IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B57 of 2012

BETWEEN

JOAN MONICA MALONEY

Appellant

10 and

THE QUEEN

Respondent

20 **SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)**

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Part I: Form of Submissions

1. The Attorney-General for the State of South Australia certifies that these submissions are in a form suitable for publication on the internet.

Part II: Basis of Intervention

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth) in support of the Respondent.

Part III: Grounds for leave for intervention

3. Not applicable.

Part IV: Applicable Constitutional and Legislative Provisions

10 4. South Australia accepts that the Appellant has properly identified the relevant constitutional and legislative provisions in the Annexure to the Appellant's Submissions.

Part V: Argument

A. Summary of Argument

5. In order for the Appellant to succeed on this appeal she must establish that Sch 1R of the *Liquor Regulation 2002* (Qld) together with the relevant provisions of the *Liquor Act 1992* (Qld) (**the Liquor Restrictions**)[1] (1) impair her enjoyment of a right within the meaning of s10 of the *Racial Discrimination Act 1975* (Cth) (**the RDA**) (2) in a

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[1] Similar restrictions operate in South Australia. See, for example, the *Pitjantjatjara Land Rights (Control of Alcoholic Liquor) By-Laws 1987*; *Aboriginal Lands Trust (Yalata Reserve) Regulations 2005* (SA), reg 4; *Aboriginal Lands Trust (Umoona Community) Regulations 2007* (SA), reg 4 and 5; *Liquor Licensing (Dry Areas) Regulations 2012* (SA).

discriminatory manner,[2] and (3) do not constitute a special measure for the purposes of s8 of the RDA.

6. In summary, South Australia contends that the Liquor Restrictions:

   i. do not impair the Appellant's enjoyment of the right to equal treatment before tribunals within the meaning of Art 5(a) of the *International Convention on the Elimination of all Forms of Racial Discrimination* (**the Convention**) (see paragraphs [8]-[12] below);

   ii. do impair the Appellant's enjoyment of the right to own property within the meaning of Art 5(d)(v) of the Convention (see paragraphs [13]-[19] below);

   iii. do not impair the Appellant's enjoyment of the right to access to any place or service intended for use by the general public such as hotels, restaurants and cafes within the meaning of Art 5(f) of the Convention (see paragraphs [20]-[22] below).

   iv. do not affect the Appellant's enjoyment of rights in a discriminatory manner (see paragraphs [23]-[34] below); and,

   v. in any event, the Liquor Restrictions are a special measure (see paragraphs [35]-[42] below).

B. Rights Protected by s10 RDA

7. The Appellant claims that her enjoyment of three rights protected by Art 5 of the Convention are infringed by the Liquor Restrictions: the right to equal treatment before tribunals and other organs administering justice (Art 5(a)), the right to own property (Art 5(d)(v)), and the right of access to any place or service intended for use by the general public (Art 5(f)).

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[2] This issue arises if leave is granted for the Respondent to file the notice of contention attached to the Respondent's Submissions.

Right to Equal Treatment before Tribunals

8. The Appellant contends that the majority of the Court of Appeal erred in adopting an unduly narrow construction of the rights protected by s10, and in particular erred in rejecting the argument that the Liquor Restrictions contravened the Appellant's right under Art 5(a) of the Convention.

9. The Appellant accepts that she was not treated differently in matters of practice and procedure compared to a non-Aboriginal accused person. However, the Appellant contends that Art 5(a) is not only concerned with matters of procedural as opposed to substantive law and asserts that she was "charged with and convicted of an offence against a law which in its practical operation and effect is directed to persons of a particular race."[3]

10. This argument elevates the right in Art 5(a) to one that is concerned with the substantive effect of the Liquor Restrictions and not the application of these Restrictions by the Magistrates Court at Palm Island (and subsequently the District Court and Court of Appeal). Such an approach is not supported by the text of Art 5(a) or the scheme of s10 of the RDA.

11. South Australia respectfully agrees with the interpretation of Art 5(a) adopted by Chesterman JA (with whom Holmes JA agreed in *Morton* and Daubney J agreed in *Maloney*).[4] As Chesterman JA noted, Art 5(a) is concerned with the equal application of laws to all persons regardless of their race and its terms suggest "a requirement of

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3 Appellant's Submissions at [36].

4 *R v Maloney* (2012) 262 FLR 172 at 201-202 [89]-[90] (Chesterman JA), 212 [127] (Daubney J), cf 176-178 [9]-[14] (McMurdo P); *Morton v Queensland Police Service* (2010) 240 FLR 269 at 291-292 [80]-[81] (Chesterman JA), 283 [39] (Holmes J). This is supported by the Human Rights Committee's views of the similarly worded right in Art 14 of the *International Covenant on Civil and Political Rights*: see Human Rights Committee, General Comment No 32: "Right to Equality Before Courts and Tribunals and Right to a Fair Trial" CCPR/C/GC/32 (23 August 2007), which focuses on the court or tribunal's treatment of the person and not on the content of the law being enforced against the person.

non-discriminatory conduct by tribunals and courts, and such like institutions, which make decisions affecting the persons with whom they deal."[5]

12. To read Art 5(a) as importing a substantive right to equal protection of the law would be to give the other provisions of Art 5 no work to do. Section 10 of the RDA is itself concerned with ensuring that persons of different races enjoy the equal protection of the law. Art 5(a) is directed to one aspect of this equal protection. As this Court has made clear, the scheme established by s10 operates by linking the discriminatory operation or effect of a law to a particular right or subject-matter.[6]

Right to Own Property

13. South Australia accepts the Appellant's submission that her right to own property as defined in Art 5(d)(v) of the Convention was infringed by the Liquor Restrictions.

14. The Liquor Restrictions, by virtue of s168B of the *Liquor Act 1992* (Qld), make it an offence to possess more than the prescribed quantity of alcohol in a public place in a restricted area. Schedule 1R of the *Liquor Regulation 2002* (Qld) specifies that the prescribed quantity of liquor (apart from beer in which the concentration of alcohol is less than 4%) is zero. Schedule 1R provides that certain areas are "restricted areas". These include the "community area of the Palm Island Shire Council" which in fact comprises the entire Local Government area of the Palm Island Shire Council.[7] Further, "public place" for a restricted area is defined to include a vehicle, boat or aircraft (including at an airport).[8]

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5 *Morton v Queensland Police Service* (2010) 240 FLR 269 at 292 [80].

6 *Gerhardy v Brown* (1985) 159 CLR 70 at 99-102 (Mason J); *Mabo v Queensland* (1988) 166 CLR 186 at 216-217 (Brennan, Toohey and Gaudron JJ); *Western Australia v Ward* (2002) 213 CLR 1 at 103-105 [115]-[119] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

7 *Maloney v Queensland Police Service* [2011] QDC 139 at [24]; Appellant's Submissions at [12]. See also *Liquor Act 1992* (Qld), s4 (definitions of "community area" and "council"), *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld), s4 and the *Local Government (Community Government Areas) Act 2004* (Qld), schedule 4 (which has since been replaced by the *Local Government Act 2009* (Qld)).

8 *Liquor Act 1992* (Qld), s4. Note that it appears that this "public place" requirement in s168B has since been removed; Annexure to Appellant's Submissions at 25.

15. The effect of the Liquor Restrictions was to prohibit the Appellant from possessing alcohol (other than certain types of beer) anywhere on Palm Island.[9]

16. Although, as acknowledged by the Appellant, there is no universal human right to possess or consume alcohol,[10] the Appellant's ability to possess a certain type of property on Palm Island was restricted by the Liquor Restrictions.

17. The right in Art 5(d)(v) is expressed as the "right to own property alone as well as in association with others". This Court has confirmed (in the context of native title rights) that "property" in the context of Art 5(d)(v) rights "includes land and chattels as well as interests therein".[11] In *Mabo [No 1]* the right to own and inherit property was considered to fall within the ambit of s10 of the RDA and this right included the right to be immune from the arbitrary deprivation of one's property.[12]

18. South Australia accepts that "property" should be broadly construed to include the possession of consumables such as alcohol, as to adopt a narrow or technical approach to "property" would narrow the protection offered by Art 5(d)(v) to an unacceptable degree. It is submitted a similar broad interpretation should be given to the interpretation of the word "property" in Art 5(d)(v) as has been taken by this Court in interpreting s51(xxxi) of the *Commonwealth Constitution*.[13] That constitutional

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9 This was accepted by all judges in the Court of Appeal: see *R v Maloney* (2012) 262 FLR 172 at 179 [18] (McMurdo P), 202 [93] (Chesterman JA, with whom Daubney J agreed).

10 Appellant's Submissions at [3]. See similarly *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 at 67 [148]-[149] (Keane JA).

11 *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 437 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Western Australia v Ward* (2002) 213 CLR 1 at 103-104 [116] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). As to the meaning of "property" more generally, see *Yanner v Eaton* (1999) 201 CLR 351 at 365-367 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

12 *Mabo v Queensland* (1988) 166 CLR 186 at 216 (Brennan, Toohey and Gaudron JJ).

13 *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 359 [87] (French CJ); *JT International SA v Commonwealth of Australia* [2012] HCA 43 at [29] (French CJ); *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290 (Starke J), 295 (McTiernan J); *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210 at 230-231 [43]-[44] (the Court); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 49 [128] (McHugh J).

guarantee is "plainly intended for the protection of the subject, and should be liberally interpreted",[14] as should Art 5(d)(v) read together with s10.[15]

19. While it could be argued that Liquor Restrictions do not affect the Appellant's right to own property because they do not prevent her from possessing alcohol of the prescribed kind in other parts of Queensland, to adopt this approach to Art 5 is artificial because, as explained above, the practical effect of the Liquor Restrictions was to prevent the possession of alcohol, a consumable item, at the place where she resides. Accordingly, the Liquor Restrictions affect the Appellant's right to own property for the purposes of Art 5(d)(v).

10 Right to Access Places and Services

20. The Appellant contends that the majority of the Court of Appeal erred in finding that there had been no contravention of the Appellant's right under Art 5(f). In particular, the Appellant argues that the Liquor Restrictions denied the Appellant the right of access to a service at the canteen on Palm Island.

21. This submission centres on the Appellant's inability to purchase alcohol (other than light or mid-strength beer) at the canteen on Palm Island, which was said to be a service "intended for use by the general public".[16]

22. This interpretation misunderstands the right protected by Art 5(f). As Chesterman JA in the Court of Appeal correctly noted, Art 5(f) "does not dictate what services must be

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14 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276 (Latham CJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 359 [87] (French CJ). This is consistent with the way that the term "property" in international human rights instruments has been interpreted: N Jayawickrama, *Judicial Application of Human Rights Law: National Regional and International Jurisprudence* (2002) at 911-913.

15 Although the s51(xxxi) cases discuss the legal meaning of the word, being "the legal relationship with a thing" (*White v DPP (WA)* (2011) 243 CLR 478 at 485 [10] (French CJ, Crennan and Bell JJ, quoting *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [17] (Gleeson CJ, Gaudron, Kirby and Hayne JJ); *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276 (Latham CJ)), it is used in Art 5(d)(v) as referring to the "thing" itself: *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [17]-[18] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), 389 [86] (Gummow J). It is submitted that the difference should not affect the fact that a broad meaning should be afforded to the word in Art 5(d)(v).

supplied by a hotel, restaurant or café."[17] It does not matter that a particular establishment offers only a limited array of services. What Art 5(f) requires is that all who seek to access services have the same access to whatever services are available. There is no dispute that everyone on Palm Island had access to the same services provided by the canteen.

C. Discriminatory Laws for the purposes of s10 of the RDA

23. Trimmed to its essentials, s10(1) of the RDA provides that:

> If, by reason of ... a law of ... a State ... persons of a particular race ... do not enjoy a right that is enjoyed by persons of another race ... then, notwithstanding anything in that law, persons of the first-mentioned race ... shall, by force of this section, enjoy that right to the same extent as persons of that other race...

24. The operation of s10 is expressly limited to those laws that *differentiate* between the rights of persons of different races. Section 10 does not expressly require that the law be *discriminatory* in the sense that the differentiation effected by the law is drawn in a manner that is "unreasonable, arbitrary, or invidious".[18] Nonetheless, in *Gerhardy v Brown* Mason J explained that:[19]

> Section 10 makes no reference to racial discrimination; nor does it make any reference, as s. 9(1) does, to the elements of the definition of 'racial discrimination' in Art. 1.1 of the Convention. Instead s. 10 is expressed to operate where persons of a particular race, colour or origin *do not enjoy* a right that is enjoyed by persons of another race, colour or origin... Some question as to the validity of s. 10 might be thought to arise because it fails to follow the language of Art. 2 of the Convention. The exclusion of persons of a race, colour or origin from the enjoyment of a relevant right by reason of a law does not necessarily involve 'racial discrimination' in that it may not amount to a distinction, exclusion, restriction or preference 'which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise' of the right 'on an equal footing'. Consequently, s. 10 should be read in the light of the Convention as a provision which is directed to lack of enjoyment of a right arising by reason of a law whose purpose or effect is to create racial discrimination.

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16 Appellant's Submissions at [37].

17 *R v Maloney* (2012) 262 FLR 172 at 204 [101]; *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 at 67 [150] (Keane JA).

18 W McKean, *Equality and Discrimination under International Law* (1993) at 288, referred to in *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 483-484 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ).

19 *Gerhardy v Brown* (1985) 159 CLR 70 at 99 (Mason J, emphasis in original text).

This conclusion has been confirmed by this Court.[20]

25. The textual basis for the imposition of this requirement in s10 of the RDA is not immediately obvious, but may be found in the phrase *"by reason of ... a law"*. In this context, *"by reason of"* does not simply mean by operation of the impugned law. Rather, s10 invites consideration of the differential treatment brought about by the impugned law in light of the reason (or purpose) of the law. So construed the question that arises is: Is the underlying rationale (or purpose) of the impugned law to differentiate between the rights of different racial groups? If so, s10 of the RDA operates.

10 26. Understood in this way, the test that s10 invokes in order to determine whether the law in question is discriminatory is a familiar one, namely, is the differential treatment brought about by the impugned law reasonably capable of being considered appropriate and adapted to a legitimate (racially neutral) end?[21] Where an impugned

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20 *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 483-484 (Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ); *Western Australia v Ward* (2002) 213 CLR 1 at 105 [121] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), referring to *Street v Queensland Bar Association* (1989) 168 CLR 461 at 571 (Gaudron J). See also *Western Australia v Ward* (2002) 213 CLR 1 at 278-281 [651]-[654] (Callinan J, in dissent).

21 A similar test has been developed to determine whether a law may be characterised as being a law with respect to a purposive power (*Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155-156 (Dixon J); *South Australia v Tanner* (1989) 166 CLR 161 at 164-165 (Wilson, Dawson, Toohey & Gaudron JJ), 175-179 (Brennan J); *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 300 (Mason CJ), 323-324 (Brennan J) 355-356 (Dawson J), 387-388 (Gaudron J); *Leask* v *Commonwealth* (1996) 187 CLR 579 at 591 (Brennan CJ), 605-606 (Dawson J), 616-617 (McHugh J), 624 (Gummow J); *Minister for Resources v Dover Fisheries* (1993) 43 FCR 565 at 576-577 (Gummow J)). This test is appropriate in the context of s10 of the RDA because the purpose for applying it is simply to determine whether the impugned law is really a law that serves a racially neutral end or not. In applying this test it is not necessary to demonstrate that the legislature has selected a method to achieve its end that is the least restrictive option and that there were no alternatives available. Nor is it necessary for the Court to weigh the undoubted importance of the right to racial equality against the legitimacy of the end pursued by the legislature. This test is consonant with respective roles performed by courts and legislatures under a separation of powers: *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 22 [29] (French CJ) ("It is not for this Court to hold such a law invalid on the basis of some finely calibrated weighing of detriment and benefit. Nor is it the function of the Court to hold such a law beyond the power of the Parliament simply because the Court thinks there might be a better way of achieving the same beneficial purpose."); *Levy v Victoria* (1997) 189 CLR 579 at 598 (Brennan CJ); *Rann v Olsen* (2000) 76 SASR 450 at 483 [184] (Doyle CJ) ("[I]t is not for the Court to substitute its judgment for that of Parliament as to the best or most appropriate means of achieving the legitimate end."); *Coleman v Power* (2004) 220 CLR 1 at 31 [31] (Gleeson CJ), 53 [100] (McHugh J)

law can be shown to be reasonably capable of being considered appropriate and adapted to such an end, it cannot be said that the differentiation in rights enjoyed by persons of different races arises by reason of any discriminatory purpose.[22] Where, on the other hand, the different treatment of persons of different races by the impugned law is not reasonably capable of being considered appropriate and adapted to a racially neutral end, the differential treatment will be taken to be discriminatory, thereby triggering the operation of s10 of the RDA.

27. To construe s10 of the RDA in this way does not render s8 of the RDA otiose because a special measure is not a law that serves a racially neutral end. Therefore, special measures will generally offend s10, and thus need to be saved by s8.

28. The application of the appropriate and adapted test in this context ensures that s10 of the RDA operates to nullify substantive discrimination. The test operates to identify and put beyond the reach of s10 a law that differentiates between races on its face but which is not in substance discriminatory. Importantly, however, it also operates to identify those laws that are neutral as to race in their terms, but which have the practical effect of distinguishing between the rights of different racial groups in a manner that cannot be justified by reference to a racially neutral end. A test that allows substance to prevail over form is mandated by s10 which focuses attention on the effect that an impugned law has on the enjoyment of rights, rather than on the

("The constitutional test does not call for nice judgments as to whether one course is slightly preferable to another."); *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 at 70-73 [160]-[169] (Keane JA) ("This kind of judgment is readily seen to be the province of the legislature rather than the judiciary.") A different test may have been applied in s92 cases: *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 476-478 [98]-[105] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan & Kiefel JJ). However, if that is so, then the difference emerges by virtue of the unique constitutional function of this Court in preserving an express constitutional guarantee.

22 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 366-368 [41]-[45] (Gaudron J); *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 364-365 (Mason CJ and Gaudron J), 378 (Brennan J); *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75 at 93 (Das J); *Street v Queensland Bar Association* (1989) 168 CLR 461 at 570-571 (Gaudron J); *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

terms of the law itself.[23] It was a submission to this effect that was accepted in the following passage in *Western Australia v Ward*:[24]

> [Section 10(1)] does not use the word 'discriminatory' or cognate expressions. Yet these terms are used throughout the authorities in which s 10(1) has been considered. That to which the sub-section in terms is directed is the *enjoyment* of rights by some but not by others... 'Enjoyment' of rights directs attention to much more than what might be thought to be the purpose of the law in question. Given the terms of the Convention which the RDA implements ... 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 (Art 2, s 1(c)). It is therefore wrong to confine the relevant operation of the RDA to laws whose purpose can be identified as discriminatory.

29. It is important to note that where this passage speaks of the operation of s10 not being limited to those laws whose purpose is discriminatory, it is directed to ensure that the operation of s10 is not understood as being limited to only those laws that have an express or stated discriminatory purpose. The point is that s10 applies also to laws that are discriminatory in their effect. This passage should not be misconstrued as suggesting that s10 operates to nullify laws that merely differentiate between the rights of members of different races because the passage is followed, shortly after, by a further passage that confirms the conclusion arrived at by Mason J in *Gerhardy*:[25]

> Only if there were some basis for distinguishing between different types of ownership of property or different types of inheritance might it be correct to say, in the context of s10(1) of the RDA, that to deprive the people of a particular race of a particular species of property or a particular form of inheritance not enjoyed by persons of another race is not to deprive them of a right enjoyed by persons of that other race. No basis for such a distinction is apparent in the text of the Convention. Nor is any suggested by the provisions of the RDA...

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23 *Gerhardy v Brown* (1985) 159 CLR 70 at 99 (Mason J); *Mabo v Queensland* (1988) 166 CLR 186 at 198-199 (Mason CJ, in dissent) 216-219 (Brennan, Toohey and Gaudron JJ), 230-232 (Deane J); *Western Australia v Ward* (2002) 213 CLR 1 at 99 [105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

24 *Western Australia v Ward* (2002) 213 CLR 1 at 99 [105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ, emphasis in this original text). The submission is recorded at (2002) 213 CLR 1 at 15 (*in arguendo*): "Sections 9 and 10 are violated by an act that, though not on its face, has a discriminatory effect on native title holders. The discrimination need not be 'aimed' at native title."

25 *Western Australia v Ward* (2002) 213 CLR 1 at 105 [120]-[121] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

> In this respect the RDA operates in a manner not unlike most other anti-discrimination legislation which proceeds by reference to an unexpressed declaration that a particular characteristic is irrelevant for the purposes of that legislation.

30. The reference to an unexpressed declaration found in anti-discrimination legislation is attributed to Gaudron J who in *Street v Queensland Bar Association* said that:[26]

> Although in its primary sense 'discrimination' refers to the process of differentiating between persons or things possessing different properties, in legal usage it signifies the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained. The primary sense of the word is 'discrimination between'; the legal sense is 'discrimination against'.
>
> Where protection is given by anti-discrimination legislation, the legislation usually proceeds by reference to an unexpressed declaration that certain characteristics are irrelevant within the areas in which discrimination is proscribed...
>
> Because most anti-discrimination legislation tends to proceed by reference to an unexpressed declaration that a particular characteristic is irrelevant it is largely unnecessary to note that discrimination is confined to different treatment that is not appropriate to a relevant difference. It is often equally unnecessary to note that, if there is a relevant difference, a failure to accord different treatment appropriate to that difference also constitutes discrimination.
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> The importance of a relevant difference was noted by Judge Tanaka in the *South West Africa Cases (Second Phase)*,[27] in these terms:
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> > '... the principle of equality before the law ... means ... relative equality, namely the principle to treat equally what are equal and unequally what are unequal. ... To treat unequal matters differently according to their inequality is not only permitted but required. The issue is whether the difference exists.'

31. It is this notion of discrimination to which s10 of the RDA is directed.

32. The construction of s10 of the RDA contended for above is supported by two further considerations. First, as Mason J noted in the passage set out above in *Gerhardy*, the RDA was enacted to make provision for the prohibition of racial discrimination and certain other forms of discrimination and, in particular, to make provision for giving effect to the Convention.[28] The overriding purpose of the Convention is clear from its title, namely the elimination of all forms of racial discrimination. Discrimination in this

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26 *Street v Queensland Bar Association* (1989) 168 CLR 461 at 570-571 (Gaudron J).

27 [1966] ICJR 6 at 305-306.

context involves more than merely drawing a distinction on the basis of race. Article 1 of the Convention provides that "racial discrimination" involves the drawing of a distinction *based* on race. The Convention therefore adopts the concept of discrimination "in its pejorative sense".[29] Art 2 of the Convention obliges State Parties to eliminate racial discrimination by, amongst other means, nullifying laws which have the effect of creating racial discrimination (Art 2(1)(c)) and prohibiting racial discrimination by legislative means (Art 2(1)(d)). Section 10 of the RDA is found in Part 2 of the RDA which is entitled "Prohibition of racial discrimination". Section 10 should be given a construction that is consistent with the purpose of the Convention. Moreover, to interpret s10 of the RDA as having application to both discriminatory and non-discriminatory laws would be to give it an operation that extends beyond the ambit of the Convention and hence beyond the legislative power of the Commonwealth conferred by s51(xxix) of the *Commonwealth Constitution*.[30] A construction of s10 of the RDA that renders it valid should be preferred over a construction that leads to invalidity.[31]

33. A second reason to support the construction urged above is that if s10 of the RDA were not restricted in its operation to discriminatory laws, then it would apply to any law that limited the rights of persons of one race compared to persons of another race. Such an interpretation would lead to absurd results. For example, without any requirement to demonstrate discrimination, s10 of the RDA would nullify the operation of a quarantine law that restricted the freedom of movement of residents of

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28 *Viskauskas v Niland* (1983) 153 CLR 280 at 287 (Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ). Australia became a signatory to the Convention on 13 October 1966 and ratified it on 30 September 1975: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 261 (Gibbs CJ).

29 W McKean, *Equality and Discrimination under International Law* (1993) at 286-288; N Lerner, *The UN Convention on the Elimination of all forms of Racial Discrimination* (1980) at 28; W Sadurski, "Gerhardy v Brown v the Concept of Discrimination: Reflections on the Landmark Case that wasn't" (1986) 11 Sydney Law Review 5 at 30-31.

30 *Gerhardy v Brown* (1985) 159 CLR 70 at 85 (Gibbs CJ), 99 (Mason J); *Western Australia v Ward* (2002) 213 CLR 1 at 278-281 [651]-[654] (Callinan J, in dissent). See, generally, *Victoria v Commonwealth* (1996) 187 CLR 416 (*Industrial Relations Act Case*) at 486-488 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

31 *Acts Interpretation Act 1901* (Cth), s15A.

a particular place for a demonstrable and racially neutral end where it could be shown that the restriction affected the rights of persons of one race differently to another. By way of further example, a law that provided for the compulsory acquisition of property from a member of a particular racial group might be nullified by s10 of the RDA even where the acquisition was pursued for a legitimate and pressing social need.

34. For the reasons advanced by the Respondent in paragraphs [35]-[47] of the Respondent's Submissions, it is submitted that the Liquor Restrictions are reasonably capable of being considered appropriate and adapted to a racially neutral end, namely "minimising ... harm caused by alcohol abuse and misuse and associated violence; and ... alcohol related disturbances, or public disorder, in a locality",[32] such that s10 of the RDA is not engaged.

D. Special Measures for the purposes of s8 of the RDA

35. The occasion for taking a special measure to which s8 of the Act applies, and to which s10 consequently does not apply, "is that the circumstances warrant the taking of the measure to guarantee that the members of the benefited class shall have 'the full and equal enjoyment of human rights and fundamental freedoms'".[33] The human right or fundamental freedom to be achieved by the special measure in the Liquor Restrictions is "[t]he right to security of person and protection by the State against violence or bodily harm" protected by Art 5(b).[34]

36. A special measure must serve the purpose of securing the adequate advancement of a racial or ethnic group requiring protection.[35] When the special measure is legislative,

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32 *Liquor Act 1992* (Qld), s173F. See comments to a similar effect in a similar context in *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 at 70 [160] (Keane JA).

33 *Gerhardy v Brown* (1985) 159 CLR 70 at 133 (Brennan J).

34 *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 at 70 [160] (Keane JA); *Liquor Act 1992* (Qld), s173F; Explanatory Notes for *Indigenous Communities Liquor Licences Bill 2002* (cl 66 of which inserted Part 6A into the *Liquor Act*) at 1-2, 18.

35 Art 1.4 *Convention on the Elimination of All Forms of Racial Discrimination*, which provides the scope of a special measure to which s8 applies.

the assessments of (1) whether a particular group needs the protection of a special measure, (2) the appropriate way in which to achieve the adequate advancement of a racial or ethnic group requiring protection, and (3) the design of the special measure, are principally matters for the legislature.

37. However, because a special measure must serve the purpose of advancement, a court may determine whether a legislative measure actually serves that end by asking whether it is reasonably appropriate and adapted to that end.[36] Where in all the circumstances an impugned measure cannot reasonably be regarded as being appropriate and adapted to the end of advancement, a court may determine that the measure is not a special measure. Those circumstances may include a history of discrimination against the group,[37] or the identification of another group or a sub-group that needs additional protection.[38]

38. An additional circumstance that a court may take into account in deciding whether a special measure is reasonably capable of being considered appropriate and adapted to securing the advancement of the group intended to benefit is whether the group has been consulted in the development of the measure or has consented to its implementation. Where acceptance by the beneficiaries of a special measure appears to be critical to its likely success, then the failure to consult or secure consent may cast doubt on whether or not the measure is reasonably capable of being considered appropriate and adapted to the end of advancement. For example, where the special measure confers a material benefit on a group, and the group is not likely to take up the benefit, then the absence of consultation about and acceptance of the measure by the group may be a factor to be weighed in determining whether the measure is

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36 The test applies should be that described in footnote 21 above. In addition to the references provided there, see also: *Gerhardy v Brown* (1985) 159 CLR 70 at 88 (Gibbs CJ), 105 (Mason J), 138-139 (Brennan J), 148-149 (Deane J), 161-162 (Dawson J); *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149 at [34] (Crennan J) (discussing the special measures provision in the *Sex Discrimination Act 1984* (Cth)).

37 *Gerhardy v Brown* (1985) 159 CLR 70 at 105 (Mason J), 150 (Deane J).

38 *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 at 52 [87] (McMurdo P), 70 [160]-[162] (Keane JA)

capable of being considered reasonably appropriate and adapted to the advancement of the group in question. The comments of Brennan J in *Gerhardy v Brown*[39] to which the Appellant's submissions refer at [51] should be understood as having that meaning.[40]

39. Although it may be accepted that consultation and consent of a beneficiary group is generally desirable, the extent to which the absence of these steps will undermine the efficacy of an impugned measure will vary from case to case. There will be many situations in which consultation with the group in question is not practicable,[41] or will be ineffective in securing its consent, a fact which is acknowledged by the Appellant.[42] The latter situation may arise when the group has no identifiable representative, or when the group's purported representative does not in fact represent the views of a significant proportion of the group, or when the representatives – or the members of the wider group – intractably disagree. For example, this situation may arise when a restriction is placed on the group by the special measure, the purpose of which is to protect a sub-group of the wider group. In those situations, the legislature's inability to secure the consent of the group subject to the restriction is unlikely to be, on its own, fatal to a decision of whether the measure is capable of being considered reasonably appropriate and adapted to the end identified in Art 1.4 of the Convention.[43]

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39 *Gerhardy v Brown* (1985) 159 CLR 70 at 135 (Brennan J).

40 That is consistent with the international human rights materials discussed in the Appellant's Submissions at [54]-[59]: see especially Committee on the Elimination of All Forms of Racial Discrimination, *General Recommendation No 32* at [18], which suggests that a measure may not be a s8 special measure if the lack of consultation itself impairs that group's full and equal enjoyment of their right to participate in public life.

41 *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 at 80 [194] (Keane JA).

42 Appellant's Submissions at [60].

43 *R v Maloney* (2012) 262 FLR 172 at 193 [54] (McMurdo P), 210 [118] (Chesterman JA, with whom Daubney J agreed); *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 at 51 [81] (McMurdo P), 80 [194], 89 [208] (Keane JA); *Morton v Queensland Police Service* (2010) 240 FLR 269 at 280 [31] (McMurdo P), 298 [114] (Chesterman JA, with whom Holmes JA agreed). See discussion in Australian Human Rights Commission, *Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975 (Cth)* (2011) at [22].

40. In those cases, to hold that the group must consent to a special measure would be to elevate the international law principle of self-determination into a domestic legal rule. The international determinations and recommendations relied on by the Appellant[44] create no enforceable obligation on the State of the type that could be capable of being expressed as a rigid rule applying to the operation of s8 of the Act,[45] and which may have the effect of rendering invalid the State law through the operation of s109 of the *Commonwealth Constitution*. While the Convention itself has been incorporated into our domestic law, and necessarily influences its interpretation,[46] it is another thing to say that statements by international law bodies as to the interpretation of the
10 Convention translate into strict rules applying to the interpretation of the domestic statute that incorporates the Convention.[47]

41. The Appellant also contends that the Liquor Restrictions are not a special measure because they do not manifest an intention that they are to be temporary in nature. In *Gerhardy v Brown*, a majority of the Court held that a law does not lose its character as a special measure simply because it does not contain a temporal limitation as to its future operation on its face.[48] The prohibition contained in Art 1.4 is that the measure not be continued after the objectives for which it was taken have been achieved.[49] There is no requirement that a legislative measure itself expressly provide for this.

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44 Appellant's Submissions at [54]-[59].

45 *Re East; ex parte Nguyen* (1998) 196 CLR 354 at 362 [19] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-7 (Mason CJ and Deane J). Note that a "General Recommendation" is not expressed to be binding in any event: see Committee on the Elimination of All Forms of Racial Discrimination, *General Recommendation No 32* and the Convention itself, Art 9.2.

46 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J) and see the Preamble to the Act and the words of s8 itself.

47 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-288 (Mason CJ and Deane J).

48 *Gerhardy v Brown* (1985) 159 CLR 70 at 88-89 (Gibbs CJ), 106 (Mason J), 113 (Wilson J), 140-141 (Brennan J), 154 (Deane J).

49 *Gerhardy v Brown* (1985) 159 CLR 70 at 88-89 (Gibbs CJ), 106 (Mason J), 140 (Brennan J), 154 (Deane J); *Australian Textiles Pty Ltd v Commonwealth* (1945) 71 CLR 161 at 170-171 (Latham CJ), 180-181 (Dixon J, with whom Rich and Williams JJ agreed).

42. When it is likely that the special measure's objective of ensuring the beneficiary group equal enjoyment or exercise of human rights and fundamental freedoms will take considerable time to achieve, a special measure in the nature of subordinate legislation subject to automatic expiry should be presumed not to offend the temporal limitation contained in Art 1.4 of the Convention.[50]

Part VI: Estimated Hours

43. South Australia estimates it will require 30 minutes for presentation of its oral argument.

10 Dated 23 November 2012

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50 *Gerhardy v Brown* (1985) 159 CLR 70 at 88 (Gibbs CJ).