SUPREME COURT OF QUEENSLAND

CITATION:	*R v Maloney* [2012] QCA 105
PARTIES:	**R** **v** **MALONEY, Joan Monica** (applicant)
FILE NO/S:	CA No 237 of 2011 DC No 289 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	20 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2012
JUDGES:	Margaret McMurdo P and Chesterman JA and Daubney J Separate reasons for judgment of each member of the Court, Chesterman JA and Daubney J concurring as to the order made, Margaret McMurdo P dissenting in part
ORDER:	**Leave to appeal refused, with costs**
CATCHWORDS:	HUMAN RIGHTS – DISCRIMINATION – GROUNDS OF DISCRIMINATION – RACIAL DISCRIMINATION – where applicant was charged with possessing liquor in a restricted area pursuant s 168B(1) *Liquor Act* 1992 (Qld) – where applicant admitted the facts of the charge but sought leave to appeal arguing that s 168B was invalidated by s 10 *Racial Discrimination Act* 1975 (Cth) – whether s 168B and related provisions of the *Liquor Act* invoke s 10 *Racial Discrimination Act* by contravening human rights enumerated in Article 5(a), 5(d)(v) and 5(f) *Convention on the Elimination of All Forms of Racial Discrimination* – whether the provisions of the *Liquor Act* are a special measure within s 8 *Racial Discrimination Act* – whether the form of consultation with the Palm Island community prevented the relevant provisions from being a special measure – whether the consent of the Palm Island community was necessary for the provisions to constitute a special measure *Racial Discrimination Act* 1975 (Cth), s 8, s 10, sch *Liquor Act* 1992 (Qld), s 3, s 168B, s 173F, s 173H, s 173I *Liquor Amendment Regulation (No. 4)* 2006 (Qld) *Liquor Amendment Regulation (No. 3)* 2008 (Qld) *Liquor Regulation* 2002 (Qld), s 37A, s 37B

Statutory Instruments Act 1992 (Qld), s 54
United Nations Declaration on the Rights of Indigenous Peoples (2007), Art 1, Art 2, Art 3, Art 4, Art 19
United Nations International Covenant on Civil and Political Rights [1980] ATS 23; 999 UNTS 171, Art 2, Art 26
United Nations International Convention on the Elimination of All Forms of Racial Discrimination [1975] ATS 40; 660 UNTS 195, Art 1, Art 2, Art 5
United Nations Universal Declaration of Human Rights (1948), Art 1, Art 2, Art 7

Aurukun Shire Council v CEO Office of Liquor Gaming & Racing (2010) 265 ALR 536; [2010] QCA 37, discussed
Bropho v Western Australia (2008) 169 FCR 59; (2008) 249 ALR 121; [2008] FCAFC 100, discussed
Gerhardy v Brown (1985) 159 CLR 70; [1985] HCA 11, discussed
Morton v Queensland Police Service (2010) 240 FLR 269; [2010] QCA 160, discussed
Pilkington (Australia) Ltd v Minister for Justice and Customs (2002) 127 FCR 92; [2002] FCAFC 423, cited
Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476; [2003] HCA 2, cited
Western Australia v Ward (2002) 213 CLR 1; [2002] HCA 28, cited
Wurridjal v The Commonwealth (2009) 237 CLR 309; [2009] HCA 2, cited

COUNSEL: C A Ronalds SC, with A McAvoy for the applicant
M D Hanson SC, with S A McLeod for the respondent

SOLICITORS: Aboriginal and Torres Straight Islander Legal Service (Qld) for the applicant
Crown Solicitor for the respondent

[1] **MARGARET McMURDO P:** The applicant, Joan Maloney, was convicted on 27 October 2010 in the Magistrates Court at Palm Island of an offence against s 168B(1) *Liquor Act* 1992 (Qld), namely, having in her possession a 1125 ml bottle of Jim Beam bourbon and a 1125 ml bottle of Bundaberg rum (three-quarters full) on 31 May 2008 in a public place on Palm Island within a restricted area declared under s 173H *Liquor Act*. The alcohol was apparently forfeited to the Crown. She was fined $150 in default one day's imprisonment. She appealed under s 222 *Justices Act* 1886 (Qld) against her conviction to the Townsville District Court. The District Court gave her leave to adduce new evidence but the judge dismissed her appeal with costs. She now applies for leave to appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld). The relevant provisions of the *Liquor Act* and the *Liquor Regulation* 2002 (Qld)[1] are set out in Chesterman JA's reasons at [70]–[72] and I will not repeat them.

[2] There are three principal issues raised in the application. The first is whether leave to appeal should be granted. The second is whether the judge erred in finding the

[1] See *Liquor Regulation* 2002 (Qld) ss 37A, 37B, Sch 1R.

relevant provisions were inconsistent with s 10 *Racial Discrimination Act* 1975 (Cth) and therefore invalid under s 109 of the Constitution. If that question is answered in the negative, Ms Maloney's proposed appeal must fail. If it is answered in the affirmative, the third question is whether the relevant provisions were a special measure under s 8 *Racial Discrimination Act* so that s 10 had no application to them.

Leave to appeal

[3] Ms Maloney's counsel contend that the application raises a matter of public importance, namely, the protection of her rights from an act of racial discrimination by the operation of a Queensland law, and the question whether discriminatory provisions aimed at prohibiting or limiting the quantity and type of liquor a person may possess within an Indigenous community are for the benefit of that community. While the case contains similar issues to those raised in *Morton v Queensland Police Service*,[2] it raises some fresh matters not argued in that case.

[4] I consider there is merit in that contention. As I noted in *Morton*,[3] citing Kirby J's observations in *Wurridjal v Commonwealth*:[4]

> "[T]he 'law knows no finer hour' than when it protects individuals from selective discrimination and persecution. [Courts] should be specially hesitant before declining effective access … to those who enlist assistance in the face of legislation that involves an alleged deprivation of their legal rights on the basis of race. All such cases are deserving of the most transparent and painstaking of legal scrutiny."[5]

[5] As Ms Maloney's counsel point out, this case does raise some new arguments and others which expand upon those presented in *Morton*. The importance of the subject matter, and the different approach to the arguments raised in *Morton*, warrant the granting of leave to appeal. This is so even though I agree with Chesterman JA and Daubney J that s 10 *Racial Discrimination Act* has no application to the relevant provisions because of s 8 *Racial Discrimination Act*.

[6] For those reasons, I would grant leave to appeal.

Are the relevant provisions inconsistent with s 10 *Racial Discrimination Act*?

[7] The primary judge, following the approach of the majority in *Morton*, found the relevant provisions were not in breach of s 10 which relevantly provides:

> "**Rights to equality before the law**
>
> (1) If, by reason of, or of a provision of, a law … of a State …, 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-

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2 (2010) 240 FLR 269; (2010) 271 ALR 112; [2010] QCA 160 ('*Morton*').

3 Above, 271 [2].

4 (2009) 237 CLR 309 (adopting Murphy J's observations in *Falbo v United States* (1944) 320 US 549, 561).

5 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 393 [210].

> 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 [on the Elimination of All Forms of Racial Discrimination].
>
> …"[6]

[8] Ms Maloney's counsel contend that the relevant provisions are inconsistent with s 10 in that they contravene the following three rights in Art 5 of the Convention, namely:

> "… 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:
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> (a) The right to equal treatment before the tribunals and all other organs administering justice;
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> …
>
> (d) Other civil rights, in particular:
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> …
>
> (v) The right to own property alone as well as in association with others;
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> …
>
> (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."
>
> *Do the relevant provisions racially discriminate against Ms Maloney's right to equal treatment before the law?*

[9] For the reasons I gave in *Morton*,[7] I accept Ms Maloney's contention that the relevant provisions offend against her right under s 10 and Art 5(a) of the Convention to equality before the law in the enjoyment of the right to equal treatment before the tribunals and all other organs administering justice. Further, this conclusion is consistent with the following international instruments and statements concerning human rights.

[10] The *United Nations Universal Declaration of Human Rights* ("the Declaration")[8] which was adopted by 48 countries, including Australia,[9] relevantly states:

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6 See *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (in force 4 January 1959); [1975] ATS 40 ('the Convention'). The Convention was adopted by Australia with the enactment of the *Racial Discrimination Act* and is contained in the schedule to the *Racial Discrimination Act*. See *Racial Discrimination Act* 1975 (Cth) s 7, sch.

7 *Morton* (2010) 240 FLR 269, 278 [24].

8 *Universal Declaration of Human Rights*, GA Res 217 (III) A (1948).

9 No countries voted against its adoption but there were eight abstentions: the Soviet Union (USSR), Ukrainian Soviet Socialist Republic (UKSSR), Byelorussian Soviet Socialist Republic (BSSR), Yugoslavia, Poland, Saudi Arabia, Czechoslovakia and South Africa.

"**Article 1**

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, … .

…

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration … ."

[11] The *International Covenant on Civil and Political Rights* ("ICCPR"),[10] which Australia signed on 18 December 1972 and ratified on 13 August 1980, includes:

"**Article 2**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, …

…

Article 26

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, … ."

[12] The Report of the United Nations Committee on the Elimination of Racial Discrimination at their 66th and 67th Sessions[11] relevantly includes:

"**B. Strategies to be developed to prevent racial discrimination in the administration and functioning of the criminal justice system**

5. States parties should pursue national strategies the objectives of which include the following:

(a) To eliminate laws that have an impact in terms of racial discrimination, particularly those which target certain groups indirectly by penalizing acts which can be committed only by persons belonging to such groups, … without legitimate

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10 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (in force 23 March 1976); [1980] ATS 23 ('ICCPR').

11 Committee on the Elimination of Racial Discrimination, *Report to General Assembly*, UN GAOR 60th sess, UN Doc A/60/18 (2005), p 101 ('*General Recommendation No 31*').

> grounds or which do not respect the principle of proportionality;
>
> …"

[13] The United Nations *Declaration on the Rights of Indigenous Peoples*,[12] which Australia adopted on 3 April 2009, includes:

> "…
> *Reaffirming* that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,
>
> …
>
> *Article 1*
>
> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
>
> *Article 2*
>
> Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity."

[14] My conclusion in *Morton*, that the relevant provisions offended against Ms Morton's right under s 10 and Art 5(a) to equality before the law in the enjoyment of the right to equal treatment before the tribunals and all other organs administering justice, is also consistent with the legislative intention stated by the relevant Minister in the second reading speech of the Racial Discrimination Bill. The relevant Minister stated: "The Bill will guarantee equality before the law without distinction as to race."[13]

[15] As I consider the relevant provisions offend s 10 and Art 5(a), they are unlawful unless they are a special measure under s 8 *Racial Discrimination Act*. But I will deal with Ms Maloney's other contentions concerning s 10 before turning to s 8.

> *Are the relevant provisions inconsistent with Ms Maloney's right to own property?*

[16] Ms Maloney's counsel contend the relevant provisions are inconsistent with her right to own property under Art 5(d)(v) of the Convention. This contention was not discussed in *Morton*.

[17] International obligations such as those under the Declaration, the ICCPR and the Convention should be construed more liberally than domestic statutes, unconstrained by technical local rules or precedent: *Pilkington (Australia) Ltd v Minister for Justice and Customs*;[14] and *Aurukun Shire Council v Chief Executive*

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12 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2007).

13 Commonwealth Parliamentary Debates, House, 13 February 1975, 285 (the Hon Mr Enderby, Attorney-General and Minister for Customs and Exercise (sic)).

14 (2002) 127 FCR 92, 100 [26].

Officer, Office of Liquor Gaming & Racing.[15] Courts should favour a construction of legislation enacted in accordance with international obligations, like the *Racial Discrimination Act*, consistent with those international obligations.[16] As Mason J explained in *Gerhardy v Brown*,[17] 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 terms of the preambles to the *Racial Discrimination Act* and of the Convention are broad, as are the terms of the Declaration Art 17(2), which provides that "No one shall be arbitrarily deprived of his property." This Court, accordingly, should take a broad approach in identifying whether the right to own property is within the terms of s 10.

[18] It is true that all people, not merely Indigenous people, are prohibited by the relevant provisions from possessing bourbon and rum on Palm Island. It is also true that Ms Maloney could own bourbon and rum in places in Queensland not listed in the schedule to the *Regulation*. But the practical purpose and effect of the relevant provisions is to discriminate directly against the overwhelmingly Aboriginal inhabitants of Palm Island as to their right to own a particular type of property. As a result of their Aboriginality, they cannot own alcohol other than beer in their own community in the way that other Queenslanders can. The right is not the right to own rum or bourbon, but the right to own rum or bourbon in the same way and to the same extent as non-Indigenous Australians.

[19] Subject to the application of *Bropho v Western Australia*,[18] which I will discuss shortly, I accept Ms Maloney's contention that the relevant provisions limit her right described in Art 5(f) of the Convention to own property as an Indigenous person in the same way as a non-Indigenous person. To accept the argument that the relevant legislation does not discriminate against Ms Maloney's right to own property because it applies equally to all people in Queensland, would be to allow a legislature, for example, to pass laws prohibiting all persons in the Palm Island community from possessing life-saving drugs during a major epidemic affecting the community.[19]

[20] In *Bropho*, the Full Federal Court (Ryan, Moore and Tamberlin JJ), in considering an Indigenous woman's right to own real property under Art 5(d)(v) of the Convention, noted:

> "[80] … 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. …
>
> [81] 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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15 (2010) 265 ALR 536, 553–554 [35] ('*Aurukun*').

16 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492; *Aurukun* (2010) 265 ALR 536, 553–554 [35].

17 (1985) 159 CLR 70, 101–103.

18 (2008) 249 ALR 121.

19 Such hypothetical legislation could well infringe other specified human rights such as the right to 'adequate … health and well-being … including medical care' (Declaration, Art 25) and the right to life (ICCPR, Art 6); as well as constituting cruel, inhuman or degrading treatment (ICCPR, Art 7).

> [82] 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 [*Racial Discrimination Act*] can be compromised by laws which have an ostensible public purpose but which are, in truth, discriminatory. …
>
> [83] … 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 [*Racial Discrimination Act*]. Indeed, although the authorities on s 10 of the [*Racial Discrimination 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 rights occurs where the State acts in order to achieve a legitimate and non-discriminatory public goal."

[21] The High Court refused Ms Bropho special leave to appeal.[20]

[22] As I noted in *Aurukun*,[21] the concept of balancing competing rights in determining whether s 10 is infringed does not seem to sit comfortably with the terms of s 10, especially in its context in Pt II of the *Racial Discrimination Act*. The more obvious construction is that, where a legislative 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 impugned provision is within the exception in s 8. The approach in *Bropho* seems to merge s 8 and s 10 into one seamless consideration. It places another potential barrier to those who claim they have been racially discriminated against, a barrier which does not appear to be raised by the ordinary meaning of the terms of

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20 *Bropho v Western Australia* [2009] HCA Trans 170 (31 July 2009, Western Australia).

21 (2010) 265 ALR 536, 561 [61].

the provisions of Pt II. But for *Bropho*, I would not give s 10 the construction adopted by the Full Federal Court, although I would have reached the same conclusion by way of s 8.

[23] 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 unless convinced the interpretation is plainly wrong: *Australian Securities Commission v Marlborough Gold Mines Ltd*;[22] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[23] and *Aurukun*.[24] As the High Court refused Ms Bropho's special leave to appeal, I cannot conclude that *Bropho* was plainly wrong. As I stated in *Aurukun*,[25] however, I consider it should be limited to the construction of Art 5(d)(v) of the Convention (the right to own property).

[24] It follows that, consistent with the *Bropho* approach, before concluding the relevant provisions interfered with Ms Maloney's property rights on the basis of race, it is necessary to consider whether such interference was effected in the legitimate public interest. The objects of the *Liquor Act* are relevantly:[26]

> "…
>
> (a) to facilitate and regulate the optimum development of the … liquor … industries of the State having regard to the welfare, needs and interests of the community …; and
>
> …
>
> (c) to provide for a flexible, practical system for regulation of the liquor industry of the State with minimal formality, technicality or intervention consistent with the proper and efficient administration of this Act; and
>
> (d) to regulate the liquor industry in a way compatible with –
>
> (i) minimising harm arising from misuse of liquor; and
>
> (ii) the aims of the National Health Policy on Alcohol; 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; …"[27]

[25] The purpose of Pt 6A *Liquor Act* and the Explanatory Notes for *Liquor Amendment Regulation (No 4)* 2006 (Qld)[28] by which Palm Island was first added to the schedule of restricted areas for the possession of certain types and amounts of alcohol, show that the legislature was acting legitimately in the public interest to "minimise harm caused by alcohol abuse and misuse and associated violence, and alcohol related disturbances or public disorder in Indigenous communities".[29]

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22 (1993) 177 CLR 485, 492.

23 (2007) 230 CLR 89, 151–152 [135].

24 (2010) 265 ALR 536, 562 [63].

25 Above, 563 [65].

26 *Liquor Act* 1992 (Qld) s 3.

27 *Liquor Act* 1992 (Qld) s 3(a), (c), (d) and (e).

28 *Liquor Act* 1992 (Qld) s 173F, relevantly set out in Chesterman JA's reasons at [70].

29 Explanatory Notes, SL 2006 No 79, [3], [4] and [9] (set out at [44] of these reasons). See also Explanatory Notes for *Liquor Amendment Regulation (No 3)* 2008 (Qld), SL 2008 No 364 (in force at the time of Ms Maloney's offence), 1–2.

[26] These provisions satisfy me that the Queensland Parliament intended, in enacting the relevant provisions which limited Ms Maloney's right to own liquor in the same way as non-Indigenous Queenslanders, to achieve a legitimate and non-discriminatory public goal. That goal was the minimisation of harm caused by alcohol abuse and misuse and associated violence and alcohol-related disturbances or public disorder in the Indigenous community of Palm Island. The effect of the relevant provisions on Ms Maloney is that if she wishes to possess or consume rum or bourbon she must do so in places other than those listed in the schedule to the *Regulation*. This means she cannot possess certain types or quantities of liquor in her own community. She has also suffered the indignity and inconvenience of having her property confiscated; being charged with an offence against the *Liquor Act*; being dealt with in court; the recording of a conviction with all that entails; a $150 fine; and the prospect that if she does not pay it, she must serve a day in prison. Adopting the approach to property rights and s 10 taken in *Bropho*, Ms Maloney has not suffered any invalid diminution of her property rights because the Queensland legislature, in enacting the relevant provisions, did so in order to achieve a legitimate and non-discriminatory public goal. It follows that the relevant provisions do not offend Art 5(d)(v). This aspect of Ms Maloney's contentions is not made out.

Do the relevant provisions infringe Ms Maloney's right of access to licensed premises intended for use by the general public, such as the Palm Island canteen?

[27] Ms Maloney's counsel contend that the relevant provisions discriminate against her right of access to a place or service intended for use by the general public under Art 5(f) of the Convention. The relevant provisions limit her right to acquire spirits from the licensed canteen at Palm Island which can sell nothing other than light or mid-strength beer. Licensed premises in non-Indigenous communities do not have such limitations.

[28] For the reasons I have explained, the rights provided by s 10 should be construed broadly.[30] The practical purpose and effect of the relevant provisions is unquestionably to deny Ms Maloney the same access to the service of liquor in licensed premises in her community on Palm Island which is enjoyed by non-Indigenous Queenslanders in their communities. The legislature clearly enacted the relevant provisions intending them to apply only to Indigenous communities. The relevant provisions do not apply to dysfunctional non-Indigenous communities with problems of alcohol-related violence. In my opinion, the relevant provisions diminish Ms Maloney's enjoyment of a right exercised by non-Indigenous people in their communities, namely, the right of access to licensed premises intended for use by the general public where spirits are served.

[29] As I consider the relevant provisions offend s 10 and Art 5(f), they are unlawful unless they are a special measure under s 8.

Conclusion on s 10 Racial Discrimination Act

[30] The relevant provisions do not compromise Ms Maloney's enjoyment of the right to own property as that right is not absolute in nature; the legislature enacted the relevant provisions for the legitimate public purpose of protecting members of the

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30 See [17]–[18] of these reasons.

Palm Island community from alcohol-related violence and public disorder and to improve school attendance. The relevant provisions do however compromise Ms Maloney's enjoyment of the rights to equal treatment before the law; and of access to a service intended for use by the general public, namely, the Palm Island licensed canteen. It is necessary, therefore, to consider the third question raised in this case.[31]

Are the relevant provisions special measures under s 8 *Racial Discrimination Act*?

[31] The primary judge found that the relevant provisions were a special measure under s 8 *Racial Discrimination Act* so that, even if under s 10 they were racially discriminatory, s 10 had no application.

[32] Despite this Court's decision in *Morton* holding the relevant provisions to be a special measure under s 8, Ms Maloney's counsel contend that they are not a special measure for four reasons. First, the legislature did not genuinely consult with the Palm Island community before enacting the relevant provisions. Second, the community did not consent to the relevant provisions. Third, the relevant provisions do not evince a legislative intention that they be a temporary measure. Fourth, the relevant provisions were not special measures as achieving a functional civil society was not an advancement; it was something a government should provide to all its communities as a right.

Racial Discrimination Act s 8 and related international instruments and statements

[33] Before discussing each of those contentions I will set out what I consider are relevant international instruments and statements concerning the construction of s 8 *Racial Discrimination Act*. Section 8 provides that s 10 has no application "to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies …".

[34] Article 1(4) of the Convention[32] contained in the schedule to the *Racial Discrimination Act* relevantly provides:

> "Special measures taken for the sole purpose of securing adequate advancement of certain racial … groups … requiring such protection as may be necessary in order to ensure such groups … equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, *lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved*." (emphasis added)

[35] Article 1(4) should be read together with Art 2(2) of the Convention which provides:

> "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete

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31 See *Aurukun* (2010) 265 ALR 536, 564–565 [71].

32 The Convention is contained in the schedule to the *Racial Discrimination Act*.

> 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*." (emphasis added)

[36] The concept of special measures is referred to in other relevant United Nations statements on human rights. The United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Indigenous Peoples* calls upon States parties to:[33]

> "(d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no *decisions directly relating to their rights and interests are taken without their informed consent*" (emphasis added)

[37] The Convention's Committee on the Elimination of Racial Discrimination in its 75th session made *General Recommendation No 32: The meaning and scope of special measures in the Convention* "with the objective of providing overall interpretive guidance on the meaning of [Art 1(4) and Art 2(2)] in light of the provisions of the Convention as a whole."[34]

[38] *General Recommendation No 32* includes:

> "**III. THE CONCEPT OF SPECIAL MEASURES**
>
> **A. Objective of special measures: Advancing effective equality**
>
> 11. The concept of special measures is based on the principle that laws, policies and practices adopted and implemented in order to fulfil obligations under the Convention require supplementing, when circumstances warrant, by the adoption of temporary special measures designed to secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms. Special measures are one component in the ensemble of provisions in the Convention dedicated to the objective of eliminating racial discrimination, the successful achievement of which will require the faithful implementation of all Convention provisions.
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> **B. Autonomous meaning of special measures**
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> 12. … The term 'special measures' includes also measures that in some countries may be described as 'affirmative measures', 'affirmative action' or 'positive action' in cases where they correspond to the provisions of articles 1, paragraph 4, and 2, paragraph 2, of the Convention, as explained in the following paragraphs. …

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33 UN Doc A/52/18, annex V (1997), [4].

34 Committee on the Elimination of Racial Discrimination, *General Recommendation No 32*, UN Doc CERD/C/GC/32 (2009), [1] ('*General Recommendation No 32*').

13. 'Measures' include the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture and participation in public life for disfavoured groups, devised and implemented on the basis of such instruments. States parties should include, as required in order to fulfil their obligations under the Convention, provisions on special measures in their legal systems, whether through general legislation or legislation directed to specific sectors in the light of the range of human rights referred to in article 5 of the Convention, and through plans, programmes and other policy initiatives referred to above at national, regional and local levels.

C. Special measures and other related notions

14. The obligation to take special measures is distinct from the general positive obligation of States parties to the Convention to secure human rights and fundamental freedoms on a non-discriminatory basis to persons and groups subject to their jurisdiction; this is a general obligation flowing from the provisions of the Convention as a whole and integral to all parts of the Convention.

15. Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, for example the rights of persons belonging to minorities to enjoy their own culture, profess and practise their own religion and use their own language, the rights of indigenous peoples, including rights to lands traditionally occupied by them, and rights of women to non-identical treatment with men, such as the provision of maternity leave, on account of biological differences from men. Such rights are permanent rights, recognized as such in human rights instruments, including those adopted in the context of the United Nations and its specialized agencies. *States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice.* The distinction between special measures and permanent rights implies that those entitled to permanent rights may also enjoy the benefits of special measures.

D. Conditions for the adoption and implementation of special measures

16. *Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary. The measures should be designed and implemented on the basis of need, grounded in a realistic appraisal of the current situation of the individuals and communities concerned.*

17. Appraisals of the need for special measures should be carried out on the basis of accurate data, disaggregated by race, colour, descent and ethnic or national origin and incorporating

a gender perspective, on the socio-economic and cultural status and conditions of the various groups in the population and their participation in the social and economic development of the country.

18. *States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.*

IV. CONVENTION PROVISIONS ON SPECIAL MEASURES

A. Article 1, paragraph 4

…

20. By employing the phrase '**shall not be deemed racial discrimination',** article 1, paragraph 4, of the Convention makes it clear that special measures taken by States parties under the terms of the Convention do not constitute discrimination, a clarification reinforced by the *travaux préparatoires* of the Convention which record the drafting change from 'should not be deemed racial discrimination' to 'shall not be deemed racial discrimination'. Accordingly, special measures are not an exception to the principle of non-discrimination but are integral to its meaning and essential to the Convention project of eliminating racial discrimination and advancing human dignity and effective equality.

21. In order to conform to the Convention, special measures do not amount to discrimination when taken for the 'sole purpose' of ensuring equal enjoyment of human rights and fundamental freedoms. Such a motivation should be made apparent from the nature of the measures themselves, the arguments used by the authorities to justify the measures, and the instruments designed to put the measures into effect. The reference to 'sole purpose' limits the scope of acceptable motivations for special measures within the terms of the Convention.

22. The notion of 'adequate advancement' in article 1, paragraph 4, implies goal-directed programmes which have the objective of alleviating and remedying disparities in the enjoyment of human rights and fundamental freedoms affecting particular groups and individuals, protecting them from discrimination. Such disparities include but are not confined to persistent or structural disparities and de facto inequalities resulting from the circumstances of history that continue to deny to vulnerable groups and individuals the advantages essential for the full development of the human personality. It is not necessary to prove 'historic' discrimination in order to validate a programme of special measures; the emphasis should be placed on correcting present disparities and on preventing further imbalances from arising.

23. The term *'protection' in the same paragraph signifies protection from violations of human rights emanating from any source,* including discriminatory activities of private persons, in

order to ensure the equal enjoyment of human rights and fundamental freedoms. *The term 'protection' also indicates that special measures may have preventive (of human rights violations) as well as corrective functions*.

24. Although the Convention designates 'racial or ethnic groups or individuals requiring … protection' (article 1, paragraph 4), and 'racial groups or individuals belonging to them' (article 2, paragraph 2), as the beneficiaries of special measures, the measures shall in principle be available to any group or person covered by article 1 of the Convention, as clearly indicated by the *travaux préparatoires* of the Convention, as well as by the practice of States parties and the relevant concluding observations of the Committee.

25. Article 1, paragraph 4, is expressed more broadly than article 2, paragraph 2, in that it refers to individuals 'requiring … protection' without reference to ethnic group membership. The span of potential beneficiaries or addressees of special measures should however be understood in the light of the overall objective of the Convention as dedicated to the elimination of all forms of racial discrimination, with special measures as an essential tool, where appropriate, for the achievement of this objective.

26. Article 1, paragraph 4, provides for limitations on the employment of special measures by States parties. The first limitation is that *the measures 'should not lead to the maintenance of separate rights for different racial groups'. This provision* is narrowly drawn to refer to 'racial groups' and *calls to mind the practice of Apartheid* referred to in article 3 of the Convention, which was imposed by the authorities of the State, *and to practices of segregation* referred to in that article and in the preamble to the Convention. The notion of inadmissible 'separate rights' must be distinguished from rights accepted and recognized by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognized within the framework of universal human rights.

27. The second limitation on special measures is that '**they shall not be continued after the objectives for which they have been taken have been achieved**'. *This limitation on the operation of special measures is essentially functional and goal-related: the measures should cease to be applied when the objectives for which they were employed – the equality goals – have been sustainably achieved. The length of time permitted for the duration of the measures will vary in light of their objectives, the means utilized to achieve them, and the results of their application. Special measures should, therefore, be carefully tailored to meet the particular needs of the groups or individuals concerned*.

…

V. RECOMMENDATIONS FOR THE PREPARATION OF REPORTS BY STATES PARTIES

…

37. Reports of States parties should describe special measures in relation to any articles of the Convention to which the measures are related. The reports of States parties should also provide information, as appropriate, on:

- The terminology applied to special measures as understood in the Convention
- The justifications for special measures, including relevant statistical and other data on the general situation of beneficiaries, a brief account of how the disparities to be remedied have arisen, and the results to be expected from the application of measures
- The intended beneficiaries of the measures
- *The range of consultations undertaken towards the adoption of the measures including consultations with intended beneficiaries and with civil society generally*
- The nature of the measures and how they promote the advancement, development and protection of groups and individuals concerned
- The fields of action or sectors where special measures have been adopted
- *Where possible, the envisaged duration of the measures*
- The institutions in the State responsible for implementing the measures
- The available mechanisms for monitoring and evaluation of the measures
- Participation by targeted groups and individuals in the implementing institutions and in monitoring and evaluation processes
- The results, provisional or otherwise, of the application of the measures
- Plans for the adoption of new measures and the justifications thereof
- Information on reasons why, in light of situations that appear to justify the adoption of measures, such measures have not been taken.

… ." (emphasis in bold in original, emphasis in italics added, citations omitted)

[39] Also relevant are the following Articles in the *Declaration of the Rights of Indigenous Peoples*:

"*Article 3*

Indigenous peoples have *the right to self-determination*. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right *to self-determination*, have the *right to autonomy or self-government in matters relating to their internal and local affairs*, as well as ways and means for financing their autonomous functions.

…

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[35] (emphasis added)

[40] Three principles relevant to Ms Maloney's contentions can be distilled from s 8, Art 1(4) and Art 2(2) of the Convention, *General Recommendations No 23* and *No 32*, and Arts 3, 4 and 19 of the *Declaration of the Rights of Indigenous Peoples*. First, special measures should be implemented only after consultation with and the active participation of those affected by them and be carefully tailored to meet the needs of the group they are to benefit. Second, special measures must not lead to the maintenance of separate rights for different racial groups akin to Apartheid or segregation. Third, special measures should be discontinued once the objectives for which they were implemented have been achieved.

Did the form of the Queensland government's consultation with the Palm Island community prevent the relevant provisions from being a special measure?

[41] Ms Maloney's counsel contend that the legislature did not undertake genuine consultation with and obtain the consent of the Palm Island community before enacting the relevant provisions. This contention turns on the affidavits of the 14 Palm Islanders which Ms Maloney led in evidence in the District Court. Her counsel submit that this evidence shows the community did not consent to the relevant provisions. In light of this evidence, they argue, the judge erred in law in accepting the statement of legislative intent in the Explanatory Notes to the relevant Regulation;[36] as there was no evidence of any genuine consultation with the Palm Island community, the relevant provisions are not a special measure.

[42] Ms Maloney's contentions as to the need for consultation when enacting legislation concerning the rights of Indigenous peoples, and especially in the context of special measures, do receive persuasive support from Art 1(4) and Art 2(2) of the Convention, *General Recommendations No 23* and *No 32*, and Arts 3, 4 and 19 of the *Declaration of the Rights of Indigenous Peoples* set out at [34] to [39] of these reasons, especially the parts which I have emphasised.

[43] It is not surprising, therefore, that Brennan J (as his Honour then was) in *Gerhardy v Brown* highlighted the importance of consulting with those for whom a special measure is being implemented:[37]

"… 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."

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35 Consultation in a specific context not directly relevant to the present is also required in Art 30(2) and Art 32(2).

36 See Explanatory Notes for *Liquor Amendment Regulation (No 3)* 2008 (Qld), SL 2008 No 364, 1–2.

37 (1985) 159 CLR 70, 135.

[44] The Explanatory Notes to the *Liquor Amendment Regulation (No 4)* 2006 which first included Palm Island in the relevant provisions contained the following statements pertaining to consultation:[38]

> "**3 Objectives of the legislation**
>
> The objective of Part 6A of the Liquor Act is to minimise harm caused by alcohol abuse and misuse and associated violence, and alcohol related disturbances or public disorder in Indigenous communities. Part 6A provides for the declaration of restricted areas and the establishment of liquor possession limits in restricted areas.
>
> **4 Reasons for the subordinate legislation**
>
> The Amendment Regulation will declare a restricted area for the community of Palm Island. The Amendment Regulation is based on the recommendations of the Palm Island Community Justice Group (CJG) and Palm Island Shire Council (Council).
>
> …
>
> **8 Consultation**
>
> **(a) Community**
>
> The CJG and Council for the Indigenous community of Palm Island have recommended alcohol limits as part of their community alcohol management strategies.
>
> **(b) Government**
>
> The Department of Aboriginal and Torres Strait Islander Policy and the Queensland Police Service were consulted in relation to the proposed Amendment Regulation.
>
> …
>
> **9 Results of consultation**
>
> *The proposed alcohol restrictions do differ from the recommendations of the CJG and Council. There is ongoing division within the CJG and between the CJG and the Council. This division has inhibited community agreement on an Alcohol Management Plan* (AMP). Subsequently, the Government developed an AMP based on a compromise between the four separate AMPs that have previously been presented to Government by the CJG and the Council.
>
> On 19 January 2005, the Government presented a draft AMP to the Council and CJG for consideration and comment by 7 February 2005.
>
> On 3 February 2005, Government received correspondence from the Mayor of the Council accompanied by 22 completed survey forms. The Council feedback did not comment on the detail of the

[38] Explanatory Notes for SL 2006 No 79, 1–3.

proposed AMP. However the Council did state that the AMP would not be successful without appropriate support structures. No other formal feedback has been received from the community. The restricted area for the community will comprise the whole of the Palm Island Shire including all ten islands, the Palm Island jetty located on Greater Palm Island and all the island foreshores. It is proposed that the possession of liquor in the community will be restricted to one carton (11.25 litres) of light or mid strength beer.

Extensive consultation has been undertaken with the community. The final round of consultation occurred in February 2006. Across the community there was common agreement that unrestricted alcohol was a major concern that needed to be addressed.

The AMP is necessary for Palm Island to effectively address its alcohol related issues. It is the Government's experience that in other Indigenous communities where similar alcohol related issues were present and an AMP was implemented, the quality of life has generally improved." (emphasis added)

[45] The Explanatory Notes to the *Regulation* (current at the time of Ms Maloney's offence)[39] contain the additional statements of legislative intent:[40]

"**Reasons for the subordinate legislation**

Between 2002 and 2006, alcohol restrictions have been implemented in 18 Indigenous communities. Alcohol restrictions are declared under Part 6A of the Liquor Act by way of regulation and prescribe the amount of alcohol that can be in a person's possession or in a vehicle (***carriage limit***).

In 2007, the Office for Aboriginal and Torres Strait Islander Partnerships, Department of Communities conducted a whole-of-government review of alcohol restrictions, programs and services. The review showed that despite existing restrictions, in many remote Indigenous communities alcohol-related harm and violence remain significantly higher, and school attendance significantly below, average Queensland standards.

In February 2008, the Premier met with Indigenous community mayors and announced an Indigenous alcohol reform package whereby communities were urged to go 'as dry as possible' with government to provide improved alcohol-related support services. Part of the reforms included a review of all carriage limits in the communities.

The review of carriage limits assessed the levels of harm occurring in communities and consultation was undertaken with the community and other stakeholders. The Strong Indigenous Communities, Chief Executive Officers' Committee (***CEO Committee***) has overseen the review. Where alcohol-related harm is high, tighter restrictions on the quantity and strength of alcohol are required.

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39 *Liquor Amendment Regulation (No 3)* 2008.

40 Explanatory Notes for SL 2008 No 364, 1–4.

> Harm levels in the community subject to regulatory amendment range from 7.5 times to 13.6 times Queensland's expected number of hospital admissions for assault; and from 11.2 times to 24.6 times the expected number of reported offences against the person.
>
> …
>
> **Consultation**
>
> ***(a) Community***
>
> Senior government representatives undertook 2 rounds of community visits (April and August 2008) to discuss alcohol management strategies and service delivery. Councils and community justice groups were also asked to make written submissions in response to the reforms.
> …"

[46] The relationship between some members of the Palm Island community on the one hand and the Queensland executive and legislature on the other were strained following the tragic death of Mulrunji Doomadgee in police custody in November 2004 and the subsequent riot which caused significant damage to Palm Island infrastructure. If authority is needed for this, see *Wotton v Queensland*[41] and the extract from the Premier's address to Parliament on 23 February 2005 set out in Chesterman JA's reasons at [119]. This strained relationship seems likely to have placed tensions on the discussions about the relevant provisions between the Queensland government and members of the Palm Island community at this time.

[47] It does not seem to me, however, that the material contained in the 14 affidavits[42] are in significant conflict with the information about the Palm Island consultation in the Explanatory Notes set out at [44] and [45] of these reasons. There were more than 2,000 residents on Palm Island at the relevant time. The legislature and the executive clearly consulted with a number of prominent Palm Islanders about the relevant provisions which the legislature intended would minimise harm caused by alcohol abuse and misuse and associated violence and alcohol related disturbances or public disorder on Palm Island. The Explanatory Notes frankly state that the legislature and the executive were unable to achieve a consensus of approach from Palm Island community members to the proposed alcohol management plan although "there was common agreement that unrestricted alcohol was a major concern that needed to be addressed". I therefore reject the contention of Ms Maloney's counsel that the affidavit evidence she adduced in the District Court has the effect that the District Court judge erred in law in accepting the Explanatory Notes as demonstrating both a genuine legislative intent to consult and meaningful consultation with the Palm Island community.

[48] Ms Maloney's counsel further submitted that s 173I *Liquor Act* required the relevant Minister to consult with the Palm Island community justice group ("CJG") before recommending that the Governor-in-Council make the regulation declaring Palm Island to be a restricted area under Part 6A *Liquor Act*.[43] The Explanatory Notes to the regulation first declaring Palm Island to be a restricted area stated that the

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41 *Wotton v Queensland* [2012] HCA 2, [4].

42 Discussed in [107]–[110] of Chesterman JA's reasons.

43 See *Liquor Amendment Regulation (No 4)* 2006 (Qld).

consultation concluded in February 2006.[44] No Palm Island CJG was established by regulation until later in 2006, shortly before the relevant provisions came into effect.

[49] It is true that the term "community justice group" is defined in the *Liquor Act* as "a community justice group established under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984*, part 4".[45] But the term "community justice group" predates the establishment of CJGs under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* and *Regulation*. So much is recognised in the affidavit of Jeannie Ling, filed on behalf of Ms Maloney, who swears she was "a member of the old non-statutory Community Justice Group some time in 1998". She makes it clear that this non-statutory CJG was consulted by members of the relevant Department about an alcohol management plan before the 2006 Regulation came into operation. Further, the existence of non-statutory CJGs is recognised in the *Penalties and Sentences Act* 1992 (Qld), which defines CJGs as including not only those established under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* but also as:[46]

> "(b) a group of persons within the offender's community, other than a department of government, that is involved in the provision of any of the following –
>
> (i) information to a court about Aboriginal or Torres Strait Islander offenders;
>
> (ii) diversionary, interventionist or rehabilitation activities relating to Aboriginal or Torres Strait Islander offenders;
>
> (iii) other activities relating to local justice issues; or
>
> (c) a group of persons made up of elders or other respected persons of the offender's community."

[50] It seems clear that the reference to consultation with "the Palm Island Community Justice Group" in the Explanatory Notes to the 2006 Regulation which first made Palm Island a restricted area for the purposes of Pt 6A *Liquor Act* is to consultation with a non-statutory CJG of the kind referred to in the *Penalties and Sentence Act*, not a CJG established under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* and *Regulation*.

[51] But in any case, s 173I(4) *Liquor Act* provides that non-compliance with the requirement to consult with the CJG does not affect the validity of a Regulation. The fact that the relevant Minister did not consult with a CJG established under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act* and *Regulation* but with an earlier form of non-statutory CJG does not assist Ms Maloney.

[52] The extracts from the international instruments and statements which I have set out make clear that consultation is required before a legislature can implement special measures under s 8. The Queensland legislature and executive did consult with the

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44 Relevantly set out at [44] of these reasons.

45 *Liquor Act* 1992 (Qld) s 4.

46 *Penalties and Sentences Act* 1992 (Qld), s 4 definition "community justice group".

Palm Island community before introducing special measures by way of the relevant provisions to help protect Palm Islanders from alcohol misuse and alcohol related disturbances and public disorder. Ms Maloney has not established that the relevant provisions fail to be a special measure because of lack of adequate consultation with the Palm Island community.

Is it necessary to obtain the consent of those said to benefit from the special measures before introducing them?

[53] Ms Maloney's counsel contend the relevant provisions are not a special measure as they were introduced without the consent of the Palm Island community.

[54] There is no doubt that the consent of those affected by special measures is desirable before enacting them: see *General Recommendation No 23* and Brennan J's observations in *Gerhardy v Brown*[47] cited with approval in *Aurukun* by Philippides J[48] and me[49] and again by me in *Morton*.[50] *General Recommendation No 23*[51] states that informed consent is necessary when making decisions about the rights of Indigenous Peoples. That approach is also consistent with Arts 3, 4 and 19 of the more recent *Declaration of the Rights of Indigenous Peoples*.[52] But it is significant that in *General Recommendation No 32*, which deals specifically with special measures under the Convention, it is not suggested that actual consent (rather than consultation) is required before introducing special measures. That is unsurprising. As I noted in *Aurukun*[53] and *Morton*,[54] there may often be competing views within a group affected by proposed special measures as to whether the measures are appropriate. The intended beneficiaries of a special measure, or some of them, because of youth, infirmity or cultural reasons, may have difficulty in expressing or be reluctant to express an informed and genuinely free opinion as to whether the special measure is in their interest.

[55] I am not persuaded that in this case the absence of evidence of consent to the relevant provisions from the Palm Island community prevents them from being a special measure under s 8.

Do the relevant provisions cease to be a special measure because they are not temporary?

[56] Ms Maloney's counsel argue that there is nothing in the relevant provisions to evince an intention that they be temporary. Whilst the relevant *Regulation* as subordinate legislation will expire after 10 years under s 9 and s 54(1) *Statutory Instruments Act* 1992 (Qld), that Act is not limited to the relevant provisions but to all subordinate legislation. The relevant provisions are therefore not a special measure under s 8.

[57] It is clear from the international instruments and statements to which I have referred[55] that special measures must be temporary and not maintained after the

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47 (1985) 159 CLR 70, 135.
48 (2010) 265 ALR 536, 612–614 [243]–[249].
49 Above, 566–567 [78]–[80].
50 (2010) 240 FLR 269, 279–280 [29].
51 Relevantly set out at [36] of these reasons.
52 Set out at [39] of these reasons.
53 (2010) 265 ALR 536, 567–568 [81].
54 (2010) 240 FLR 269, 281 [31].
55 See [34]–[39] of these reasons.

objectives for which they were enacted have been achieved. See also Brennan J's observations in *Gerhardy*.[56] But nothing in the *Racial Discrimination Act* or the relevant international instruments or statements mandates that a special measure must be enacted for a specific limited period. The fact that the relevant provisions will not expire for 10 years, and then only in the same way that all subordinate Queensland legislation expires under the *Statutory Instruments Act*, does not, at least in the circumstances here, prevent the relevant provisions from being a special measure under s 8. The legislature may have considered it difficult to place temporal limits on the relevant provisions because it is impossible to predict precisely how long they might take to effect the desired positive social change to the Palm Island community. Improving the quality of life in the Palm Island community by limiting alcohol misuse, increasing school attendance, and preventing alcohol-fuelled violence cannot necessarily be expected to happen overnight. If and when the relevant provisions are successful in the way the legislature intends, there will no longer be a need for them and the legislature will be obliged to repeal them.

[58] Conversely, if it becomes clear after a reasonable period that legislation enacting a special measure is ineffective in achieving the intended results, in accordance with the spirit of *Racial Discrimination Act* and the international instruments and statements relating to special measures to which I have referred, it would cease to be a special measure and must be repealed. This follows from the requirement that special measures should not lead to the maintenance of separate rights for different racial groups akin to Apartheid or segregation.[57]

[59] The Queensland executive presently reports quarterly to the Queensland Parliament on key indicators in those Indigenous communities affected by the relevant provisions, including Palm Island. The report for the period July 2010 to June 2011 (published December 2011) recorded that the Alcohol Management Plan commenced on Palm Island on 19 June 2006. As to hospital admissions, there was no overall trend in admission rates. As for reported offences against the person, there was no overall trend but, in the period from 2006/07 onwards, rates of reported offences against the person trended up. As to substantiated child protection notifications and admissions to child protection orders, the 2010/11 rate was similar to that in 2009/10 but there was a decrease in the rate at which children were admitted to child protection orders. As to student attendance rate at the Bwgcolman Community School (Palm Island) 2010 to 2011, the student rate increased but remained less than the rate recorded in 2007.[58]

[60] These figures do not suggest the relevant provisions insofar as they affect the Palm Island community are yet producing the results hoped for by the legislature. The legislature may reasonably consider that more time is required to assess the impact of the relevant provisions on achieving the desired special measure. But if it subsequently becomes clear that the relevant provisions are ineffective as a special measure, the legislature must repeal them. Ms Maloney and other like-minded members of the Palm Island community may wish to take up this question with their Queensland Member of Parliament and the responsible Minister. I also note that

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56 (1985) 159 CLR 70, 140.

57 See *General Recommendation No 32*, [26]–[27] set out at [38] of these reasons.

58 Queensland Government, *Annual Highlights Report for Queensland Discrete Indigenous Communities July 2010-June 2011* (2011), 145–153.

under s 173I(3) *Liquor Act*, the relevant Minister "must consider a recommendation made by the community justice group about changing the declaration".

Can the objective of achieving a functional civil society warrant a special measure?

[61] Ms Maloney's counsel contended in oral argument that the relevant provisions are not a special measure because it is not an advancement to make the Palm Island community a civil society: that is something which the State should provide in Palm Island in any case.

[62] The review I have undertaken of the relevant provisions of the *Racial Discrimination Act* and international instruments and statements of human rights make plain that special measures are about making disadvantaged groups equal to others in the community or moving them towards equality.[59] Making the Palm Island community a more functional society by protecting its members from alcohol misuse and alcohol induced violence and improving school attendance is unquestionably about improving the human rights of members of the Palm Island community. As the legislature reasonably considered that the Palm Island community presently suffers harm caused by alcohol abuse and associated violence and alcohol-related disturbances and public disorder, and associated low school attendance, the relevant provisions address those concerns and are a special measure within s 8.

[63] Ms Maloney's contention that the relevant provisions are not a special measure as they are not temporary must be rejected.

Conclusion on s 8

[64] The relevant provisions are capable of being reasonably considered by the legislature as appropriate and adapted to achieving their purpose of reducing harm caused by alcohol abuse and associated violence in the Palm Island community. The relevant provisions have an objective of the kind described in Art 1(4) of the Convention: see *Gerhardy v Brown*.[60] They do not lead to the maintenance of separate rights for different racial groups in the sense of Apartheid or segregation. The same laws apply to all people, Indigenous and non-Indigenous on Palm Island, and there is no present reason to conclude the special measures will not be repealed once their objective is resolved or if it becomes clear they are ineffective in reaching those objectives.[61] On the material in the appeal before the District Court judge, his Honour correctly determined that the relevant provisions were a special measure under s 8 so that s 10 did not apply to them.

Summary

[65] The relevant provisions do not breach s 10 and Art 5(d)(v) (the right to own property). The relevant provisions have the result that Ms Maloney does not enjoy to the same extent as non-Indigenous Queenslanders the right to equal treatment before the law under Art 5(a) in breach of s 10. The relevant provisions also have the result that she does not enjoy to the same extent as non-Indigenous Queenslanders the right of access to liquor services in licensed premises under

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59 See, for example, *General Recommendation No 32*, [22]–[23] set out at [38] of these reasons.

60 (1985) 159 CLR 70, 105 (Mason J), 148–149 (Deane J).

61 See, for example, *General Recommendation No 32*, [26]–[27] set out at [38] of these reasons.

Art 5(f) in breach of s 10. But the relevant provisions are a special measure to which Art 1(4) applies so that Pt II of the *Racial Discrimination Act* (including s 10) has no application to them and s 109 Constitution is not invoked. It follows that the appeal must be dismissed.

[66] I would grant the application for leave to appeal but refuse the appeal with costs.

[67] **CHESTERMAN JA**: On 27 October 2010 the applicant was convicted in the Magistrates Court at Palm Island of possessing, on 31 May 2008, a quantity of liquor, rum and bourbon, in a public place within a restricted area being more than the prescribed quantity of liquor for the area. She was fined $150 in default one day's imprisonment and the spirits were forfeited.

[68] The prosecution before the magistrate proceeded *ex parte* and was extremely brief. There had, it appears, been some prior negotiation between the prosecutor and the applicant pursuant to which a short summary of agreed facts was put before the magistrate. The schedule said only:

> "**Circumstance:**
> Police intercepted a motor vehicle on Park Road, Palm Island.
> **Alcohol:**
> 1 x 1125ml of Jim Beam Bourbon and 1 x 1125ml of Bundaberg Rum (3/4 full).
> **Located:**
> In a black backpack in the boot of the vehicle.
> **Admissions:**
> The defendant was an occupant of the vehicle and admitted to owning the liquor."

[69] The offence was created by s 168B of the *Liquor Act* 1992 ("*Liquor Act*"), which provided:

> "(1) A person must not, in a public place in a restricted area to which this section applies because of a declaration under section 173H, have in possession more than the prescribed quantity of a type of liquor for the area, other than under the authority of a restricted area permit.
> Maximum penalty –
> (a) for a first offence – 500 penalty units; or
> (b) for a second offence – 700 penalty units or 6 months imprisonment; or
> (c) for a third or later offence – 1000 penalty units or 18 months imprisonment".

[70] Section 173H provided that a regulation may declare that a restricted area is an area to which s 168B applies, and such a regulation:

> "… must state the quantity of liquor that a person may have in possession ... in the restricted area …".

That section is preceded by s 173F and s 173G. The former provides that the purpose of Part 6A of the *Liquor Act*, in which the sections appear:

> "… is to provide for the declaration of areas for minimising –

(a) harm caused by alcohol abuse and misuse and associated violence; and
(b) alcohol related disturbances, or public disorder, in a locality".

The second section, s 173G, provides that a regulation may declare an area to be a restricted area and that, without limiting that generality, a community area may be declared a restricted area. By subsection 3 the Minister must be satisfied that the declaration is necessary to achieve the purposes of Part 6A before recommending the regulation to the Governor in Council.

[71] Part 8A of the *Liquor Regulation* 2002 (Qld) ("the Regulation") provided, by s 37A and s 37B respectively, that an area stated in a relevant schedule is a restricted area, and that s 168B of the *Liquor Act* applies to all restricted areas, in respect of each of which the schedule is to prescribe the quantity and type of liquor that may be possessed.

[72] The relevant schedule is 1R. It reads:

"**Palm Island**
sections 37A and 37B
1 Areas declared to be restricted areas
Each of the following areas is a restricted area –
(a) the community area of the Palm Island Shire Council;
(b) any foreshore of the community area of the Palm Island Shire Council;
(c) the jetty on Greater Palm Island known as Palm Island jetty.

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

3 …"

[73] The applicant appealed against her conviction to the District Court. The outline of argument summarised her contention that the magistrate:

> "… erred in convicting [her]… because … he erred in failing to conclude that ss. 168B, 173G and 173H of the *Liquor Act* … and/or ss. 37A and 37B of the *Liquor Regulation* … were not applicable … because they are invalid pursuant to the operation of s. 10 of the *Racial Discrimination Act 1975* (Cth) ["*RD Act*"] and s. 109 of the *Constitution*."

These points were not raised before the magistrate. The notice of appeal curiously therefore complained of errors in reasoning on points he did not, and was not asked to, consider. Judge Durward nevertheless considered the contentions and dismissed the appeal on 27 July 2011. His Honour considered he was bound by the decision of *Morton v Queensland Police Service* [2010] QCA 160, a case decided on the same legislation and relevantly identical facts. The applicant now seeks leave to appeal against the failure of her first appeal. She wishes to raise again the two questions

decided in *Morton*, whether the prohibition contained in s 168B and the related provisions of the *Liquor Act* ("impugned provisions") is overcome by s 10 of the *RD Act*, and if yes whether the impugned provisions are a special measure so that s 8 of the *RD Act* makes s 10 inapplicable.

[74] Section 10 of the *RD Act* provides:

> "**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.
>
> …"

[75] The Convention referred to is the International Convention on the Elimination of All Forms of Racial Discrimination ("Convention"). It is reproduced in the Schedule to the *RD Act*. Article 5 of the Convention provides:

> "Article 5
>
> 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;
>
> (c) Political rights, in particular the rights to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
>
> (d) Other civil rights, in particular:
>
> (i) The right to freedom of movement and residence within the border of the State;
>
> (ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;
(iv) The right to marriage and choice of spouse;
(v) The right to own property alone as well as in association with others;
(vi) The right to inherit;
(vii) The right to freedom of thought, conscience and religion;
(viii) The right to freedom of opinion and expression;
(ix) The right to freedom of peaceful assembly and association;

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

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
(ii) The right to form and join trade unions;
(iii) The right to housing;
(iv) The right to public health, medical care, social security and social services;
(v) The right to education and training;
(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".

[76] The operation of s 10 of the *RD Act* was explained by Gleeson CJ, Gaudron, Gummow and Hayne JJ in *The State of Western Australia v Ward* (2002) 213 CLR 1 at 99. Their Honours said:

> "That to which (s 10(1)) … 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 [*RD Act*] implements … that is not surprising. The Convention's definition of racial discrimination refers to any distinction, exclusion, restriction or preference based … on race which has the purpose *or effect* of nullifying or impairing … 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 … . It is therefore wrong to confine the relevant operation of the [*RD Act*] to laws whose purpose can be identified as discriminatory … .
>
> … [Section] 10(1) operates by force of federal law to extend the enjoyment of rights enjoyed under another federal law or a … State law".

[77] Sections 8 and 10 are in Part II of the *RD Act*. Section 8 provides that the 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)".

[78] Section 10(3) is of no present relevance. Article 1(4) of the Convention is in these terms:

> "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".

[79] Article 2(2) contains an obligation on those bound by the Convention to take special measures where appropriate. It provides:

> "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".

[80] The effect of these provisions is that when a special measure is taken pursuant to the obligation on a State Party imposed by Article 2(2), the special measure meeting the definition in Article 1(4), the measure which, by definition, will be racially discriminatory does not have the consequences it otherwise would because Part II of the *RD Act* does not apply. A special measure which makes a distinction or restriction based on race denies formal equality before the law but has the purpose of achieving effective and genuine equality by alleviating adverse conditions of a disadvantaged class.

[81] The applicant's arguments are a reprise of those in *Morton* with what are said to be variations requiring a different result. Although all members of the Court in *Morton* agreed in the result, and that the impugned provisions were a special measure within s 8, there was a difference of opinion as to whether the provisions came within the ambit of s 10. The President expressed the opinion that the rights protected by s 10 should be interpreted widely to include human rights set out in international conventions to which Australia is a party, such as the United Nations Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the United Nations Declaration on the Rights of Indigenous People. Her Honour thought that these conventions at [18]:

> "… recognise[d] that to discriminate against people on the basis of their race … is to strike at the essence of the humanity of those discriminated against",

and that the impugned provisions were contrary to the human right to equality before the law.

[82] The President had expressed the same opinion in *Aurukun Shire Council v Chief Executive Officer, Office of Liquor, Gaming and Racing in the Department of Treasury*,[62] concluding that the protection afforded by s 10 extended to any laws that were discriminatory in purpose or effect on the ground of race, and that Article 26 of the International Covenant on Civil and Political Rights gave rise to a "free standing right" against discriminatory laws "in any field regulated and protected by public authorities". Philippides J expressed the same opinion at [240] to [242], holding that s 10 applied to any law which effected any discrimination on the ground of race.

[83] The other members of the Court in *Morton*, Holmes JA and I, took a narrower view and held that there was no human right, protected by s 10, not to be discriminated against at all on the ground of race, and that the protection given by the *RD Act* was to fundamental human rights and freedoms, as defined or described in Article 1(1), and unless the law in question impacts upon such a right it is not effected by s 10. Keane JA took the same view in *Aurukun* at [113] to [116].

[84] All the members of the Court agreed that the impugned provisions were discriminatory on the ground of race. It is pointed out that their effect is to prohibit the inhabitants of Palm Island from possessing more than a specified type and quantity of alcohol. The inhabitants of Palm Island are overwhelmingly Aboriginal so that the legal and practical effect of the legislation is to restrict possession of alcohol by members of a group who are identified, by the fact of their residence, as Aboriginal. There is no reason in this application to depart from that opinion.

[85] The applicant's attempt to circumvent *Morton* rests on evidence led in her appeal to the District Court which was not put forward in the earlier case. The evidence is said to show that the impugned provisions do not amount to a special measure for the purposes of s 8 of the *RD Act*. It was also urged as a separate but related point that the new evidence shows the contents of the Explanatory Notes to the *Liquor Amendment Regulation (No. 4)* 2006 to be wrong in point of fact. The effect of *Morton* is that the impugned provisions of the *Liquor Act* are a special measure, not invalidated by the *RD Act*. The applicant should not have leave to appeal unless there is perceived substance in the contention that the new evidence nullifies that unanimous opinion. Repetitious litigation is to be discouraged, even on such an important topic as human rights.

[86] The focus of the application should therefore be on s 8. The arguments as to s 10 will have no consequence if the former section applies. Nevertheless, out of deference to the arguments, what was said about s 10 may be addressed briefly.

[87] The applicant declined to take sides in the debate as to the ambit of s 10. In this respect her oral argument departed from her written submissions which had contended that there was a "stand alone" right to equality before the law, and that any discrimination on the grounds of race came within the scope of s 10. In oral submissions, however, Ms Ronalds SC accepted that, for the purposes of the application, the narrower view was sufficient. The argument therefore proceeded on the basis that s 10, and Article 1(1) of the Convention, do not refer to racial

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62 (2010) 265 ALR 536 at [32] to [34].

discrimination in all forms and of whatever kind but are restricted to discrimination with respect to those rights designated "human rights and fundamental freedoms", an understanding of which is gained from Article 5.

[88] The applicant identified three rights found in Article 5 and submitted that each had been infringed by the *Liquor Act*. They were:

> (a) the right to equal treatment before the tribunals and all other organs administering justice; …
>
> (d) ….
>
> (v) the right to own property …
>
> (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.

[89] The first right relied upon, that to equal treatment before the tribunals and all organs administering justice, was discussed in *Morton.* The President relied upon it for the conclusion that there is a "stand alone" right not to be discriminated against at all, in any respect, on the ground of race. The other members of the Court read the convention more literally and concluded that:

> "[80] The right which the applicant contended for comes down to a right not to be subjected to any discrimination by act of parliaments. It is difficult to see how that right can be regarded as a right to equal treatment before tribunals etc. administering justice. The subject matter of that right would seem to be the equal application of municipal laws to all persons regardless of race etc. It suggests, to my mind at least, a requirement of non-discriminatory conduct by tribunals and courts, and such like institutions, which make decisions affecting the persons with whom they deal. It probably extends to the executive enforcement of laws, for example by police officers. Constable Tabuai, who made the complaint, and the Magistrate who convicted the applicant, may each have been an organ or tribunal administering justice, but their conduct is not complained of. Anyway s 10 does not apply to them. It applies to laws which have the described effect. Parliament, when it passed the *Liquor Act*, was not a tribunal or organ administering justice.
>
> [81] Article 5(a) does not confer upon the applicant a right to control Parliament with respect to the laws it passes, or a right to be unaffected by any law made by Parliament which, by its terms, applies to her. Her rights with respect to legislation are those conferred by s 10 of the *RD Act*. Article 5(a) does not assist her."

[90] There is no suggestion that either before the Magistrate or the District Court the applicant was treated any differently to any other defendant in those courts. Whatever may be the ambit of the phrase, "tribunals … and organs administering justice" the only ones relevant to this application were those two courts. The complaint is not that the tribunals in question discriminated against the applicant on

the basis of race but that the laws pursuant to which she was prosecuted were discriminatory. If that premise is to be proved it must be by reference to some provision other than Article 5(a) or else the argument becomes completely circular.

[91] The next right said to be infringed was that found in Article 5(d)(v), to own or possess property. This is not a right relied upon in *Morton* nor, indeed, in the courts below but it can nevertheless be dealt with.

[92] The applicant submitted that because the "right to possess goods is fundamental to human existence", "is expressly recognised in Article 5(d)(v) of the [Convention]", it must include "the right to transport … that property from a place of lawful acquisition … to a place of lawful consumption". It is pointed out that the applicant was the owner of the liquor and the impugned provision denied her the right to possess or own the property enjoyed by persons throughout the State, except for those on Palm Island. The submission continues that the Aboriginal community of the island, in particular the applicant, had been denied her enjoyment to the right protected by s 10 of the *RD Act*.

[93] The reference to a right to transport the liquor from a place where it might have been lawfully bought, e.g. Townsville, to a place where it may be lawfully consumed on Palm Island is a distraction. The restriction imposed by the *Liquor Act* applies to possession anywhere in Palm Island. The provisions created an offence once the applicant had the alcohol in her possession on the island, whether in a motor car, her home or a public place.

[94] The respondent's answer is that the right to own property specified in the Convention as protected by s 10 of the *RD Act* is not absolute but is subject to regulation in the public interest. The respondent relies upon the judgment of Mason J in *Gerhardy v Brown*:[63]

> "The concept of human rights … evokes universal values, i.e. values common to all societies. This involves a paradox because the rights which are accorded to individuals in particular societies are the subject of infinite variation … with the result that it is not possible … to distil common values readily or perhaps at all. Although 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.
>
> This observation is particularly true of the concept of freedom of movement, which is central to the respondent's case. In broad terms the concept may be said to embrace a claim to immunity from unnecessary restrictions on one's freedom of movement and a claim to protection by law from unnecessary restrictions upon one's freedom of movement by the State or other individuals. It extends … to movement without impediment throughout the State, but subject to compliance with regulations legitimately made in the public interest …"

[95] The respondent relies also on the judgment of the Full Federal Court (Ryan, Moore and Tamberlin JJ) in *Bropho v Western Australia*:[64]

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63 (1985) 159 CLR 70 at 102.

64 (2008) 249 ALR 121 at 143.

> "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. … 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. … The overwhelming evidence … was that … violence [was] pervasive … and … revocation of the … management order was effected to obviate the risks to the safety and welfare of … women and children residing at [the] Reserve… . On that basis, the act of the Western Australian Parliament revoking the … management order would inform the content of the human right being asserted by the appellant. That is, the right to occupy and manage the land conferred by statute was subject to the contingency that the right would be removed … if its removal … was necessary to protect vulnerable members of the community ... 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. … To the extent that the rights in question … 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 … will not be inconsistent with s 10 of the RD Act."

[96] The respondent submitted, relying upon *Gerhardy*[65] correctly I think, that the rights protected by s 10 are those which every legal system ought to recognise and observe, being those human rights "in the political, economic, social and cultural or other field of public life" described in Article 1(1) of the Convention. Section 10 is, however, limited to protecting the rights described in the Convention and those which, like them, are fundamental to an individual's human existence. There was a point made in *Morton* by reference to the authorities there discussed. The right to possess liquor is not such a right: see *Morton* at [94] and the judgment of Keane JA in *Aurukun*.[66] The right to possess liquor of any type and in any quantity did not evoke a universal rule, common to all societies for which universal recognition and observance is required. It is not fundamental to existence as a human being. As the respondent's submissions point out, the right to possess liquor is regulated by different legal systems in many different ways, all reflecting local rather than universal policies and values.

[97] The right which the applicant seeks to enforce is to ownership or possession of a particular kind of liquor in a particular location. The restriction imposed by the impugned provisions applies with respect to a locality and for a discernible reason, the protection of the inhabitants of that area from violence exacerbated by the excessive consumption of alcohol. The law does not interfere with an abstract right

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65 (1985) 159 CLR 70 at 86 per Gibbs CJ and at 125-126 per Brennan J.

66 (2010) 265 ALR 536 at [148].

to own property, but with the right to possession or ownership of a particular type of property for a legitimate reason.

[98] Sections 3 and 173F of the *Liquor Act* respectively set out its objects generally and particularly with respect to restricted areas. One of the objects specified in s 3 is to regulate the supply of liquor compatibly with minimising harm arising from its misuse, and its sale and supply in particular areas to minimise harm caused by alcohol abuse and associated violence. Section 173F describes the purposes of Pt 6A as being the minimisation, within restricted areas, of harm caused by alcohol abuse and misuse and associated violence as well as alcohol related disturbances and public disorder.

[99] These considerations indicate that the impugned provisions impose restrictions which are reasonable and legitimate to achieve the stated purpose of reducing violence associated with the excessive consumption of alcohol, and public disorder in particular localities. The restrictions do not have the effect that the human right and fundamental freedom recognised by Article 5(d)(v) have been infringed. Section 10 of the *RD Act* is not engaged.

[100] The third right advanced is that of access to any place or service intended for use by the general public such as hotels etc. The applicant's argument was expressed with extreme brevity. It was that the right must include the right to be supplied with any goods ordinarily supplied by (relevantly) hotels and restaurants. Such goods extend to alcohol in forms other than mid-strength beer. Accordingly the inability of the applicant to purchase any other kind of alcohol on Palm Island was said to be an infringement of her right of access to any service intended for the general public.

[101] The short answer, given by the respondent, is that the right described by Article 5(f) is not concerned with the nature of the place or services occupied by or provided by the enterprises described but with discrimination based on race among the occupants of the places or patrons of the services. The right does not dictate what services must be supplied by a hotel, restaurant or café. What it requires is that all persons, regardless of race, shall have access to the services which the premises in fact supply. The right would be infringed if a particular good or service was supplied to members of one racial group but not another. The right is not infringed by the premises supplying to all its patrons, regardless of their race, the limited range of goods it has available for sale.

[102] This brief treatment of the arguments shows that there is insufficient substance in the applicant's complaint, that the impugned provisions infringe rights protected by s 10 of the *RD Act*, to justify granting leave to appeal. The application should not, however, be decided on that basis. Had the applicant contended that any discrimination on the basis of race attracted the operation of s 10, and the argument were accepted the section would operate to invalidate the impugned provisions unless s 8 operated. The result of the application should depend on the answer to that question. Unless the applicant can demonstrate that the impugned provisions are not a special measure, as they were found to be in *Morton*, there is no point in granting leave to appeal. An appeal would be unsuccessful. The applicant, it should be repeated, did not challenge the correctness of *Morton*. She sought to distinguish it on the basis of the new evidence which is said to establish error in the facts which underpinned the finding in *Morton.*

[103] The Explanatory Notes to the amendments which introduced the impugned provisions were important to the finding that they were a special measure. They read in part:

> "8 Consultation
>
> (a) Community
> The CJG [Community Justice Group] and Council for the Indigenous community of Palm Island have recommended alcohol limits as part of their community alcohol management strategies.
>
> (b) Government
> The Department of Aboriginal and Torres Strait Islander Policy and the Queensland Police Service were consulted in relation to the proposed … Regulation. …
>
> 9 Results of consultation
>
> The proposed … restrictions do differ from the recommendations of the CJG and Council. There is ongoing division within the CJG and between the CJG and the Council. This division has inhibited community agreement on an Alcohol Management Plan (AMP). Subsequently, the Government developed an AMP based on a compromise between the four separate AMPs that have previously been presented to Government by the CJG and the Council.
>
> On 19 January 2005, the Government presented a draft AMP to the Council and CJG for consideration and comment … .
>
> On 3 February 2005, Government received correspondence from the Mayor of the Council accompanied by 22 completed survey forms. The Council feedback did not comment on the detail of the proposed AMP. However the Council did state that the AMP would not be successful without appropriate support structures. No other formal feedback has been received from the community. ….
>
> Extensive consultation has been undertaken with the community. The final round of consultation occurred in February 2006. Across the community there was common agreement that unrestricted alcohol was a major concern that needed to be addressed.
>
> The AMP is necessary for Palm Island to effectively address its alcohol related issues. It is the Government's experience that in other Indigenous communities where similar alcohol related issues were present and an AMP was implemented, the quality of life has generally improved."

[104] Before dealing with the new evidence it is convenient to rehearse the court's reasons for finding that they were a special measure. The President said:

"[27] The relevant provisions pertaining to special measures in this application are contained in s 8(1) *Racial Discrimination Act* and Art 1(4) and Art 2(2) of the Convention.[67] In *Gerhardy*, Brennan J 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."[68]

Mason J[69] and Deane J[706] observed 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.[71]

[28] In my opinion, it is desirable for legislatures to consult with the beneficiaries of special measures before introducing them. As Brennan J noted in *Gerhardy*:

> "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."[72]

[29] Brennan J's observations were cited with approval by Philippides J[73] and me[74] in *Aurukun*. The desirability of consultation is supported by Art 1 of the International Covenant on Civil and Political Rights which provides:

> "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.
>
> …

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67 Set out at [9]-[11] of these reasons.
68 (1985) 159 CLR 70 at 133.
69 At 105.
70 At 149.
71 Set out at [10] of these reasons.
72 (1984) 159 CLR 70 at 135.
73 At [243]-[249].
74 At [78]-[80].

> 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."

[30] The International Declaration on the Rights of Indigenous People[75] provides further support for the need for legislatures to consult with Indigenous people before imposing special measures in its emphasis on Indigenous self-determination:

> "**Article 3**
>
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> **Article 4**
>
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[76]

[31] Whilst Brennan J recognised that the wishes of the beneficiaries may be essential in determining whether racially discriminatory provisions are special measures under s 8, his Honour did not categorically state that consultation was essential in order to constitute special measures under s 8. There are prudent reasons for not making the desirability for consultation a mandatory pre-requisite for the application of s 8. There may be competing views within a group affected by proposed special measures as to whether the measures are appropriate. As I noted in *Aurukun*,[77] the intended beneficiaries of special measures, or some of them, perhaps because of age, infirmity or cultural reasons, may have difficulty in expressing an informed and genuinely free opinion as to whether special measures are in

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75 Adopted by Australia on 3 April 2009.

76 The desirability for consultation with the beneficiaries of the special measure was also 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)).

77 At [81].

their interest. Nevertheless, meaningful consultation with, and consideration of the wishes of, the beneficiaries of special measures is highly desirable.

[32] Subject to those matters and with that contextual background, it is essentially a political question for the legislature to determine whether members of a racial group need particular legislative protection through special measures in order to ensure those members of that racial group are able to enjoy or exercise their human rights and fundamental freedoms.[78] If it is reasonably open to the legislature to make such a political assessment, a court will not interfere.[79] But a court must not hesitate to strike down a law which amounts to a clearly manifested unauthorised exercise of power.[80] Special measures should be of a temporary nature and should cease effect once "the objectives for which they were taken have been achieved".[81]

…

[36] These statements of legislative intent in the impugned provisions and in the explanatory notes to them are clear. The legislative intent is to confer a benefit on those predominantly Aboriginal members of the Palm Island community by minimising harm to them from alcohol-fuelled violence in order that they may enjoy and exercise equally with others their "right to security of person and protection by the State against violence or bodily harm."[82] The appellant offered no evidence to show that these statements of legislative intent were disingenuous. The legislature apparently made a genuine effort to consult the Palm Island community before determining the format of the impugned provisions. The legislature, had it not put in place special measures of some kind, may have been subjected to reasonable criticism from an international human rights perspective. The measures it introduced in the impugned provisions are capable of being reasonably considered to be appropriate and adapted to achieving their purpose of minimising harm caused by alcohol-fuelled violence to members of the Palm Island community. It may be that, in time, if circumstances improve and evolve on Palm Island, and the views of its responsible citizens change, the impugned provisions could cease to amount to special measures under s 8."

[105] My reasons referred to the recitals in the Explanatory Notes and went on:

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

79 Above, Brennan J at 139; Dawson J at 161-162.

80 Above, Brennan J at 139, 141; Dawson J at 161-162.

81 The Convention, Art 1(4).

82 The Convention, Art 5(b), set out at [13] of these reasons.

"[113] These recitals appear a complete answer to the allegation that the residents of Palm Island were not consulted about the special measure. Additionally one should note that it was only Brennan J who thought that consultation, and indeed agreement to the measure by those it was designed to protect, was essential to the validity of the measure. None of the other Justices expressed that opinion in *Gerhardy*. It does not appear in the later cases. Moreover it finds no support in the language of Articles 1(4) or 2(2) of the Convention.

[114] No doubt as a matter of practicality consultation is important, both to ensure that a special measure is appropriately designed to achieve its object, and will be well received thereby improving its efficacy. It is, however, doubtful that consultation is a legal requirement for the validity of the special measure. Moreover if the assent of those intended to benefit from the special measure was essential to its legal efficacy then, in cases such as Palm Island, where opinion was divided, there could never be a special measure and those who wanted its protection would be denied it.

[115] The approach the court should take to the question whether sufficient facts have been established to make it appear that the *Liquor Act* provisions in question amount to a special measure was explained by Gibbs CJ in *Gerhardy*. The Chief Justice said (87-88):

> 'There was no evidence put before the Court to show that the facts either did or did not satisfy the words of Art. 1(4). The case is not one in which the constitutional validity of a statute depends upon facts, but it is closely analogous to such a case … . In *Breen v Sneddon* … Dixon C.J. pointed out the distinction between ordinary questions of fact which arise between parties … and, on the other hand, matters of fact upon which the constitutional validity of some general law may depend. He said that matters of the latter description cannot and do not form issues between parties to be tried like the former questions but simply involve information which the Court should have in order to judge properly of the validity of the statute. He went on to cite a passage from *Commonwealth Freighters Pty Ltd v Sneddon* … where he had said that 'if a criterion of constitutional validity consists in matter of fact, the fact must be ascertained by the court as best it can, when the court is called upon to pronounce upon validity'. That statement is, in my opinion, applicable to the present case and we must determine as best we can the facts

> which will enable us to answer the question whether the Act is a special measure within Art. 1(4). We may take judicial notice of facts that are notorious and may rely on the material placed before us …' .
>
> [116] In the same case, Brennan J (137-8) pointed out that whether an initiative is a special measure is a political question which a court is ill equipped to answer; and Dawson J (161-2) thought that if it was reasonably open to Parliament to make the political assessment that protection is needed in the form adopted the court should not enquire further into the question.
>
> [117] Given the terms of the explanatory memorandum and the nature of the *Liquor Act* provisions in question it cannot be doubted that the provisions are a special measure. They were obviously meant to advance rights recognised by Article 5 of the Convention, namely (b), the right to security of person and protection by the State against violence or bodily harm; and (e)(iv) the social right to public health."

[106] Ms Morton in her application did not contest that the impugned provisions were capable of amounting to a special measure. Her complaint was that there was no evidence, or insufficient evidence, to prove that any of the criteria discussed by Brennan J in *Gerhardy*, quoted in the judgment of the President, had been satisfied. In particular she complained that there was no evidence that the inhabitants of Palm Island had been consulted about the proposal to make the island subject to restriction on the possession of alcohol, and no evidence that they had given their assent to it. The same complaint is made by the present applicant who contends she has better evidence of inadequate consultation than Ms Morton had.

[107] Affidavits were sworn by members of the Palm Island Aboriginal Council, the statutory CJG and Community Elders. There were 14 deponents. There are about 2000 inhabitants on Palm Island. The affidavits were said to establish:

(a) The Palm Island Aboriginal Council ("Council") did not give its support or consent to the impugned provisions.
(b) Meetings of the CJG to discuss the proposed provisions were irregularly and haphazardly convened; there was little constructive discussion.
(c) Many elders were not consulted and there was insubstantial general publication to the wider community, methods usually adopted to disseminate information were not utilised.

[108] The deponents do, however, acknowledge that there was some discussion about an alcohol management plan and that some residents favoured restrictions on the supply of alcohol. For example Ms Ling deposed that she knew:

> "… for a fact that the … Council Mayor … and the Community Justice Group elders were driving the AMP."

She said that staff from the Department of Aboriginal and Torres Strait Islander Policy ("Department") spoke to members of the previous CJG which was funded by the Department. The staff members:

> "…wanted to speak about the Alcohol Management Plan (AMP) and how it could be implemented … and best to consult it with community [she knew] for a fact that … Council Mayor … and the Community Justice Group elders were driving the AMP."

[109] Mr Nallajar said that he knew:

> "…about the alcohol management plan but [he did] not agree with it. From conversations with people …. [he knows] that the vast majority of them also do not agree with it."

[110] Mr Walsh deposed that he was appointed a member of the CJG in November 2008. At his first meeting an official from the Department explained that its role was to "consult the community on the Queensland Government draft Alcohol Management Plan", and that departmental officers intended "to facilitate community meetings … on the draft AMP." These meetings never occurred because members of the group wanted to "dissect, discuss or rebut the Government draft AMP" before it was put to the wider community. That process was unacceptable to the Department.

[111] The applicant's submission that the affidavits show the contents of the Explanatory Notes to be wrong should not be accepted. That was not clearly said to be their purpose when leave was sought to read them in the District Court. The affidavits were not tendered before the Magistrate. That was the appropriate forum to determine disputed questions of fact. The prosecution was uncontested. The invalidity of the impugned provisions was raised for the first time in the District Court. Leave was sought to adduce the new evidence to show that there had been no "genuine" consultation with the residents of Palm Island before the restrictions were imposed. The applicant did not put the respondent on notice, then or subsequently, that she contended the effect of the affidavits was to nullify the Explanatory Notes. This Court should not conclude the affidavits have that effect when there has been no cross-examination of any deponent and no opportunity (because of the lack of notice) for the respondent to lead evidence in support of the Explanatory Notes.

[112] The use to which the affidavits can be put should be limited to that claimed for them in the District Court: to establish a lack of genuine or extensive consultation. They do not, in my opinion, have that effect. They show the deponents' opposition to the impugned provisions and a division of opinion within the Palm Island community about the desirability or efficacy of the provisions. Some at least of the deponents were aware of the proposals to impose alcohol restrictions on the island so there must have been some consultation, or at least publicity about the proposals.

[113] In reality the applicant's argument is the same as that addressed to the Court in *Morton*, and rejected, that there had not been adequate consultation. The short point is that there was consultation; the people of Palm Island were divided as to whether alcohol restrictions should be imposed and disagreement between those who thought there should be restrictions as to what restrictions were appropriate. There was no prospect of agreement. The applicant does not contest that alcohol fuelled violence was a problem on the island. Her point is that unless all, or a substantial majority of, the inhabitants, including those who behave violently when drunk,

agreed to the restrictions, their imposition could not be a special measure. The argument should be rejected for the reasons given in *Morton*.

[114] The applicant argues as a separate point, that the impugned provisions could not qualify as a special measure unless the indigenous community gave its "free prior and informed consent" to them. This argument was not advanced in *Morton*. The applicant relies on Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples which provides:

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

[115] The applicant refers as well to General Recommendation XXIII of the Report of the Committee on the Elimination of Racial Discrimination:

> "[T]hat members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."

[116] It is then pointed out that when the impugned provisions were imposed the residents of Palm Island were represented by their duly elected Council which opposed liquor restrictions on the island.

[117] The applicant relies, as did Miss Morton, on the opinion of Brennan J in *Gerhardy* that the wishes of the beneficiaries of a special measure are of great importance in determining whether a measure is in fact taken for their advancement.

[118] The short answer to the submissions is that nothing in Articles 1(4) or 2(2) makes consent necessary to the validity of a special measure although consent, or its lack, may be relevant in determining whether a provision is a special measure. If consent were an essential pre-condition to the validity of a special measure the utility of s 8 of the *RD* Act and Article 1(4) would be denied to communities, such as Palm Island, which were divided in opinion about the measures. A small minority could deprive the majority of a valuable protective measure. Article 19 of the Declaration on the Rights of Indigenous People does not assist the argument. The Declaration does not alter the terms of the Articles. Nor does this country's accession to the Declaration give rise to enforceable rights or obligations: see *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 362.

[119] The contention that the impugned provisions could not be a special measure because they were opposed by the Council can be answered separately. The then Premier addressed Parliament on 23 February 2005 to report on a meeting he and three other Ministers had had with the Palm Island Community and in particular, the Council. The Premier and the Ministers discussed a number of topics among which was restrictions on the supply and consumption of alcohol. The meeting was unproductive and, indeed, acrimonious. The Premier told Parliament that he was "shattered" by the behaviour of council members. He said:

> "I no longer believe that this council can adequately represent the people of Palm Island. I do not believe that they can deliver services

> to the people. I think they are basically dysfunctional and that the people of Palm Island are badly served."

It cannot, I think, be right that legislation, intended as a special measure to secure adequate advancement of a racial group requiring protection to ensure equal enjoyment or exercise of human rights and fundamental freedoms, will be invalid if the consent of such a group as that described by the Premier is not first obtained.

[120] The applicant had two other points. The first is that a measure can only be special for the purposes of the Convention if it is temporary. The applicant points out that the impugned provisions do not themselves identify when they will cease to operate. Reliance was put on the judgment of Brennan J in *Gerhardy* at 140 and on General Recommendation No. 32 of the Committee on the Elimination of Racial Discrimination in its 75th session. The recommendation is entitled:

> "The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination".

Paragraph 27 provides:

> "The second limitation on special measures is that '**they shall not be continued after the objectives for which they have been taken have been achieved'**. This limitation … is essentially functional and goal-related: the measures should cease to be applied when the objectives for which they were employed – the equality goals – have been sustainably achieved. The length of time permitted for the duration of the measures will vary in the light of their objectives, the means utilised to achieve them, and the results of their application. Special measures should, therefore, be carefully tailored to meet the particular needs of the groups or individuals concerned" (footnotes omitted).

[121] This complaint may also be answered shortly. There is no requirement for a special measure that it itself nominate the date of its termination. Such a requirement would be impractical in many if not all cases. Moreover, the applicant's reliance upon the judgment of Brennan J in *Gerhardy* is misplaced. His Honour said (140):

> "What the provisos are concerned to avoid, however, is the maintenance of separate rights after the objectives have been achieved and the continuation of special measures after that time. The provisos are satisfied if, when that time arrives, separate rights are repealed and special measures are discontinued. As it is impossible to determine in advance when the objectives of a special measure will be achieved, the better construction of the provisos is that they contemplate that a State Party will keep its special measure under review, and that the measure will lose the character of a special measure at the time when its objectives have been achieved. But the provisos do not require the time for the operation of the special measure to be defined before the objectives of the special measure have been achieved."

[122] Deane J said (154):

> "It was argued the proviso would prevent provisions from being 'special measures' to which Art. 1(4) applied unless the provisions

> themselves contained some qualification which would automatically deprive them of operative force if they were continued or if they led to the maintenance of separate rights for different racial groups after the objectives for which they were 'taken' had been achieved. That argument must be rejected. There is nothing at all in the proviso to par. 4 of Art. 1 which justifies the requirement of any such qualification."

Wilson J made a remark to the same effect at 113.

[123] There is evidence that regular reports on the functionality of Palm Island as a community with reference to lawlessness, violence, injury etc. are the subject of regular reports to Parliament so that an assessment can be made of when the objectives of impugned provisions have been achieved.

[124] The applicant's last point is one not taken before Judge Durward. It was raised for the first time in this application. It is that s 173I of the *Liquor Act* requires the Minister to consult with the CJG before recommending a regulation (the impugned provisions) to the Governor-in-Council. A CJG was established by regulation on 21 April 2006. The Explanatory Notes state that consultation concluded in February 2006. The impugned provisions came into effect on 5 May 2006. The chronology leads the applicant to argue that in "the absence of a CJG and consultation therewith raises real questions as to the reliability … [of] the explanatory note."

[125] The argument is disingenuous. The applicant's witnesses depose in their affidavits to the existence of a community justice group which existed and functioned prior to the establishment of the new statutory group in April 2006.

[126] Nothing advanced by the applicant provides any basis for doubting the conclusion reached in *Morton* that the impugned provisions were intended to be, and were, a special measure within the meaning of s 8 of the *RD Act*. The applicant's arguments are no more than an elaboration of the same points advanced, and rejected. An appeal, if leave to appeal were granted, would inevitably fail. Leave to appeal should therefore be refused, with costs.

[127] **DAUBNEY J:** I respectfully agree with the reasons for judgment of Chesterman JA, and with the orders proposed by his Honour.