IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B57 of 2012

BETWEEN:

Joan Monica MALONEY
Appellant

and

THE QUEEN
Respondent

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APPELLANT'S REPLY

Filed on behalf of the Appellant on 30 November 2012
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Part I: Certification for publication

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

Part II: Reply to the arguments of the respondent and interveners

2. **Past liquor restrictions:** The respondent at [8]-[14] provides various examples of legislation restricting the possession and consumption of alcohol in Australia since the last decade of the 18th century. Each of the cited regimes for the licensing of retailers, creating offences in connection with drunken behaviour, and prohibiting the consumption of liquor in certain public places is of general application to all persons of any race, and none imposes a discriminatory burden or prohibition directed to Aboriginal persons. The same can said of similar restrictions which prohibit the possession of weapons, drugs and other potentially dangerous things.[1] The only analogous legislative regimes are those referred to at RS [24], being laws which directly prohibited the supply of liquor to Aborigines. Each of the examples given, and acknowledged by the respondent to be "*expressly racist*", existed prior to the commencement in Australia of the RDA. The point of distinction to the impugned provisions in this case is that the Liquor Restrictions do not make a distinction expressly based on race. Nor is this required in order to engage s 10(1) of the RDA.

3. **Notice of contention issue – whether s 10 is engaged:** The respondent seeks to argue, by way of its Notice of Contention, that s 10 of the RDA is not engaged. The contention is supported by the Commonwealth and the SA Attorneys but not, notably, the WA Attorney. The approach is at odds with the approach of all members of the Court of Appeal below,[2] as well as in *Morton v Queensland Police Service*.[3] The point was not put by the respondent in either the District Court or the Court of Appeal, and it was not understood to be in dispute. Insofar as it raises issues of fact (see below), the appellant objects to the issue now being raised. It is, anyway, no answer.

4. The way in which the argument is put by the respondent is to focus on the relevant discriminant, which is said to be residence or presence, and not membership of a racial group (RS [18]-[19] and [35]-[36]). The respondent's argument involves a reversion to formalism, long-rejected in this area of the law. Reliance on notions of direct and indirect discrimination only serves to distract from the analysis required by s 10.[4] As the plurality observed in *Ward* at [115], to determine whether a law is in breach of s 10(1), it is necessary to bear in mind that the sub-section is directed at the enjoyment of a right; it does not require that the relevant law makes a distinction based on race; s 10(1) is directed at "*the practical operation and effect*" of the impugned legislation and is "*concerned not merely with matters of form but with matters of substance*".[5] The respondent's argument is reminiscent of the argument put and rejected in *Street v Queensland Bar Association*.[6]

5. The practical reality here is clear. Such measures as those at issue were intended to apply to, and in substantial effect *only* apply to, Indigenous communities:[7]

   (a) The explicit purpose of Part 6A of the *Liquor Act* and the *Liquor Amendment Regulation (No 4)* by which Palm Island was first added to the schedule of restricted areas for the possession of

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[1] Respondent's submissions (**RS**) at [15].
[2] McMurdo P at [18]; Chesterman JA at [84].
[3] (2010) 240 FLR 269 per McMurdo P at [5]; at [54], Holmes JA agreeing.
[4] Contra RS [25]-[26]; cf AHRC [35]-[37], WA [35].
[5] See also *Gerhardy* per Gibbs CJ at 85, Mason J at 97and 99, Brennan J at 118; *Mabo [No 1]* (1988) 166 CLR 186 per Mason CJ at 198-199 (dissenting), Brennan, Toohey and Gaudron JJ at 216-219, Deane J at 231-232.
[6] (1989) 168 CLR 461 at 487-9, 507-510, 525-7, 543-6, 556-560, 567-9, 580-8.
[7] As accepted by McMurdo P at [28].

certain types and amounts of alcohol[8], was to prevent or minimise alcohol-related harm in Indigenous communities.[9] Part 6A was introduced by the *Indigenous Communities Liquor Licences Act 2002*.

(b) The Liquor Restrictions impose a burden or prohibition on persons present in a "community area" under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld) (see appellant's primary subs (**AS**) [12]).

(c) The only areas subjected to restrictions under Part 6A are Indigenous communities.

(d) The Court of Appeal correctly appreciated, drawing upon its earlier decision in *Morton*,[10] that the substance and practical operation and effect of that burden or prohibition was directed to the "*overwhelmingly*" Aboriginal persons resident on Palm Island (see at [83]-[84]).[11] The respondent appears to accept this fact (RS [18]). That a very small number of non-Indigenous people also lived on Palm Island, and were thus subject to the burden, is of even less significance here in characterising the law than was the benefit offered to one interstate competitor by the protectionist law invalidated in *Castlemaine Tooheys*.[12]

(e) Neither in the District Court nor the Court of Appeal did the respondent make any attempt to challenge this view from *Morton* – rather, its position in essence was that *Morton* was indistinguishable and it should be followed (which occurred). In that context, insofar as the absence of facts on this issue is criticised by the Commonwealth Attorney (at [44]-[47]), that cannot be held against the appellant.

(f) The respondent refers at [65] to the annual reporting by the Queensland Government on "key indicators in Indigenous communities" affected by the legislation, including Palm Island. It neglects to identify the title of the relevant report: "*Annual Highlights Report for Queensland Discrete Indigenous Communities*".[13]

6. Part of a practical effect analysis involves reference to features which are characteristic of a particular racial (etc) group.[14] It is plainly a characteristic of the Indigenous community of Palm Island that they reside, and are generally present, there. RS [41] reveals the artificiality of the argument concerning the irrelevance of race to the Liquor Restrictions. The respondent there apparently accepts that the "*violent offenders whose violence the legislation seeks to curb*" are all Aboriginal persons. The presence and/or residence of such persons on Palm Island is no mere coincidence or matter of recent social convenience or preference. To suggest (RS [35]) that residence and presence on Palm Island is not an attribute characteristically possessed by Aborigines is to ignore the history of Palm Island, its current demographics, and more recent troubled events on the Island.[15]

7. The relevant comparator for the purposes of s 10, if that be an appropriate inquiry, cannot be between the appellant as an Aboriginal person in a public place on Palm Island and a person of any other race in a public place on Palm Island: cf RS [37]. It must be between an Aboriginal

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[8] See McMurdo P at [25] and [44].
[9] See further AHRC [41],
[10] *Morton* (2010) 240 FLR 269.
[11] The history of the creation of Palm Island as an Aboriginal Reserve, and of removals of Indigenous people to Palm Island, was noted and explained in *Clumpoint v DPP* (Qld) [2005] QCA 43 at fn 1.
[12] See *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 475.
[13] Referred to by McMurdo P at [59]–[60].
[14] *Native Title Act Case* (1995) 183 CLR 373 at 437; *Ward* at [117].
[15] Including those noted by McMurdo P at [46]. See also *Clumpoint v DPP* (Qld) [2005] QCA 43.

person in a public place on Palm Island and a non-Aboriginal person in a public place elsewhere in Queensland (not in a similarly restricted Indigenous community). Similarly, the example given at RS [40] of laws regulating the sale of alcohol in Chinatown in Sydney or Brisbane illustrates the respondent's formalistic and narrow approach. Whilst no doubt each law must be judged on its own facts, a law prohibiting the sale or consumption of alcohol in localities known historically to be inhabited and frequented only, or overwhelmingly, by Chinese Australians, and where all businesses were owned by ethnically Chinese people, would undoubtedly engage s 10. Without seeking to offend, it not difficult to see how the respondent's approach logically could lead to apartheid-like laws imposing entirely separate burdens and prohibitions on racial minorities by reference to facially neutral discriminants, such as locality, which is contrary to CERD.

8. The respondent argues at [37] that the consequence of the appellant's argument is that non-Aboriginal people on Palm Island would still be subject to the Liquor Restrictions, which is said to be absurd. It is doubtful that the legal point is correct. Even if it is, the argument involves the tail wagging the dog, in a manner allowing easy evasion of the RDA – simply ensure a measure applies to a handful of others, then it cannot be said that there is any racial discrimination. Any absurd consequence flows from the failure of Queensland's Liquor Restrictions to comply with the RDA. The appellant does not suggest that s 10 would be engaged by legislation criminalising the possession of certain types and amounts of alcohol in any public place in Queensland, or in any public place within 100 metres of a school or place of worship or the like. It is the invocation of the discriminant of residence or presence in an Indigenous community that engages s 10.

9. The effect of the approach advocated by the Commonwealth and SA Attorneys is to read in an appropriate and adapted/proportionality test at the s 10 stage, as well as with respect to s 8.[16] Indeed, the Commonwealth submissions seem to suggest that this type of test is potentially applied *three times*: at an "anterior" stage, in considering whether a disparate law is adapted to real and legitimate differences, and in applying s 8. The appellant submits that even if this approach was correct – and it is not – the Liquor Restrictions would still fail a proportionality analysis, for reasons given in her primary submissions.

10. There are two main arguments put: that the contrary view leads to absurd results, and that s 10 should be taken to incorporate the generic notion of equality and/or discrimination. As to the latter point, the Commonwealth's analysis makes scant reference to the text of s 10, which is effectively treated as a mere vehicle to incorporate the generic notion of discrimination. That type of approach to statutory construction has been repeatedly and emphatically rejected by this Court in recent years.[17] It is necessary to pay close attention to this particular statute, giving effect to this particular Convention.

11. That is not to dispute Mason J's statement in *Gerhardy* at 99 that s 10 should be read (for validity reasons) as "directed to lack of enjoyment of rights arising by reason of a law whose purpose or effect is to create racial discrimination", being discrimination in the sense employed in article 1(1) of CERD. That article refers to distinctions (etc) "*based on*" race (etc).[18] That raises a question of characterisation. It may be that that renders relevant questions of being appropriate, adapted and proportionate to achieving some legitimate purpose. But to the extent that that is so, it must be possible to characterise the law as – to employ the SA Attorney's language at [26] – *racially neutral*. So much flows from the objectives and purposes of the Convention,[19] not to mention the

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[16] Cth [21]-[29], [45]-[47] and [54]-[58]; SA [26] and [37].

[17] Eg *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]-[51]; *Australian Education Union v Department of Education and Children's Services* (2012) 86 ALJR 217 at [28].

[18] See also the Recital's 7th para, and the CERD Cttee's General Recommendation No.14.

[19] See the CERD Cttee's General Recommendation No 14, para 2.

presence of s 8 and article 1(4). The question posed by s 10 must also take in account the practical effect of a measure. If the practical effect of a measure is to impose a burden directed to and peculiarly affecting one racial group, then it will generally not be capable of being characterised as racially neutral. To give too great an emphasis to the appropriate and adapted test at the s 10 level, being a test which is focused on achievement of a *purpose*, is to ignore the fact that *enjoyment* of rights "directs attention to much more than what might be thought to be the purpose of the law in question".[20]

12. If a law said to be for the benefit of a racial group is said not to even engage s 10, then that leaves little or no work for s 8 to do. That is contrary to accepted principles of construction.[21] More
10 importantly, it would undermine the very specific restrictions which are imposed on special measures, which must, inter alia, confer a *benefit*, for the *sole purpose* of *advancement* of members of the relevant group. As the Congress correctly emphasises at [29]-[35], the reference to "sole" purpose is a significant restriction.[22] That requirement is distinct from the general Australian approach to characterisation.[23] The SA Attorney accepts part of the logic of this argument in stating at [27] that "a special measure is not a law that serves a racially neutral end". But to really avoid rendering s 8 otiose it is necessary to say that if a measure is directed facially, or in substance and practical effect, to a particular racial (etc) group, then it falls to be justified under s 8 or not at all. The WA Attorney correctly accepts as much (at [50]-[63]).

13. A law which imposed planning/building restrictions on Palm Island genuinely referable to
20 environmental conditions there (cf Cth [17]) would not be characterised as a measure imposing a differential burden based on race, but would be viewed as part of a range of environment-specific planning measures imposed generally in the State and not directed to a particular racial (etc) group. Much the same could be said of a quarantine law (cf SA [33]). Similarly, a law which required English for jurors (cf RS [44]) would be characterised as a law with the purpose and effect of ensuring fair trials, or such like. It could not be said that the law was based on racial distinctions. But a law which in practice prevents the equal enjoyment of rights by members of a racial group, and which is said to be for the benefit of that group because of their particular characteristics, is a law which falls within the operation of s 10 and which must meet the standard of s 8.[24]

14. **Rights affected:** As to what rights are detrimentally affected here, the SA Attorney is right to
30 accept at [17]-[19] that the right to property is so affected, and the AHRC and Congress are right to refer (at [43]-[48] and [14] respectively) to the right to equality under the law and before the courts.[25] The appellant also maintains her submission on the right to services.

15. **Special measures:** None of the submissions has identified a single instance in any other jurisdiction where a law criminalising the conduct of persons identified as the beneficiaries of a measure, or where a law imposed contrary to the wishes of the representative institution of the so-

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[20] *Ward* at [105].

[21] *Project Blue Sky v ABA* (1998) 194 CLR 355 at [69]-[71]; *Plaintiff M47/ 2012 v Director General of Security* (2012) 292 ALR 243, eg at [41], [172], [450].

[22] See the CERD Cttee's General Recommendation No 32, para 21, and generally paras 16-27.

[23] Eg *Grain Pool of WA v Commonwealth* (2000) 202 CLR 479 at [16]; cf, in the s 92 context, *Betfair v WA* (2008) 234 CLR 418 at [48].

[24] See *Gerhardy* at 113-114 per Wilson J.

[25] As to the suggestion at SA [8]-[12] (also Cth [7(a)]) that article 5 is only directed to one aspect of equal protection, namely the application of the Liquor Restrictions by the Magistrates Court, rather than their substantive operation, see the CERD Cttee's General Recommendation No 20 "*Non-discriminatory implementation of rights and freedoms (Art. 5)*" which notes at para 1 that article 5 contains the obligation of States Parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination, and that note should be taken "*that the rights and freedoms mentioned in article 5 do not constitute an exhaustive list*".

called beneficiaries, has been sought to be defended as special measures within the meaning of article 1(4) or 2(2) of CERD (or equivalent provisions in other treaties).

16. In seeking to support the Liquor Restrictions as a special measure, the respondent, and the Commonwealth, SA and WA Attorneys, necessarily accept that the measure is directed specifically to a racial group. This is not a claim that may appropriately be put in the alternative – either it is sought to be justified as measure for the benefit of the relevant racial group, or it is not. In any event, the respondent's submissions make little attempt to support the law on this basis. It has pointed to no facts which answer the case put by the appellant. It has not answered the appellant's factual critique of the consultation process. It has pointed to no evidence that less restrictive means were not suitable. It says at [64] that the explanatory notes informed Parliament's assessment as to whether to disallow. That may be right, but it does not make the notes true.

17. As for the Commonwealth, it seeks to circumvent such issues by asserting (implicitly at [30]-[44], then at [73]-[75]) that the onus is on the appellant, and further that because she has not made an administrative law challenge she is precluded from making an effective RDA challenge (at [31]-[40]). Neither the State Parliament nor the Executive can read itself out of the operation of the RDA (as the Cth submissions seem to accept at [54]). The appellant was prosecuted; she was entitled to stand her ground on the basis of the RDA. In any event, any administrative law question would raise distinct issues to those raised by the RDA – for example, validity under the *Liquor Act* depended merely on the Minister being "satisfied" of the requisite matters (s 173G(3)). As for onus, the Commonwealth relies on principles from the s 92 cases where it suits it (notably at [43]), but declines to accept the logic of where that leads (as to which see AS [66]). Further, it is notable that the approving quotation from Dr McKean at Cth [21] omits, by ellipsis, what he said about onus.[26] The Commonwealth Attorney at [47] refers generically to purportedly notorious issues, then at [75] to a Cape York study as though that spoke to all Indigenous communities. The CERD Committee's General Recommendation No 32, at para 17, identified the need for special measures to be based on "accurate data". That data, if it existed, would be in the possession of the State government. It was incumbent on it to make out its justification. It has failed to do so.

18. With respect to the imperative for consultation, only the Commonwealth and WA Attorneys seek to have this Court disregard what Brennan J said in *Gerhardy* at 137.[27] His Honour's analysis correctly reflects the importance of and necessity for generally consulting those for whom the benefit is intended, with a view to obtaining consent. That analysis has been strengthened by subsequent international developments in the understanding of CERD (see AS [54]-[59]).[28]

Dated: 30 November 2012

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[26] *Equality and Discrimination under International Law*, Clarendon, 1983, at 286-7, see also 239.
[27] Cth [65]-[72], and WA [22]-[28]; cf RS [61]; SA [38]-[40]; AHRC [78]-[84]; Congress [19]-[28].
[28] See also Committee on Economic, Social and Cultural Rights General Recommendation No 20 "*Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*" at para 36: "*Individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should be ensured the right to participate in decision-making processes over the selection of such measures.*"