the right would be removed or modified if that was necessary to protect vulnerable members of the community enjoying the right of occupation and management. The court determined that the challenged legislation was effected to obviate the risks to the safety and welfare of (particularly) women and children residing at the reserve in question. It was found that, to the extent that there was an interference with property rights, this occurred in order to achieve a legitimate and non-discriminatory public goal and did not infringe s 10 RDA.

[253] It is critical to observe that the principle recognised in *Bropho* only permits a modification of the content of a human right in the pursuit of non-discriminatory laws. The Court was at pains to stress this aspect, stating:[211]

> "We accept that it will always be a question of degree in determining the extent to which the content of a universal human right is modified or limited by legitimate laws and rights recognized in Australia. We also emphasise that these observations are not intended to imply that basic human rights protected by the RD Act can be compromised by laws which have an ostensible public purpose but which are, in truth, discriminatory."

[254] Thus, the principle recognised in *Bropho* sits outside the concerns of s 8 RDA which is directed at legislative measures effecting racially different treatment.[212]

Do the impugned provisions offend s 10 of the Racial Discrimination Act?

[255] Prior to 1 July 2008, the appellants held general liquor licences in their respective shires, enabling them to store and sell liquor at their premises. In respect of each of the communities, an alcohol management plan had been adopted, with the consequence

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209 See also the CCPR *General Comment No 18: Non-discrimination*: *10/11/89*, para 13.

210 (1985) 159 CLR 70 at 102.

211 *Bropho v Western Australia* (2008) 169 FCR 59 at 83.

212 See *Gerhardy* (1985) 159 CLR 70, per Brennan J at 130: "A special measure is, ex hypothesis, discriminatory in character; it denies formal equality before the law in order to achieve effective and genuine equality." Cf *Gerhardy* (1985) 159 CLR 70 at 104, per Mason J; at 132 – 133 per Brennan J.

that the appellants' premises were the only place where it was legal to store and sell alcohol.[213]

[256] As the impugned provisions exclude local governments from being entitled to hold a liquor licence, and, as the appellants held the only liquor licences in their respective communities, presently, upon the lapsing of the appellants' licences, liquor is not available at licensed premises in communities in question. However, the amendments do not exclude others from holding a liquor licence and therefore do not preclude alcohol being made available from licensed premises in the communities in question. Indeed, one of the arguments raised by the appellants against the application of the special measures exception was precisely that a third party may still apply for a liquor licence in the appellants' shires.

[257] Furthermore, limitations on the availability of alcohol within the communities in question, beyond that arising from the present lack of licensed premises, do not result from the operation and effect of the impugned provisions, but from the operation and effect of other measures, including the alcohol management plan in place in the communities in question.

[258] The issue then that arises for determination centres on whether, as counsel for the appellants expressed in oral argument, by revoking the licences of the appellants, with the consequence that those in the predominantly indigenous communities in question are unable to acquire alcohol from licensed premises operated by their local government, a right protected by s 10(1) RDA is compromised. In their written submissions, the appellants contended that the impugned provisions have the purpose or effect of limiting the enjoyment of a least four rights of indigenous people:

(a) the right to equal protection of the laws without discrimination;
(b) the right to equal participation in cultural activities;
(c) the right to access places and services used or intended for use by the general public;
(d) the right not to be arbitrarily deprived of property.

(a) The right to equal protection of the laws without discrimination

[259] As is already apparent, I accept the appellants' submissions that s 10(1) RDA encompasses a right to equal protection of the law in relation to any particular field regulated by public authorities, and that it includes a right to equal treatment before the law in respect of the legislative scheme for liquor licensing within Queensland. However, in the present case, the right to equal legislative treatment in that regard has not been compromised. Rather, the impugned provisions provide that the same licensing provisions apply to all local governments in Queensland.

[260] This formal equality, however, is said, nevertheless, to have the practical consequence of effecting a racially discriminatory regulatory regime. In this regard, the appellants submitted that the impugned provisions impose a discriminatory burden on the right of indigenous persons to equal protection of the laws. In particular, the appellants argued that, while all local governments are precluded from applying for or holding general licences, in practice only councils in certain indigenous communities are affected. It is contended that the results of "singling out" those councils are that a different regime of alcohol regulation applies in the predominantly indigenous communities governed by the appellants because no licensed premises are available. In this regard it is said that:

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213 Appeal Record, pp 1-9, 1-10.

> "The reason for divesting local governments of their liquor licences was inextricably linked to race or ethnicity: the government claimed it was addressing alcohol-related harms in specific indigenous communities. Officials also foresaw that the effect of the legislation might well be to deprive persons in indigenous communities of any place in which alcohol could be consumed under supervision."

[261] In a similar vein, it was submitted on behalf of HREOC, that the impugned provisions "have the effect of making a distinction between indigenous and non-indigenous peoples in Queensland", because although the impugned provisions do not prevent third parties obtaining a licence in the communities in question, "the practical operation and effect of the section is that the limitation exists until such time as a new licence is granted. The limitation is a complete one and for an uncertain period of time."

[262] As I have stated, it can be accepted that the right of indigenous people to equal protection of the law entails a right to be free of discriminatory legislation in respect of the regulation of liquor licences in Queensland. However, the impugned provisions do not in substance or practical effect impose a different liquor licensing regime in indigenous communities as claimed. The prohibition they impose is solely in relation to the appellants' entitlement to obtain a licence; a prohibition which applies to all local governments in Queensland. In the absence of any provision which precludes third parties from being entitled to obtain liquor licences in the relevant communities, the impugned provisions do not as a matter of practical operation result in a different licensing regime for those communities. True it is, that upon the appellants being divested of their licences (and until a further licence is applied for and granted in the relevant communities) alcohol is not available at licensed premises in the communities. But the alcohol limitations which thereby follow do not arise because a liquor licence cannot by law be obtained in those communities but because such a licence has not yet been obtained under the *Liquor Act* by those who may apply for one.

[263] In my view, this is not a case therefore where it has been shown that the amendments to the *Liquor Act*, either by its terms or manner of implementation, imposes a regime for the licensing of alcohol in indigenous communities which is racially discriminatory. If such a racially discriminatory regime had been effected by the impugned provisions, the principle enunciated in *Bropho* would have no relevance; rather a consideration of s 8 RDA would be required. But that is not the situation that arises for consideration here.

(b) The right not to be arbitrarily deprived of property

[264] One of the rights specified in Art 5 CERD is the right to own property alone, as well as in association with others (Art 5(d)(v)). The appellants rely on that provision, in conjunction with Art 17(2) of the Universal Declaration which provides that: "No one shall be arbitrarily deprived of his property", to claim that a s 10(1) RDA right is compromised.

[265] As to whether the divesting of the appellants' licences compromises a right not to be arbitrarily deprived of property so as to attract the protection of s 10 RDA, I accept that a broad interpretation of the term "property" should be adopted. That accords with the

approach taken in *Mabo,* which was confirmed in *Ward*;[214] see also *Bropho*.[215] However, even accepting for present purposes that the appellants' licences may properly be characterised as "property" for the purposes of Art 5, and that the cancellation of the licences constitutes a deprivation of property, and further, that in the circumstances of this case, the appellants ought to be regarded as a "person" within s 10 RDA, the matter does not rest there.

[266] To the extent that the appellants' rights, derived from statute, may be seen as property rights protected by s 10 RDA, the protection afforded is not an absolute one. As was recognised in *Bropho,* the content of a human right, such as the right to own property, may be modified to achieve a legitimate and non-discriminatory public purpose.

[267] The Explanatory Notes to the Bill[216] for the amending Act are set out in the judgments of McMurdo P and Keane JA, and there is no need to repeat them, except to observe that the clearly stated purpose of the impugned provisions is expressed as follows:[217]

> "The divestment of canteens from local governments is a policy decision based on the inappropriateness of local government social services being reliant on the level of profit from a business whose purpose is to sell alcohol, particularly when alcohol-related harm is driving the need for those services.
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> …
>
> As part of the alcohol reforms, the Government has committed $14 million as revenue replacement over the next 4 years for canteen profits to the extent they have been used to provide social services. This is not direct compensation, but is to ensure that there is no loss in services as a result of councils no longer having canteens as a source of revenue."

[268] The impugned provisions are thus expressly directed to remedying the "inappropriateness" of a local government being placed in a position where the funding of social services it provides is reliant on the level of profit from sales of alcohol, especially in the context of alcohol-related harm driving the need for those services. This legislative intent is apparent not only from the Explanatory Notes but also the 1999 Aboriginal and Torres Strait Islander Women's Task Force on Violence Report ("the Task Force Report")[218] and the 2001 Cape York Justice Study ("the Cape York Justice Study"),[219] referred to in the Explanatory Notes, extensive extracts of which are also recorded in the judgments of McMurdo P and Keane JA.

[269] The impugned provisions pursue a policy of divesting local governments of liquor licences as part of a suite of measures aimed at reducing alcohol-related violence. These measures include the provision of an alternate source of revenue for local governments divested of a liquor licence. The impugned provisions are the outcome of a political judgment in respect of the balancing of the appellants' statutory rights

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214 *Western Australia v Ward* (2002) 213 CLR 1 at 103 – 105, per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

215 (2008) 169 FCR 59 at 81.

216 Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Bill 2008 (Qld).

217 Explanatory Notes p 9.

218 Aboriginal and Torres Strait Islander Women's Task Force on Violence & Queensland Department of Aboriginal and Torres Strait Islander Policy and Development, 2000, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report*.

219 Queensland Dept of the Premier and Cabinet & Tony Fitzgerald, 2001, *Cape York Justice Study*.

against other competing rights, such as the right "to security of person and protection of State against violence or bodily harm" recognised in Art 5 (b) CERD, with primacy being accorded to the latter.

[270] In *Mabo* it was observed that the word "arbitrary" has been interpreted to mean not only "illegally" but also "unjustly."[220] To the extent that the divestiture of the appellants' licences amounts to a deprivation of a property right for the purposes of Art 5, I do not consider that it can be said to be arbitrary where, as is the case here, it is effected in order to achieve a legitimate and non-discriminatory public purpose. Nor, in the circumstances of this case, does the legitimate public purpose behind the impugned provisions assume the character of an arbitrary or racially discriminatory measure because the only local governments in fact divested of their licences are those which have predominantly indigenous constituents, such as the appellants – that is a reflection of the position historically held by the appellants in their respective communities in relation to the selling of alcohol under a liquor licence.

[271] Accordingly, I do not find that the appellants have shown that a right not to be arbitrarily deprived of property has been compromised so as to engage s 10 RDA.

(c) The right to equal participation in cultural activities

(d) The right to access places and services

[272] The appellants also contended that the practical operation and effect of the impugned provisions is to curtail the right of indigenous Australians to participate in cultural activities on an equal footing with other Australians, thus compromising the right set out in Art 5 (e)(vi) CERD. The cultural activity in question was articulated as one of "social drinking in a controlled, safe environment", and one of participating "in the very Australian custom of going to the pub", because "alternative licensees in the isolated Aboriginal communities are not readily available, at least in the short term".

[273] Counsel on behalf of HREOC put the matter somewhat differently by submitting that it was open to the Court to find that the impugned provisions engaged "the rights of members of the [relevant] communities to 'engage freely in public activity', namely access to alcohol".

[274] Relying on Art 5(f) CERD, the appellants also contended that the impugned provisions infringe the right of access to any place or service for use by the general public.

[275] The answer to these submissions is that the impugned provisions do not, in form or substance, preclude indigenous Australians from accessing alcohol from licensed premises, such as a pub. While the appellants are now precluded from selling liquor, others may hold a licence to sell liquor in the relevant communities. The impugned provisions therefore do not themselves entrench inequalities in a social, cultural or any other field of public life.[221] Furthermore, to the extent that alcohol limitations (other than those relating to alcohol licensing) are in place in the relevant communities, such as restrictions which preclude alcohol from being brought into or stored in the relevant communities, they do not stem from the impugned provisions but from the management plan adopted in place in the communities.

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220 (1988) 166 CLR 186 at 217.

221 Cf *Gerhardy v Brown* (1985) 159 CLR 70 at 129.

[276] The inability of indigenous persons in the relevant communities to access liquor from premises operated by the appellants pursuant to licences held by them does not result in a compromise of the rights of indigenous "members of the [relevant] communities to 'engage freely in public activity', namely access to alcohol". Nor has it been shown that there is a compromise in the enjoyment of a relevant right arising by reason of a legislative provision whose purpose or effect is to create racial discrimination. No one in Queensland is able to obtain liquor from premises licensed by a local government. The removal of a previously existing ability to access alcohol from the appellants' licensed premises, by legislation applying to all local councils in Queensland, does not amount to an exclusion from enjoyment of a human right or fundamental freedom or a right of a kind referred to in Art 5 CERD.

Conclusion and orders

[277] I agree for the reasons stated by McMurdo P that the application to adduce further evidence should be refused.

[278] In my view, the revocation of the appellants' licences, with the consequence that alcohol is not available from licensed premises operated by the appellants in the respective shires, does not compromise a right protected by s 10(1) RDA. Because of the view I have reached that s 10 RDA is not engaged, there is no call to consider the application of s 8 RDA.

[279] As the impugned provisions do not infringe the provisions of the RDA, the appeals must be dismissed.

[280] As to the question of costs, the appellants have raised significant issues of public interest which they as representative bodies are well placed to ventilate and which touch on principles that have relevance beyond the commercial interests sought to be maintained by the appellants. In those circumstances, I consider the costs order proposed by McMurdo P to be appropriate.