IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY NO B57 OF 2012

BETWEEN:

JOAN MONICA MALONEY

Appellant

THE QUEEN

Respondent

SUBMISSIONS OF THE NATIONAL CONGRESS OF AUSTRALIA'S FIRST PEOPLES LTD

SEEKING LEAVE TO INTERVENE AS AN AMICUS CURIAE

Date of document: 27 November 2012

Filed on behalf of: The National Congress of Australia's First Peoples Limited

Human Rights Law Centre
Level 17, 461 Bourke Street
Melbourne VIC 3000

Tel: (03) 8636 4450
Fax: (03) 8636 4455
Ref: Ben Schokman

PART I CERTIFICATION

1. The National Congress of Australia's First Peoples (**Congress**) certifies that these submissions are in a form suitable for publication on the Internet.

PART II BASIS OF INTERVENTION

2. Congress seeks leave to intervene as *amicus curiae* to make submissions about the proper interpretation and application of the *Racial Discrimination Act 1975* (Cth) (**RDA**), the meaning of 'special measures' and the operation of sections 8 and 10 of the RDA.

3. The function and objects of Congress are set out in the affidavit of Lindon Coombes dated 27 November 2012.

4. There are four reasons why Congress' application to intervene as an *amicus* should be granted.

5. First, the issues raised are of general importance to Aboriginal and Torres Strait Islander peoples throughout Australia, and are likely to impact on their rights. The interest of the Appellant in relation to the proper interpretation and application of the RDA, the meaning of 'special measures' and the operation of sections 8 and 10 of that Act primarily relates to the criminal charge against her under the legislative regime that imposes restrictions on alcohol on Palm Island. In contrast, Congress' interest is in the interpretation and application of the RDA to all existing and future legislative measures that differentially affect Aboriginal and Torres Strait Islander peoples. French CJ noted in *Wurridjal v Commonwealth*[1] that an *amicus* may be permitted to intervene, where it is 'in the interests of the administration of justice that the Court have the benefit of a larger view of the matter before it than the parties are able or willing to offer'.[2]

6. Second, as the national representative body for Aboriginal and Torres Strait Islander peoples, Congress represents the political, social, cultural and environmental interests of Aboriginal and Torres Strait Islander peoples and is tasked with protecting those interests. Congress also possesses specialist subject matter expertise in relation to issues of central importance to this matter, including in relation to the effect of the

---

1 (2009) 237 CLR 309 (**Wurridjal**).

2 *Wurridjal* at 312.

United Nations Declaration on the Rights of Indigenous Peoples (**Declaration**) on the construction of s 8 of the RDA. If the Court accepts that an *amicus* role may be of assistance in this case to provide 'a larger view of the matter before it', Congress is the most appropriate entity to undertake that role on behalf of Aboriginal and Torres Strait Islander peoples.

7. Third, Congress has a legitimate concern and interest in the outcome of this particular matter, because of its potential to clarify what constitutes a special measure under the RDA. As set out in the affidavit of Lindon Coombes dated 27 November 2012, part of Congress' role is to promote the interest of its members and of all Aboriginal and Torres Strait Islander peoples by promoting the development of the law relating to the fundamental rights of those people.

8. Fourth, most of Congress' arguments about why the impugned provisions should not be characterised as special measures differ from those raised by the Appellant. They also provide the perspective of a broader range of potentially affected people and incorporate Congress' subject matter expertise on these issues.

PART III STATEMENT OF ARGUMENT

9. Congress submits:

(a) The impugned provisions are racially discriminatory laws, by reason of which Aboriginal persons living on Palm Island[3] do not enjoy the right to equal protection of the law without discrimination in the same way as do other persons in Queensland. This is the most appropriate characterisation of the right for the purposes of s 10 of the RDA. Section 10(1) of the RDA therefore applies to the impugned provisions.

(b) The impugned provisions are not a special measure for the purposes of s 8 of the RDA, for one or more of the following reasons:

(i) free, prior and informed consent from the identified beneficiaries is required for any measure to be characterised as for the advancement of indigenous peoples;

---

3 In these submissions, references to Aboriginal persons living on Palm Island include Torres Strait Islanders living in that community.

(ii) the impugned provisions were not, on their face, measures taken for the 'sole purpose' of securing the advancement of the Aboriginal people of Palm Island;

(iii) a law criminalising the conduct of the persons identified as the beneficiaries of the measure is not capable of being characterised as a special measure for the purposes of s 8 of the RDA so as to avoid the effect of s 10;

(iv) in any event, the measures were not reasonably appropriate and adapted to achieve the sole purpose of 'securing adequate advancement' of Aboriginal persons living on Palm Island 'requiring such protection as may be necessary'.

10. In the present circumstances, in so far as constructional choices exist within ss 10 and 8, the principle that a construction of legislation that favours Australia's international obligations should be favoured is of particular importance.[4] The RDA is the domestic enactment of the *International Convention on the Elimination of All Forms of Racial Discrimination* (**Convention**), and should therefore be construed to give effect to the Convention. The true meaning of the RDA is to be ascertained by reference to the meaning in international law of the corresponding Convention provisions.[5] The Committee for the Elimination of Racial Discrimination (**CERD**) is the authoritative body on the interpretation of the Convention, and its recommendations and statements as to the meaning and application of particular provisions are highly persuasive when construing the RDA.[6] Australia's international obligations as they apply to Aboriginal and Torres Strait Islander peoples have recently been elucidated by Australia's endorsement of the Declaration .[7]

---

4 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, Mason CJ and Deane J at 287; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, Brennan, Deane and Dawson JJ at 38; *Aurukun Shire Council v Chief Executive Officer, Office of Liquor Gaming and Racing in the Department of Treasury* ([2012] 1 Qd R 1, McMurdo P at [35].

5 *Gerhardy v Brown* (1985) 159 CLR 70 (**Gerhardy**), Brennan J at 124.

6 CERD is established by article 8 of the Convention, with the functions set out in articles 9 and 11.

7 Statement by the Hon Jenny Macklin, Minister for Families, Community Services and Indigenous Affairs, *United Nations Declaration on the Rights of Indigenous Peoples*, 3 April 2009, available at http://jennymacklin.fahcsia.gov.au/node/1711.

A. THE RIGHT ENGAGED FOR THE PURPOSES OF SECTION 10

11. In *Morton v Queensland Police Service,*[8] all members of the Court of Appeal agreed that s 168B and Part 6A of the *Liquor Act 1992* (Qld) and Part 8A and Schedule 1R of the *Liquor Regulation 2002* (Qld) (the **impugned provisions**) were discriminatory on the ground of race.[9] The Court of Appeal in this case reaffirmed the racially discriminatory character of the impugned provisions.[10] The legal and practical effect of the impugned provisions is to restrict possession of alcohol by the overwhelmingly Aboriginal people of Palm Island, and to subject them to criminal sanctions to which persons in other parts of Queensland are not exposed.

10 12. This conclusion was unremarkable, given the intention expressed in the Explanatory Notes to address alcohol related issues in 'Indigenous communities'.[11] There is no doubt the impugned provisions were aimed at the Aboriginal people of Palm Island. The Court of Appeal's conclusion was a straightforward application of the approach taken in earlier decisions of this Court, which direct attention to the 'practical operation and effect' of a law and matters of substance rather than matters of form.[12] It is consistent with the interpretation of the Convention adopted by CERD, which looks to see whether an action has an unjustifiable disparate impact upon a group distinguished by race when seeking to determine whether an action has an effect contrary to the Convention.[13] It is also consistent with the approach taken by this
20 Court in determining whether a law is discriminatory for the purposes of ss 92 or 117 of the *Constitution*, which looks to the practical operation of the law.[14]

---

8 (2010) 271 ALR 112; [2010] QCA 160 (**Morton**).

9 *Morton*, McMurdo P at [5], Chesterman JA at [54] (Holmes JA agreeing at [39]).

10 *R v Maloney* (2012) 262 FLR 172; [2012] QCA 105, McMurdo P at [9], Chesterman JA at [84] (Daubney J agreeing at [127]).

11 *Liquor Amendment Regulation (No. 4) 2006, Explanatory Notes for SL 2006 No. 79*, items 3 and 9.

12 *Gerhardy*, Mason J at 99; *Western Australia v Ward* (2002) 213 CLR 1, Gleeson CJ, Gaudron, Gummow and Hayne JJ at [115].

13 CERD, *General Recommendation No. 14: Definition of discrimination (Art. 1, par.1)*, 22 March 1993. CERD applied this approach in noting its concerns about the disproportionately high rate of incarceration of Indigenous people in Australia and the disproportionate impact on them of minimum mandatory sentencing laws: *Report of the Committee on the Elimination of Racial Discrimination*, Fifty-sixth session (6-24 March 2000) Fifty-seventh session (31 July-25 August 2000), [38]-[39]. See also United Nations Human Rights Committee, *General Comment No. 18 – Non-discrimination*, 11 October 1989, [7].

14 See for example *Cole v Whitfield* (1988) 165 CLR 360, 400-1; *Street v Queensland Bar Association* (1989) 168 CLR 461, Mason CJ at 487-488, Brennan J at 507-8, Deane J at 528, Dawson J at 545-6,

13. It follows that the impugned provisions prevent or limit the Aboriginal people of Palm Island from enjoying the right to equal protection of the law without discrimination. This autonomous human right is recognised by article 26 of the *International Covenant on Civil and Political Rights* (**ICCPR**), which provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

10 Article 7 of the United Nations Declaration of Human Rights (**UNDHR**) is in the same terms.[15]

14. The right to equal protection of the law without discrimination is a 'right' for the purposes of s 10(1) of the RDA. Any of the human rights and fundamental freedoms with which the Convention is concerned is a right for s 10(1) purposes.[16] Those rights include, but are not limited to, the rights enumerated in article 5 of the Convention; they extend to all of the human rights and fundamental freedoms with which the Convention is concerned.[17]

15. The right to equal protection of the law without discrimination is an autonomous, substantive human right; it is not an ancillary right that exists merely to protect other
20 human rights.[18] It prohibits discrimination in law or in fact in any field regulated and

---

Toohey J at 554-5, Gaudron J at 569-571, McHugh J at 581; *Betfair Pty Ltd v Racing New South Wales* (2012) 286 ALR 221, French CJ, Gummow, Hayne, Crennan and Bell JJ at [51]-[56]. In another context, see *Rowe v Electoral Commissioner* (2010) 243 CLR 1, French CJ at [25], Gummow and Bell JJ at [151], [158], [167], Hayne J at [151] and Crennan J at [376].

15 Section 15(1) of the Canadian *Charter of Rights and Freedoms* and s 8(3) of the Victorian *Charter of Human Rights and Responsibilities* both provide for equal protection of the law without discrimination, in terms similar to art. 26 of the ICCPR.

16 *Gerhardy*, Mason J at 101-102.

17 RDA, s 10(2); *Gerhardy*, Gibbs CJ at 86, Mason J at 101, Brennan J at 126-7; *Mabo v Queensland* (1988) 166 CLR 186, Brennan, Toohey and Gaudron JJ at 216-7, Deane J at 229-230.

18 United Nations Human Rights Committee, *General Comment No. 18: Non-discrimination*, 11 October 1989, [1], [12]; *Broeks v The Netherlands* (United Nations Human Rights Committee, Communication No. 172/1984); Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, 2005), 604; *Lifestyle Communities Ltd (No. 3)* [2009] VCAT 1869 (**Lifestyle Communities**), [126].

protected by public authorities, and requires that legislation should not be discriminatory.[19]

16. The essential value of the equality right is the protection of human dignity. It is grounded in the idea that: 'The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.'[20]

17. The right to equal protection of the law without discrimination is one facet of substantive equality. It is complemented by an understanding that the achievement of substantive equality permits, and can require, the taking of special measures for the advancement of groups disadvantaged by past discrimination.[21] This is reflected in articles 1(4) and 2(2) of the Convention.

18. Unless the impugned provisions are a special measure under s 8 of the RDA, they offend s 10 of the RDA and are invalid by operation of s 109 of the Constitution. For the reasons that follow, the impugned provisions are not capable of being characterised as a special measure.

B. CONSENT TO SPECIAL MEASURES

19. In order to constitute a special measure under s 8 of the RDA and article 1(4) of the Convention, the measure must be taken for the sole purpose of the advancement of its intended beneficiaries. The notion of advancement is to be considered from the perspective of the beneficiaries, rather than that of the benefactor. This requires, in the case of indigenous peoples, consultation undertaken in order to obtain their free, prior and informed consent to the measure to be taken That is because the dignity and self-determination of indigenous peoples, having been denied historically, is now integral to their advancement.

---

19 United Nations Human Rights Committee, *General Comment No. 18: Non-discrimination,* 11 October 1989, [12].

20 *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (Andrews), 171; *R v Kapp* [2008] 2 SCR 483 (Kapp), [15], [21]; *Lifestyle Communities*, [277].

21 Joseph, Schultz & Castan, *The International Covenant of Civil and Political Rights: Cases, Material and Commentary*, 2nd ed., 2004, [23.12]; *Kapp*, [15]-[16]; *Lifestyle Communities*, [165], [254]-[257], [290]-[291].

20. In *Gerhardy*, Brennan J emphasised that those intended to benefit from a special measure should agree to it:[22]

> A special measure must have the sole purpose of securing advancement, but what is "advancement"? To some extent, that is a matter of opinion formed with reference to the circumstances in which the measure is intended to operate. "Advancement" is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement. The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.

His Honour's reasoning is compelling, and should be adopted by the Court. It is an approach that affords appropriate recognition to dignity and self-determination, which underpin all human rights.

21. Brennan J's emphasis on the need for a special measure to be in accordance with the wishes of its intended beneficiaries is also consistent with more recent statements of principle by CERD. The requirement for consultation with those affected by a special measure was affirmed by CERD in its General Recommendation No. 32:[23]

> 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.

22. Specifically in relation to indigenous peoples, CERD in its General Recommendation No. 23 noted the history of discrimination against and dispossession of indigenous peoples in many regions of the world. Against that background, CERD recommended that States parties:[24]

---

22 *Gerhardy*, Brennan J at 135.

23 CERD, *General Recommendation No. 32: The meaning and scope of special measures in the International Covenant on the Elimination of All Forms of Racial Discrimination*, 24 September 2009, [18].

24 CERD, *General Recommendation No. 23: Indigenous Peoples, 18 August 1997*, 4(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.

23. Most recently, the United Nations General Assembly adopted the Declaration.[25] Australia endorsed the Declaration on 3 April 2009.[26] The Declaration affirms the need to obtain the free, prior and informed consent of indigenous peoples to a range of matters affecting them.[27] In particular, article 19 of the Declaration requires:

> 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.

The importance of free, prior and informed consent to the rights and freedoms of indigenous peoples is to be understood against the historical backdrop of the treatment of indigenous peoples by colonial powers, articulated in the preamble to the Declaration.

24. While the Declaration is a non-binding text, it is now a unanimous declaration of the United Nations General Assembly and so carries considerable moral force.[28] The Declaration provides authoritative guidance as to the interpretation of human rights as they apply to indigenous peoples.[29] It reinforces the pre-existing recommendation by CERD that decisions affecting indigenous peoples should not be taken without their informed consent. It has also informed criticism by CERD and the Special

---

25 United Nations General Assembly, Resolution 62/295, *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007.

26 See Statement by the Hon Jenny Macklin, Minister for Families, Community Services and Indigenous Affairs, *United Nations Declaration on the Rights of Indigenous Peoples*, 3 April 2009. When announcing Australia's endorsement of the Declaration the Minister said 'Australia's existing obligations under international human rights treaties are mirrored in the Declaration's fundamental principles.'

27 Articles 10, 11, 19, 28, 29 and 32.

28 Davis, *The United Nations Declaration on the Rights of Indigenous Peoples* (2007) 11(3) AILR 55, 55.

29 Statement by the Hon Jenny Macklin, Minister for Families, Community Services and Indigenous Affairs, *United Nations Declaration on the Rights of Indigenous Peoples*, 3 April 2009; Permanent Forum on Indigenous Issues, *Report on the eighth session*, UN Doc E/C.19/2009/14 (2009), Annex, [1], [6]-[13].

Rapporteur[30] of measures taken in Australia without consultation directed to obtaining the consent of the affected indigenous communities.[31]

25. The Special Rapporteur has provided guidance as to the content of the requirement in article 19 of the Declaration.[32] The requirement is to enter into genuine negotiations with indigenous peoples prior to making decisions about proposed measures, rather than providing information about decisions already made where there is no opportunity to influence decision-making.[33] Article 19 does not create a 'veto power' for indigenous peoples; rather, it obliges States to make every effort to build consensus on the part of all concerned.[34]

26. The Expert Mechanism on the Rights of Indigenous Peoples[35] describes the content of 'free, prior and informed consent' thus:[36]

> The element of "free" implies **no coercion, intimidation or manipulation**; "prior" implies that consent is **obtained in advance of the activity** associated with the decision being made, and **includes the time** necessary to allow indigenous peoples to undertake their own decision-making processes; "informed" implies that indigenous peoples have been **provided all information relating to the activity** and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; "consent" implies that indigenous peoples have **agreed** to the activity that is the subject of the relevant decision, which may also be subject to conditions.

The Expert Mechanism emphasises that consent is an integral part of the right of indigenous peoples to self-determination.[37]

---

30 James Anaya, appointed by the United Nations Human Rights Council as Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.

31 CERD, Seventy-seventh session, 2 –27 August 2010; *Consideration of reports submitted by States parties under article 9 of the convention; Concluding observations of the Committee on the Elimination of Racial Discrimination; Australia*, [16]; *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya; Addendum:Situation of indigenous peoples in Australia*, 1 June 2010, 28, 35.

32 *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya,* 15 July 2009.

33 *Ibid,* [46].

34 *Ibid,* [48].

35 Established by the United Nations Human Rights Council in 2007 to provide the Council with advice on the rights of indigenous peoples.

36 Expert Mechanism on the Rights of Indigenous Peoples, *Expert Mechanism Advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making*, [25].

27. In the context of s 8 of the RDA, the presence or absence of consent of those affected by a measure is relevant both to the question of the 'sole purpose' of the measure and to the question whether the measure is an 'advancement'. Measures that are 'foisted' upon indigenous communities impair their dignity, no matter what good they may aim to achieve. States must take time to work with indigenous communities to identify advancement measures that are wanted by them. As Brennan J pointed out, 'advancement' is not a paternalistic notion. The imposition of a measure against the wishes of those affected by it undermines their dignity and self-determination and is fundamentally inconsistent with their advancement. It compels the conclusion that the measure was not taken for the sole purpose of their advancement, and is not a special measure within article 1(4) of the Convention or s 8 of the RDA.[38]

28. In this case, the purported beneficiaries of the impugned provisions are Palm Island's indigenous community. That community is represented by the Palm Island Shire Council, the elected body with which the State should have worked to obtain consensus. The impugned provisions impose a significant burden or detriment on Aboriginal persons living on Palm Island, which is likely to result in criminal records, fines and even imprisonment for many of them. The Explanatory Note provides no basis for concluding that the community was consulted about the imposition of this burden, or that it was provided with information about any benefits that might be expected to result from it. The evidence that is available indicates that the consultation that occurred was perfunctory and dismissive of the views expressed by the community through its elected Council.[39] On no view was it consultation genuinely directed to obtaining the consent of the community to the imposition of criminal penalties for possessing alcohol on Palm Island. It is clear that the community did not consent to the measures imposed. Rather, they were foisted upon them, and in a form that exposes them to criminal liability, punishment and records.

C. SOLE PURPOSE

29. A measure can only be a 'special measure' for the purpose of s 8 of the RDA, by virtue of article 1(4) of the Convention, if it is 'taken for the **sole purpose** of securing

---

37 *Ibid,* [20].

38 *Gerhardy*, Brennan J at 139.

39 See in particular the affidavit of Magdalena Blackley made on 11 April 2011.

adequate advancement' of the group requiring protection. This 'sole purpose' test stands in contrast to the variety of other purpose related formulations in Australian law – dominant purpose, substantial purpose and primary purpose – which all accommodate secondary purposes.[40] CERD has described the reference to 'sole purpose' as limiting the scope of acceptable motivations for special measures within the terms of the Convention.[41] A sole purpose test only allows for one purpose, which in this case must be the purpose of 'securing the adequate advancement' of the relevant group.

30. The ascertainment of the purpose of a measure is a question of fact to be objectively determined by the Court. In *Gerhardy,* Gibbs CJ noted that the question of purpose under article 1(4) was to be determined in the same way that other constitutional facts are determined: 'the fact must be ascertained by the court as best it can'.[42] In that case Brennan J ascertained the purpose of the relevant legislation 'from its terms, from the Report of the Pitjantjatjaras Land Rights Working Party and from the speeches of the Ministers in charge of the Bill'.[43] Dawson J noted that what is required is 'an examination and evaluation of purpose, not necessarily confined to the terms in which the special measures are expressed'.[44] Deane J described the task of ascertaining this purpose in the following manner:[45]

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

---

40 For example, the 'dominant purpose' test now governs the application of legal professional privilege; the 'substantial purpose' test is used when determining whether an investigation is tainted by an improper purpose; the 'primary purpose' test is used in determining eligibility for union membership.

41 CERD, General Recommendation 32 – The meaning and scope of special measures, [21].

42 *Gerhardy*, Gibbs CJ at 88.

43 *Gerhardy*, Brennan J at 136.

44 *Gerhardy*, Dawson J at 160.

45 *Gerhardy*, Deane J at 149.

31. Although what is required is one single purpose – of advancement – there may be a number of measures all aimed at the 'sole purpose' of advancement.[46] This was the case in *Gerhardy* where Gibbs CJ noted that:[47]

> It was submitted for the defendant that "the sole purpose" of the Act was not that described in Art 1(4), since, it was submitted, the Act discloses at least three purposes – to make a land grant (s 15), to grant a power to control access to the lands (s 19) and to restrict alienation of the lands granted (s 17). This is too narrow a view; the Act obviously adopts a number of measures to achieve its purpose, but nevertheless has the sole purpose of securing the advancement of the ethnic groups in question.

10 32. The 'sole purpose' test was for many years the test used for determining whether a document attracted legal professional privilege. This test was established by Stephen, Mason and Murphy JJ in *Grant v Downs*.[48] It requires that the relevant purpose be the only purpose. The sole purpose test was discussed and overturned by the High Court in favour of the 'dominant purpose' test in *Esso Australia Resources v Federal Commissioner of Taxation*.[49] In that case Gleeson CJ, Gaudron and Gummow JJ described the sole purpose test as requiring that 'such a purpose be the only purpose', noting that it is a 'bright-line test' and in that context describing it as 'unduly restrictive'.[50] Rather than see this bright line test watered down because of its absoluteness and rigidity,[51] the plurality preferred to abandon it in favour of the
20 dominant purpose test. They noted that:[52]

> If it is to be taken literally, one other purpose in addition to the legal purpose, regardless of how relatively unimportant it may be, and even though, without the legal purpose, the document would never have come into existence, will defeat the privilege.

33. In the context of a provision that authorises racial discrimination, it is unsurprising that the Convention adopts a rigid and absolute test requiring that the only purpose is

---

46 *Pareroultja v Tickner* (1993) 117 ALR 206 at 221-2.

47 *Gerhardy*, Gibbs CJ at 88.

48 (1976) 135 CLR 674.

49 *Esso Australia Resources v Federal Commissioner of Taxation* (1999) 201 CLR 49 (Esso).

50 *Esso* at 68-9.

51 *Esso* at [60].

52 *Esso* at [58].

that described in article 1(4). Provisions that have a dominant or primary purpose of 'advancement' and another non-qualifying purpose are not for the sole purpose of advancement, and should not excuse discrimination. As the High Court indicated in *Esso*, the benefit of this test is that it is clear and easy to apply – albeit absolute and rigid.[53] The 'sole purpose' restriction within article 1(4) has been interpreted as a safeguard against the misuse of special measures – 'they can be understood as a defense against the abuse and misuse of special measures by those who wish to advance racist policies'.[54]

34. In this case the evidence of legislative purpose indicates that the measures did not have the sole purpose of advancement. As noted in the judgment of McMurdo P below,[55] the Explanatory Notes for *Liquor Amendment Regulation (No 4) 2006* (Qld), which applied the impugned provisions to Palm Island, set out their purpose at note 3:

> 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. (emphasis added)

35. The purpose of minimising harm caused by disturbances or public disorder is not an acceptable purpose under article 1(4) – it does not relate to advancement in the Convention sense but rather is directed towards issues of orderliness and control. While these purposes are legitimate public concerns, they are not advancements in the sense that term is used in article 1(4). The existence of this second purpose means the measure does not have the sole purpose of advancement and cannot be considered a 'special measure' under s 8 of the RDA. The measure fails the strict sole purpose test imposed by article 1(4).

D. CRIMINAL OFFENCES AS SPECIAL MEASURES

36. Special measures are commonly understood to involve some positive discrimination in favour of a disadvantaged group, such as setting selection targets or quotas, or making membership of the group a criterion for selection, or developing programs aimed to

---

53 *Esso* at [60].

54 Loper, K 'Substantive Equality in International Human Rights Law and its Relevance for the Resolution of Tibetan Autonomy Claims' 37 N.C. J. Int'l L. & Com. Reg. 1 at 21.

55 *Esso* at [44].

increase participation of the group. For example, union rules setting quotas for female representatives on the union's governing bodies have been found to be a special measure for the purposes of the *Sex Discrimination Act 1984* (Cth).[56]

37. The imposition of a burden or restriction on a disadvantaged group is less readily characterised as a special measure.[57] Where that burden or restriction involves the criminalisation of conduct by the group, it cannot be characterised as a special measure.[58]The Special Rapporteur has commented to this effect, in relation to restrictive measures taken during the Northern Territory Emergency Response:[59]

> As already stressed, special measures in some form are indeed required to address the disadvantages faced by indigenous peoples in Australia and to address the challenges that are particular to indigenous women and children. But it would be quite extraordinary to find consistent with the objectives of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members. Ordinarily, special measures are accomplished through preferential treatment of disadvantaged groups, as suggested by the language of the Convention, and not by the impairment of the enjoyment of their human rights.

38. A special measure within article 1(4) of the Convention must be taken to ensure the adequate advancement of the intended beneficiaries. The impugned provisions are a punitive measure imposed without the consent of the Palm Island community, and impair their dignity rather than advancing it. The exposure of Aboriginal persons on Palm Island to criminal sanctions for conduct that is lawful elsewhere in Queensland will expose many in the community to criminal records, fines and imprisonment. These sanctions are inherently unlikely to advance the economic, social and cultural development of the indigenous community of Palm Island.

---

56 *Jacomb v Australian Municipal Administrative Clerical and Services Union* (2004) 140 FCR 149, [60], [63]-[65].

57 *Kapp*, [53]-[54].

58 See the discussion in Hunyor, *Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention'* (2009) 14 Australian Journal of Human Rights 39, 49-56.

59 *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya; Addendum:□Situation of indigenous peoples in Australia*, 1 June 2010, p 31; and see the recommendations at p 35.

39. The impugned provisions can be distinguished from those at issue in *Gerhardy*, where the criminal sanctions were not imposed on the Pitjantjatjara people, and the positive measures (namely land rights) were in any event introduced with their consent. The impugned provisions are more akin to the provisions of the *Aborigines Act 1971-1975* (Qld) and the *Aborigines Regulations 1972* (Qld), which permitted payment of below award wages to Aboriginal people living on reserves, including Palm Island. In *Bligh v Queensland*[60] the Human Rights and Equal Opportunity Commission rejected a submission that these provisions were a special measure under s 8 of the RDA

E. PROPORTIONALITY OF SPECIAL MEASURES

40. In *Gerhardy* Mason and Deane JJ each used the Constitutional concept 'appropriate and adapted' to assess whether a discriminatory law was a special measure.[61] In *Lange v Australian Broadcasting Corporation*[62] this Court acknowledged that 'there is little difference between the test of "reasonably appropriate and adapted" and the test of proportionality'.[63] In coming to this conclusion the Court in *Lange* referred to *Cunliffe v Commonwealth*[64] where the concept of proportionality was used interchangeably with that of 'appropriate and adapted'. The judgment of Brennan J in that decision is an example:[65]

> [I]n determining whether the law is reasonably appropriate and adapted to the achieving of a legitimate purpose or object and any infringement is merely incidental, the court may inquire into the proportionality of the means adopted by the law to achieve the postulated purpose or object.

41. Article 1(4) of the Convention specifically incorporates a proportionality requirement through the words 'requiring such protection as may be **necessary**'.[66] CERD confirms

---

60 *Bligh v Queensland* [1996] HREOCA 28.

61 *Gerhardy*, Mason J at 105 and Deane J at 149; compare Brennan J at 139, who asked "Could the political assessment inherent in the measure reasonably be made?"

62 (1997) 189 CLR 520 (**Lange**).

63 *Lange* at 567 (fn 272).

64 (1994) 182 CLR 272 (**Cunliffe**).

65 *Cunliffe* at 324.

66 When considering whether limits on rights are 'necessary', both international and foreign domestic jurisdictions frequently use the principle of proportionality in making that assessment : Carolyn Evans

that a measure needs to be proportionate to be considered a special measure, in General Recommendation No. 32:[67]

> 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. (emphasis added)

42. The various expressions of the proportionality test all broadly require 'the state to articulate its aim in limiting rights, to explain how limiting the right promotes that aim, and to consider whether the severity of the rights limitation is appropriate in light of the aim of that legislation.'[68] Because a 'special measure' is simply an explicitly recognised category of allowable differential treatment,[69] the proportionality principle is used to determine whether a measure is in fact a 'special measure'.[70] As Crennan and Kiefel JJ observed in *Momcilovic v The Queen*,[71] one test of proportionality is that of 'reasonable necessity'; it asks 'whether there are less restrictive statutory measures available to achieve the purpose that is sought to be achieved'.[72] The existence of less drastic means by which the objectives of the law could be achieved will influence the question of whether a measure with the sole purpose of advancement can be considered a 'special measure'.

43. The European Court of Human Rights has found that it is particularly hard to justify discrimination on the grounds of race.[73] In addition to breaching article 14 of the *European Convention on Human Rights*, discrimination on the grounds of race has

---

& Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act*, 173 - 177.

67 At [16].

68 Evans and Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act*, at [5.47].

69 CERD's General Recommendation 32 states at [29] that 'Article 1, paragraph 4, of the Convention is essentially a clarification of the meaning of discrimination when applied to special measures'.

70 For example, under article 26 of the ICCPR, the Human Rights Committee considers whether a measure of affirmative action is proportionate to the end sought when determining whether the distinction being made is a permissible one. See *Stalla Costa v Uruguay* (198/1985) and *Ballantyne et al v Canada* (359, 385/1989). Similarly, under article 14 of the European Convention on Human Rights a difference in treatment will be discriminatory if it has 'no objective and reasonable justification'. See *Belgian Linguistic Case (No 2)* 1 EHRR 252 at [10].

71 (2011) 245 CLR 1 (**Momcilovic**).

72 *Momcilovic* at [556]. See also *Coleman v Power* (2004) 220 CLR 1, McHugh J at [93], citing *Lange* at 568, and *Wotton v Queensland* (2012) 86 ALJR 246, Kiefel J at [89].

73 *DH v Czech Republic* (2008) 47 EHRR 3 at [196].

also been held to be 'degrading treatment' contrary to article 13 because it constitutes a 'special form of affront to human dignity'.[74]

44. Where a right is subject to exceptions or internal qualification it is for the state to show that there is a justification for a *prima facie* breach.[75] In this context, once a measure is identified as discriminatory, the burden falls upon the person imposing the measure to justify the discrimination.[76] The Canadian courts have given extensive consideration to the burden of justifying interference with a right. The leading case of *R v Oakes*[77] sets out the rule:[78]

> The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonably and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.

45. While the burden of proof is the civil standard, regard should be had to the fact that a very high degree of probability is 'commensurate with the occasion'.[79] Cogent and persuasive evidence of the consequences of not imposing the limit will generally be required.[80] Where a discriminatory measure is claimed to be a 'special measure' under s 8 of the RDA, the person making that claim (here, the Respondent) bears the onus of establishing that the measure is reasonably appropriate and adapted, or proportionate, to the sole purpose of securing the adequate advancement of a racial group (here, the indigenous community of Palm Island).

46. In this case there is no evidence or other material[81] to support a conclusion that the impugned provisions, which infringe the rights of indigenous people on Palm Island to equal protection of the law without discrimination, are appropriate and adapted to

---

74 *East African Asians v United Kingdom* (1973) 3 EHRR 76 at [207].

75 *Andrews*, 176.

76 *Carson and Reynolds v Secretary of State for Work and Pensions* [2006] 1 AC 173; *Darby v Sweden* (1990) 13 EHRR 775 at [31] and *Petrovic v Austria* (1998) 33 EHRR 14 at [30].

77 [1986] 1 SCR 103 (**Oakes**).

78 *Oakes*, Dickson CJ at 137.

79 *Oakes*, 137-8.

80 *Oakes*, Dickson CJ at 137. In Victoria, Warren CJ has applied the same requirements in the context of the *Charter of Human Rights and Responsibilities Act 2006* (Vic.): *Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 at [147].

81 Material of the kind referred to by Brennan J in *Gerhardy* at 142-143, to which a court may refer to ascertain statutory or constitutional facts.

achieving the purpose of the advancement of its intended beneficiaries. It is difficult to discern exactly what advancement it is said the impugned provisions secure, since the indigenous community on Palm Island are both the asserted beneficiaries and the target of the criminal sanctions. There is no evidence that less drastic (or more positive[82]) measures were considered or, if they were, why they were rejected in favour of the impugned provisions. There is no evidence of any mechanism in place to ensure that the measures do not remain in place once their objective has been achieved.

47. The measures adopted involve criminal sanctions of convictions, fines and imprisonment. Affected people will have criminal records, which can have long term and adverse affects on employment prospects and reputation. These impacts will all result from doing something that is lawful in most other parts of Australia. Aside from the Explanatory Note, there is no evidence to which to apply the criteria of a special measure enunciated by Brennan J in *Gerhardy.*[83] The cursory reference to the measures in the Explanatory Note is insufficient to be considered coherent or cogent evidence of the consequences of not imposing the limit. Given the 'special form of affront to human dignity' involved in racial discrimination, the weighty onus of establishing that the impugned provisions are a special measure has not been discharged.

F. CONCLUSION

48. For the above reasons, s 10 of the RDA applies to the impugned provisions and they are not capable of being characterised as special measures under s 8 of the RDA. It follows that they are invalid by operation of s 109 of the *Constitution.*

PART IV TIMING OF ORAL SUBMISSIONS

49. Congress seeks to intervene by filing written submissions, together with short oral submissions of approximately 20 minutes, if the Court considers that appropriate.

---

82 Examples of local measures include agreement with the local roadhouse not to supply alcohol to community members; restricting the sale of take away alcohol from the local bottle shop to low strength beer; sobering-up shelters and safe places; and community patrols. In Australian cities numerous non punitive supports are provided to the broader community to deal with alcoholism and its related harms, including assistance with detoxification, relapse prevention medicine, psychological interventions, peer support programs and long term counselling.

83 *Gerhardy*, Brennan J at 133.

Date of filing: 27 November 2012

RON MERKEL QC

DEBBIE MORTIMER SC

MELINDA RICHARDS

SARALA FITZGERALD

10 Counsel for Congress

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **NO B57 OF 2012**

BETWEEN:

JOAN MONICA MALONEY

Appellant

THE QUEEN

Respondent

SUBMISSIONS OF THE NATIONAL CONGRESS OF AUSTRALIA'S FIRST PEOPLES LTD

CLARIFICATION

APPLICABLE PROVISIONS

10 For the purposes of its submissions seeking leave to intervene as an amicus curiae, which were filed on 27 November 2012, the National Congress of Australia's First Peoples adopts the Appellant's list of applicable provisions.

Date of filing: 30 November 2012

Date of document: 30 November 2012

Filed on behalf of: The National Congress of Australia's First Peoples Limited

Human Rights Law Centre Tel: (03) 8636 4450

Level 17, 461 Bourke Street Fax: (03) 8636 4455

Melbourne VIC 3000 Ref: Ben Schokman