

# COMMENTARY: ALCOHOL RESTRICTIONS AND INDIGENOUS AUSTRALIANS: THE SOCIAL AND POLICY IMPLICATIONS OF MALONEY v THE QUEEN<sup>+</sup>

RACHEL GEAR\*

## ABSTRACT

*Maloney v The Queen*<sup>1</sup> is a complex and controversial human rights case involving discrimination, ‘special measures’ and Indigenous peoples. In this case, the High Court of Australia upheld the Queensland Government’s singling out of Aboriginal communities for differential treatment – alcohol restrictions and criminal convictions for failing to comply with those restrictions – as being lawful, beneficial ‘special measures.’ The Court’s decision resulted in an interpretation of ‘special measures’ as per s 8(1) of the *Racial Discrimination Act 1975* (Cth) that is highly unlikely to be what Parliament intended when the law was enacted to give domestic effect to Australia’s international obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*. The decision is out-of-step with Australia’s international legal obligations and current international law. This commentary focuses on the social and policy implications of the case: stereotypes of Aboriginal people go largely unquestioned; Indigenous self-determination is fractured; ‘special measures’ may criminalise beneficiaries without their consent and without judicial review; and statutory interpretation is ‘frozen in time.’

## CONTENTS

### I Introduction

### II *Maloney v The Queen* in the High Court of Australia

#### A Facts

#### B Legal Issues

#### C Major Themes of the Reasoning

- 1 Relevant Provisions of the *Racial Discrimination Act 1975* (Cth)
- 2 The Right to Equality and to be Free from Racial Discrimination?
- 3 The ‘Right’ to Own and Access Alcohol
- 4 ‘Special Measures’: Alcohol Restrictions and Consultation with Beneficiaries
- 5 ‘Special Measures’: Proportionality and Judicial Review
- 6 Constitutional Fact Finding and the High Court
- 7 International Law and the Enacting Domestic Law

---

<sup>+</sup> (2013) 252 CLR 168 (*‘Maloney’*).

\* Master of Public and International Law Candidate, Melbourne Law School, The University of Melbourne. An earlier draft of this article was submitted as part of coursework undertaken for the Melbourne Law Masters at Melbourne Law School, The University of Melbourne. The author can be contacted via Rachel.L.Gear@gmail.com

<sup>1</sup> (2013) 252 CLR 168 (*‘Maloney’*).

### III Social and Policy Implications

- A Stereotypes Go Largely Unquestioned
- B Indigenous Self-Determination is Fractured
- C ‘Special Measures’: Criminalise Beneficiaries, No Consent, No Judicial Review
- D Statutory Interpretation: ‘Frozen in Time’

### IV Conclusion

## I INTRODUCTION

This article provides commentary on *Maloney v The Queen*,<sup>2</sup> a controversial decision of the High Court of Australia. In this case, the Queensland Government's singling out of Aboriginal people for differential treatment – alcohol restrictions and criminal convictions for failing to comply with those restrictions – based on stereotypes and labelling Aboriginal people as dysfunctional was affirmed by the Court as being properly characterised as a 'special measure.' Whilst others have provided detailed analysis,<sup>3</sup> this commentary focuses on social and policy implications of the decision.

The *Maloney case* is a complex human rights case involving discrimination, 'special measures' and Indigenous people. Racial discrimination is prohibited in Australia by the *Racial Discrimination Act 1975* (Cth) ('RDA'),<sup>4</sup> which gives effect to Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* ('Convention').<sup>5</sup> The Preamble and s 9 of the RDA make racial discrimination unlawful and s 10 promotes equality before the law for all persons. Section 8 allows for 'special measures' which advance the human rights of certain racial or ethnic groups or individuals.

In international human rights law,<sup>6</sup> 'special measures' are typically 'positive measures taken [by the State] to redress historical disadvantage... [by] confer[ring] benefits on a particular racial group, so that they may enjoy their rights equally with other groups...'<sup>7</sup> As such, the phrase is often used interchangeably with affirmative action.<sup>8</sup> Special measures also provide 'an exception to the definition of discrimination'<sup>9</sup> to protect these positive actions 'from being challenged as discriminatory by non-members of the group who do not receive the benefit.'<sup>10</sup>

---

<sup>2</sup> (2013) 252 CLR 168.

<sup>3</sup> See Professor Simon Rice, 'Case Note: *Joan Monica Maloney v The Queen* [2013] HCA 28' (2013) 8(7) *Indigenous Law Bulletin* 28; Patrick Wall, 'Case Note: The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15(1) *Melbourne Journal of International Law* 228.

<sup>4</sup> See the Preamble and ss 9 and 10.

<sup>5</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('Convention'). See *Racial Discrimination Act 1975* (Cth) Preamble.

<sup>6</sup> See, for example, *Convention art 1(4)*; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 107<sup>th</sup> plen mtg, UN Doc A/61/295 (13 September 2007) art 21; Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Rights of Indigenous Peoples*, 51<sup>st</sup> sess, UN Doc A/52/18 (18 August 1997) annex V para 4(d); Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, 75<sup>th</sup> sess, UN Doc A/64/18 (August 2009) annex VIII; Expert Mechanism on the Rights of Indigenous Peoples, *Expert Mechanism Advice No 2 (2011): Indigenous peoples and the right to participate in decision-making* [21] <[http://www.ohchr.org/documents/issues/ipeoples/emrip/advice2\\_oct2011.pdf](http://www.ohchr.org/documents/issues/ipeoples/emrip/advice2_oct2011.pdf)>.

<sup>7</sup> Australian Human Rights Commission, *2011 Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975 (Cth): Implementing 'special measures' under the Racial Discrimination Act 1975 (Cth)*, 2 [4] <<https://www.humanrights.gov.au/publications/guidelines-understanding-special-measures-racial-discrimination-act-1975-cth-2011#fnB8>> ('AHRC').

<sup>8</sup> *Ibid* 3 [9] (citations omitted).

<sup>9</sup> *Ibid* 2 [5].

<sup>10</sup> *Ibid* 3 [9].

Examples of ‘special measures’ in Australia which reflect contemporary international human rights law include a Centrelink payment<sup>11</sup> which provides additional funding to Indigenous students completing tertiary studies. When challenged by a non-Indigenous student deprived of this benefit, the scheme was found not to be discriminatory because it properly constituted a ‘special measure’ to benefit Indigenous people according to s 8(1) of the RDA.<sup>12</sup> Another example is *Gerhardy v Brown*.<sup>13</sup> The High Court of Australia unanimously held that the criminal prohibition on non-Pitjantjatjara persons entering Pitjantjatjara land without a permit<sup>14</sup> was properly characterised as a ‘special measure’ within s 8(1) of the RDA and therefore did not discriminate against non-Pitjantjatjara persons.

These shared understandings of what constitutes ‘special measures’ are challenged in the *Maloney case*. In *Maloney*, the appellant, an Indigenous woman, was unsuccessful in appealing her criminal conviction for possession of alcohol on the premise that the law is discriminatory on the basis of race. The Court found that whilst the impugned statutory provisions regarding criminalisation for the possession of alcohol<sup>15</sup> are not typical of what constitutes ‘special measures’, they are nevertheless lawful as they can properly be characterised as a ‘special measure’ under s 8(1) of the RDA.<sup>16</sup> Thus, Maloney’s criminal conviction for the mere possession of alcohol stands.

The facts, legal issues and reasons are presented first. These are followed by a values-based critique of the decision, which focuses on social and policy implications.

## II MALONEY v THE QUEEN IN THE HIGH COURT OF AUSTRALIA

### A Facts

The appellant, Joan Monica Maloney, is an Indigenous woman pensioner with no prior criminal record who resides on Palm Island (‘the Island’), which is located off the coast of Queensland.<sup>17</sup> Aboriginal persons constitute 97% of the Island’s population.<sup>18</sup> Legally recognised representative organisations from the Island agreed<sup>19</sup> that some kind of Alcohol Management Plan (AMP) is needed to curb alcohol-related violence and harm but there is no agreement on the form these restrictions should take.

---

<sup>11</sup> The ABSTUDY rental assistance scheme, see Department of Human Services, Australian Government, *ABSTUDY* <<https://www.humanservices.gov.au/customer/services/centrelink/abstudy>>.

<sup>12</sup> See *Bruch v Commonwealth* [2002] FMCA 29. See also *AHRC*, above n 7, 8-9 [33]-[34].

<sup>13</sup> (1985) 159 CLR 70 (‘*Gerhardy*’).

<sup>14</sup> *Pitjantjatjara Land Rights Act 1981* (SA) s 19.

<sup>15</sup> *Liquor Act 1992* (Qld) ss 168B, 173G, 173H; *Liquor Regulation 2002* (Qld) ss, 37A, 37B, Schedule 1R ss 1(a)-(c) and 2(1).

<sup>16</sup> French CJ’s handling of the matter is illustrative, see *Maloney* (2013) 252 CLR 168, 193-5 [46]-[47]. See also Gageler J at 285 [308], 305 [376].

<sup>17</sup> *Maloney* (2013) 252 CLR 168, 170 (C A Ronalds SC).

<sup>18</sup> *Maloney* (2013) 252 CLR 168, 170 (C A Ronalds SC).

<sup>19</sup> Explanatory notes to the *Liquor Amendment Regulation (No 4) 2006* (Qld) show that the Palm Island Community Justice Group and the Palm Island Shire Council both recommended limits on the use of alcohol as part of a community Alcohol Management Plan, see Explanatory Notes, *Liquor Amendment Regulation (No 4) 2006* (Qld) 1 [4], 2 [8(a)].

The Queensland Government made the political decision to unilaterally implement its own AMP on the Island. It declared the community areas of the Palm Island Shire Council, its foreshores and jetty a restricted area, and restricts the nature and quantity of liquor people may have in their possession in these places.<sup>20</sup> Persons may possess up to one carton of light or mid-strength beer; tolerance for any other form of alcohol and/or more than this quantity and strength is zero. Although private homes are excluded from the restrictions, essentially one cannot transport other alcohol on the Island without committing a criminal offence.<sup>21</sup>

On 31<sup>st</sup> May 2008, Maloney admitted to owning a bottle each of bourbon and rum, which were discovered in a backpack in the boot of a car in which she was a passenger when it was pulled over on a public road on the Island by Queensland Police. She was charged and convicted under s 168B of the *Liquor Act 1992* (Qld) for being in possession of more than a prescribed quantity of liquor in a public place in a restricted area.<sup>22</sup>

Maloney appealed her conviction by contending<sup>23</sup> that the impugned provisions – s 168B of the *Liquor Act 1992* (Qld)<sup>24</sup> and the provisions of the *Liquor Regulation 2002* (Qld)<sup>25</sup> – contravene s 10 of the RDA, cannot properly be characterised as a ‘special measure’ within the meaning of s 8(1) of the RDA, and are therefore invalid under s 109 of the *Australian Constitution*.<sup>26</sup> Her appeals to the Townsville District Court and to the Court of Appeal of the Supreme Court of Queensland were dismissed. She was granted special leave to appeal her conviction in the High Court of Australia.

## B Legal Issues

The appeal<sup>27</sup> raised two legal issues. First, are the impugned statutory provisions discriminatory? That is, do the provisions regarding the possession of alcohol on Palm Island have the effect that Aboriginal persons enjoy a *Convention* Article 5<sup>28</sup> right ‘to a more limited extent than non-Aboriginal persons so as to engage s 10 of the

---

<sup>20</sup> See *Liquor Act 1992* (Qld) ss 168B, 173G, 173H; *Liquor Regulation 2002* (Qld), ss 37A, 37B, Schedule 1R ss 1(a)-(c), 2 (a)-(b).

<sup>21</sup> With the foreshores, jetty and public roads all declared restricted areas, possibly the only legal way of transporting other alcohol onto the Island would be by chartering a helicopter to land in one’s backyard. I am indebted to an unknown peer from Melbourne Law School for this observation.

<sup>22</sup> Her alcohol was forfeited and she was ordered to pay a fine of \$150 within two months, or spend one day in prison in default of payment.

<sup>23</sup> Joan Monica Maloney, ‘Appellant’s Submissions’, Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 1 [2], 9-12 [39]-[50], 19-20 [78]-[79].

<sup>24</sup> And other related provisions, see *Liquor Act 1992* (QLD) ss 173G, 173H.

<sup>25</sup> Sections 37A, 37B, Schedule 1R.

<sup>26</sup> Section 109 of the *Australian Constitution* reads: ‘When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.’ See also Maloney, above n 23, 1 [2], 9 [38].

<sup>27</sup> Maloney, above n 23, 1 [2].

<sup>28</sup> *Convention* art 5. The *Convention* was signed by Australia on 13 October 1966, ratified on 30 September 1975 and entered into force through the domestic law of the RDA on 30 October 1975. The relevant Article 5 rights are described shortly in Section ‘1 *Relevant Provisions of the Racial Discrimination Act 1975* (Cth).’

RDA?’<sup>29</sup> Secondly, if so, are they lawful: can these provisions be characterised as a ‘special measure’ under s 8(1) of the RDA and so be rendered a valid exception?

### *C Major Themes of the Reasoning*

All six Justices dismissed the appeal giving separate judgments. This section presents the relevant provisions of the RDA and outlines major themes of the reasoning.<sup>30</sup>

#### *1 Relevant Provisions of the Racial Discrimination Act 1975 (Cth)*

Evident from its Preamble, the purpose of the RDA is to give domestic effect to Australia’s commitment to the *International Convention on the Elimination of All Forms of Racial Discrimination* (‘Convention’).<sup>31</sup> Other stated purposes of the RDA are to prohibit racial and other kinds of discrimination.<sup>32</sup> RDA s 10(1) stipulates that if people of one race do not enjoy the same right as people of another race – or enjoy a right to a more limited extent than another race – then persons of the first mentioned race should be ensured enjoyment of that right to the same extent as others.<sup>33</sup> Section 10(2)<sup>34</sup> clarifies that the right referred to in s 10(1) includes the kind enumerated in *Convention* Article 5. Racial discrimination with respect to Article 5 rights is to be eliminated and prohibited. Relevant Article 5 rights are equal treatment before the courts,<sup>35</sup> protection by the State against violence,<sup>36</sup> property ownership,<sup>37</sup> and the right to access places and services intended for the general public.<sup>38</sup>

RDA s 8(1) is the exception provision: ‘This part does not apply to... special measures to which paragraph 4 of Article 1 of the Convention applies...’ *Convention* Article 1(4) states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not,

---

<sup>29</sup> *Maloney* (2013) 252 CLR 168, 195 [51] (Hayne J).

<sup>30</sup> For a detailed analysis of the High Court’s decision-making process, see generally Wall, above n 3; Rice, above n 3.

<sup>31</sup> See *Racial Discrimination Act 1975* (Cth) Preamble; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) (‘Convention’).

<sup>32</sup> *Racial Discrimination Act 1975* (Cth) Preamble.

<sup>33</sup> *Racial Discrimination Act 1975* (Cth) s 10(1) reads: ‘If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.’

<sup>34</sup> *Racial Discrimination Act 1975* (Cth) s 10(2) reads: ‘A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.’

<sup>35</sup> *Convention* art 5(a).

<sup>36</sup> *Ibid* art 5(b).

<sup>37</sup> *Ibid* art 5(d)(v).

<sup>38</sup> *Ibid* art 5(e)(f).

as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The *Maloney* case hinged upon the Court's approach to and interpretation of these provisions.

## 2 *The Right to Equality and to be Free from Racial Discrimination?*

Australia's RDA s 10(1) has been described as a 'defacto equal protection right, in the absence of a Constitutional Bill of Rights.'<sup>39</sup> It is therefore a complex area of law for which the High Court of Australia is known to take a very conservative approach.<sup>40</sup>

Due to established High Court precedents,<sup>41</sup> the RDA's s 10(1) protection is not restricted to discrimination but is broadly understood to cover 'conduct that limits the enjoyment of human rights.'<sup>42</sup> This distinction is important because some members of the Court did not want to acknowledge discrimination. For instance, Hayne J emphasised that the word 'discrimination' does not appear in the text of RDA s 10(1),<sup>43</sup> describing it as 'conceptual baggage.'<sup>44</sup> His Honour asserted that 'it is not necessary to consider whether... there is a right to be free from racial discrimination' in the present case.<sup>45</sup> Kiefel J agreed, stating that 'the elimination of racial discrimination cannot itself be a right for the purposes of ss 10 and 8.'<sup>46</sup> Others such as Bell J were willing to concede that despite its absence from the text of the provision,<sup>47</sup> discrimination is relevant to the present case because '[t]he purpose of the RDA to implement Australia's Convention obligations.'<sup>48</sup> According to Bell J, s 10(1)'s '[e]quality before the law is the counterpart of the elimination of racial discrimination'<sup>49</sup> and as such, the alcohol restrictions were racially discriminatory by virtue of effect.<sup>50</sup> It is within this context of an absence of a Constitutional Bill of Rights, a reticent High Court and a broad conceptualisation of human rights that the following reasons were handed down.

---

<sup>39</sup> Beth Gaze, 'What Vision Of Equality And Racial Discrimination Law Does *Maloney v R* Reveal?' (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014); Rice, above n 3, 32.

<sup>40</sup> Gaze, above n 39. See also Professor Gillian Triggs 'International Human Rights and Australian Exceptionalism' (Sir Anthony Mason Lecture, Melbourne Law School, The University of Melbourne (4 August 2016).

<sup>41</sup> Relevant cases range from *Gerhardy v Brown* (1985) 159 CLR 70 through *Western Australia v Ward* (2002) 213 CLR 1. Gageler J helpfully sets forth the precedents of these cases, see *Maloney* (2013) 252 CLR 168, 279 [298] ff.

<sup>42</sup> Rice, above n 3, 28. See also *Maloney* (2013) 252 CLR 168, 242 [200] (Bell J); 279-280 [298]-[300] (Gageler J).

<sup>43</sup> *Maloney* (2013) 252 CLR 168, 200 [65].

<sup>44</sup> *Ibid* 201 [68].

<sup>45</sup> *Ibid* 203 [72].

<sup>46</sup> *Ibid* 230 [160].

<sup>47</sup> *Ibid* 242 [200].

<sup>48</sup> *Ibid* 242 [201].

<sup>49</sup> *Ibid* 242-3 [201].

<sup>50</sup> *Ibid* 241 [197], 242-3 [201].

### 3 The 'Right' To Own And Access Alcohol

Five judges<sup>51</sup> agreed that because of the impugned provisions of the *Liquor Act 1992* (Qld) and *Liquor Regulation 2002* (Qld), the residents of Palm Island enjoyed the right to own property<sup>52</sup> (liquor) to a lesser extent than other Queensland residents. Bell J stated: 'In Australian society, competent adults may own alcohol. Aboriginal persons on Palm Island enjoy that right to a more limited extent than persons elsewhere in Queensland... by reason of the liquor restrictions.'<sup>53</sup> And Gageler J: 'Geography was used as a proxy for race.'<sup>54</sup> Whilst there is no absolute right to own liquor, Aboriginal people should be entitled to own it to the same extent as non-Aboriginal people. Section 10 of the RDA was engaged unless s 8 applied.

Kiefel J disagreed, asserting that no infringement of human rights had taken place.<sup>55</sup> Her Honour's very narrow, literal interpretation of the right affected reconceptualised Maloney's claim as being the freedom to possess alcohol instead of the right to own it.<sup>56</sup> The impugned provisions permitted ownership of alcohol, just not the possession of it on the Island.<sup>57</sup> For Kiefel J, this distinction decided the case against Maloney. Since possession of alcohol is not a 'universal human right' it does not fall within the purview of s 10 rights<sup>58</sup> and the s 8 exception clause is superfluous:<sup>59</sup> appeal dismissed.

The right to access a service<sup>60</sup> was more controversial. Justices Bell and Gageler recognised the racial element of the impugned provisions and that they had the operational and intended effect<sup>61</sup> of denying Palm Island residents – who are 'overwhelmingly Aboriginal'<sup>62</sup> – access to a service that is available elsewhere in Queensland.<sup>63</sup> Section 10 was engaged unless s 8 applied. In separate judgments, French CJ and Kiefel J disagreed, asserting more narrowly that all adult residents on the Island received the same access to and service by the particular licensed premises, and thus, Maloney's appeal to this human right is irrelevant.<sup>64</sup> In this way, French CJ joined Kiefel J in advancing an very literal and narrow interpretation of the right

<sup>51</sup> *Maloney* (2013) 252 CLR 168, 191-2 [38]-[39] (French CJ); 206 [84]-[85] (Hayne J); 219 [128]-[129] (Crennan J, agreeing the restriction on *possession*, not property, is more restrictive on Palm Island than elsewhere in Queensland *but that this is acceptable* in light of the legion of laws effecting Australian society and alcohol); 241 [197] (Bell J); 301-2 [360]-[362] (Gageler J).

<sup>52</sup> *Convention* art 5(d)(v).

<sup>53</sup> *Maloney* (2013) 252 CLR 168, 251 [224].

<sup>54</sup> *Ibid* 302 [362] (Gageler J). Earlier in the same paragraph he states: 'The *Liquor Regulation* was brought into existence in an attempt to prevent harm arising from alcohol-related conditions and behaviours *perceived generally to exist within indigenous communities but not perceived generally to exist elsewhere in Queensland*' (emphasis added).

<sup>55</sup> *Ibid* 231 [163].

<sup>56</sup> *Ibid* 229 [157].

<sup>57</sup> *Ibid* 228-9 [153], [155]-[156].

<sup>58</sup> *Ibid* 229-30 [157]-[158], 231 [163], 239 [188] (emphasis added).

<sup>59</sup> *Ibid* 231 [163].

<sup>60</sup> *Convention* art 5(e)(f). In this case, it was the right to access the supply of spirits, wine and full strength beer at a licensed premise.

<sup>61</sup> *Maloney* (2013) 252 CLR 168, 242-3 [200]-[202] (Bell J); 301-2 [361]-[362] (Gageler J).

<sup>62</sup> *Ibid* 206 [84] (Hayne J).

<sup>63</sup> *Ibid* 243 [202], 252 [226] (Bell J); 301-302 [361] (Gageler J).

<sup>64</sup> *Ibid* 192 [41] (French CJ); 227-8 [152] (Kiefel J). True to her Honour's earlier literal and narrow conceptualisation of rights affected, Kiefel J added at [152] that the right to access other alcohol is not a right under *Convention* art 5(f).



affected. Gageler J arguably provides a fitting answer to French CJ and Kiefel's J objection: 'Racial targeting is not negated by some persons of other races being caught in the net.'<sup>65</sup> Finally, Hayne J expressed doubt about the infringement of the right to access a service but abstained from deciding.<sup>66</sup>

#### 4 'Special Measures': Alcohol Restrictions and Consultation with Beneficiaries

Despite the 5:1 majority of the Court agreeing that Ms Maloney's human right to own property had been limited by the impugned provisions and thus contravened s 10(1) of the RDA,<sup>67</sup> the Court was unanimous in holding that the alcohol restrictions were a 'special measure' within the meaning of RDA s 8 and are therefore a valid exception to this law.<sup>68</sup> Recall the plain text of the s 8 exception clause<sup>69</sup> invokes *Convention* Article 1(4) for its definition of 'special measures' and that the *Convention* was entered into force in Australia through the RDA on 30 October 1975. Article 1(4) reads:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.<sup>70</sup>

Thus, at the time the *Convention* was imported into the RDA, the text did not require consultation as a definitional characteristic.<sup>71</sup> This may have been because the types of measures intended were purely beneficial measures, whereas alcohol restrictions appear quite unique as a special measure. Indeed, Gageler J notes that *Maloney* is the first case where the High Court has considered RDA's s 10 in light of an impugned law that results in 'adverse impact discrimination'.<sup>72</sup>

Maloney's argument<sup>73</sup> relied heavily on the centrality of consultation and consent for measures to qualify as 'special measures' based on Brennan J's reasoning in *Gerhardy*<sup>74</sup> and on contemporary understandings from international law. This section

---

<sup>65</sup> Ibid 302 [363].

<sup>66</sup> Ibid 203 [73].

<sup>67</sup> Ibid 191-2 [38]-[39] (French CJ); 206 [84]-[85] (Hayne J); 219 [128]-[129] (Crennan J, agreeing the restriction on *possession*, not property, is more restrictive on Palm Island than elsewhere in Queensland but that this is acceptable in light of the legion of laws effecting Australian society and alcohol); 241 [197] (Bell J); 301-2 [360]-[362] (Gageler J).

<sup>68</sup> Ibid 177 [5], 193-4 [46] (French CJ); 196 [53], 212-3 [106]-[108], [110] (Hayne J); 223 [138]-[139] (Crennan J); 239 [188] (Kiefel J, deciding in theory); 260-1 [249], [253] (Bell J); 305-6 [376], [378]-[380] (Gageler J).

<sup>69</sup> *Racial Discrimination Act 1975* (Cth) s 8(1).

<sup>70</sup> *Convention* art 1(4).

<sup>71</sup> *Maloney* (2013) 252 CLR 168, 185-6 [24], 192-3 [43] (French CJ); 208 [91] (Hayne J); 255-6 [235], 257 [240] (Bell J).

<sup>72</sup> Ibid 285 [308] (citations omitted).

<sup>73</sup> *Maloney*, above n 23, 12-15 [51]-[61].

<sup>74</sup> (1985) 159 CLR 70, 133-40 (Brennan J).

presents those bases briefly.<sup>75</sup> In *Gerhardy*, Brennan J sets the authoritative criteria for ‘special measures.’<sup>76</sup> In a well-known passage, Brennan J states:

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.<sup>77</sup>

The ‘foisting’ of ‘special measures’ on beneficiaries by others is something to be avoided, regardless of well-meaning intent. A benefit is only beneficial if the beneficiaries deem it to be so beforehand.

In international law, the meaning of *Convention* Article 1(4) has been subject to jurisprudence which well establishes the centrality of consultation and consent to special measures. In 1997, the United Nation’s Committee on the Elimination of Racial Discrimination stated: ‘no decisions directly relating to [Indigenous peoples’] rights and interests [should be] taken without their informed consent.’<sup>78</sup> In 2009, the same Committee provided *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*.<sup>79</sup> Under the subtitle ‘Conditions for the Adoption and Implementation of Special Measures’ paragraph 18 reads: ‘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.’<sup>80</sup> In 2009, Australia formally endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* which states at Article 19:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>81</sup>

---

<sup>75</sup> See Wall, above n 3 for a thorough analysis of the Court’s use of international material in *Maloney*. For a discussion of the handling of the *Gerhardy* decision in *Maloney*, see Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013) 23–24 [1.82]–[1.85] (‘*Stronger Futures*’); Wall, above n 3, 239–42.

<sup>76</sup> *Gerhardy* (1985) 159 CLR 70, 133, 139–40. These criteria are outlined in footnote 128 below.

<sup>77</sup> *Ibid* 135.

<sup>78</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Rights of Indigenous Peoples*, 51<sup>st</sup> sess, UN Doc A/52/18 (18 August 1997) annex V para 4(d).

<sup>79</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, 75<sup>th</sup> sess, UN Doc A/64/18 (August 2009) annex VIII.

<sup>80</sup> *Ibid* para 18.

<sup>81</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 107<sup>th</sup> plen mtg, UN Doc A/61/295 (13 September 2007) art 19.

In 2011, the United Nation's Expert Mechanism on the Rights of Indigenous Peoples<sup>82</sup> clarifies that:

The duty of the State to obtain indigenous peoples' *free, prior and informed consent* entitles indigenous peoples to *effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes*. Consent is a significant element of the decision-making process obtained through genuine consultation and participation. Hence, *the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples' rights*.<sup>83</sup>

In spite of the weight of overwhelming international jurisprudence and Brennan J's established reasoning in *Gerhardy*, the Court unanimously determined there was no legal requirement to consult with nor obtain the consent of beneficiaries of 'special measures'.<sup>84</sup> This determination was based on a strict positivist approach to the RDA's s 8 and *Convention* Article 1(4): neither provision contained textual reference to consultation as a requisite for 'special measures'.<sup>85</sup> Subsequent developments in international law do not permit the Court to alter the meaning of the enacting domestic legislation.<sup>86</sup> This decision by the High Court is highly unlikely to be what Parliament intended when it enacted the RDA to give domestic effect to the *Convention* over 40 years ago.<sup>87</sup> The implications are discussed in a later section of this article.

Notwithstanding the above, both consultation and consent were discussed. French CJ recognised their practical benefits,<sup>88</sup> Hayne J determined that only consultation might be a criterion for a 'special measure',<sup>89</sup> and Crennan J asserted both factors are irrelevant in the context of routine measures to combat problems from alcohol.<sup>90</sup>

---

<sup>82</sup> The Expert Mechanism consists of a panel of five independent experts tasked with formulating proposals for the United Nations Human Rights Council to use in advancing the implementation of Indigenous peoples' rights.

<sup>83</sup> Expert Mechanism on the Rights of Indigenous Peoples, *Expert Mechanism Advice No 2 (2011): Indigenous peoples and the right to participate in decision-making* [21]

<[http://www.ohchr.org/documents/issues/ipeoples/emrip/advice2\\_oct2011.pdf](http://www.ohchr.org/documents/issues/ipeoples/emrip/advice2_oct2011.pdf)> (emphasis added).

<sup>84</sup> *Maloney* (2013) 252 CLR 168, 185-6 [24] (French CJ), 208 [91] (Hayne J), 219-22 [128]-[136] (Crennan J), 238 [186] (Kiefel J), 257 [240] (Bell J), 300-01 [357] (Gageler J).

<sup>85</sup> Rice, above n 3, 30.

<sup>86</sup> *Maloney* (2013) 252 CLR 168, 181-2 [15] (French CJ); 198-9 [61] (Hayne J, citations omitted); 221-2 [134] (Crennan J); 235 [176] (Kiefel J); 255-6 [235] (Bell J). The implications of this reasoning is discussed in a later section of this article.

<sup>87</sup> Gaze, above n 39.

<sup>88</sup> *Maloney* (2013) 252 CLR 168, 186 [25], 193-4 [46] (French CJ).

<sup>89</sup> *Ibid* 208 [91] (Hayne J).

<sup>90</sup> *Ibid* 219 [129] (Crennan J).

Only Bell J recognised that unilaterally imposing a ‘benefit’ on a group sits uneasily with respect for autonomy and dignity of group members<sup>91</sup> and thus can hardly be a ‘special measure.’<sup>92</sup>

The reasoning of the High Court in *Maloney* reflects the general approach of lower level Australian Courts in recent times of recognising that whilst the wishes of the intended beneficiaries are valuable, consultation and consent are not a mandatory feature of a special measure.<sup>93</sup> Legitimate reasons by lower Australian Courts for not seeking consultation and consent from the beneficiaries of ‘special measures’ can include potential difficulties in reconciling divergent views within a group effected by the proposed measure, and the possibility that some beneficiaries may be unable to express a free and informed opinion about the desirability of the proposed measure.<sup>94</sup> In *Maloney*, the State of Western Australia challenged Maloney’s insistence that meaningful consultation and consent from beneficiaries is needed for the special measure to be valid based on the latter reason: how, asked the State, can one procure the consent of adults addicted to alcohol?<sup>95</sup> When there are competing views within the group, a strong body of informed support within that group may be sufficient for a ‘special measure’ to be valid.<sup>96</sup> Despite her Honour’s reservations, Bell J concluded this final point in a narrower way in *Maloney*: since there was widespread agreement on the Island that an AMP was needed – and although there was no agreement about its specifics – her Honour determined that the presence of this agreement was sufficient for the purposes of a ‘special measure.’<sup>97</sup>

### 5 ‘Special Measures’: Proportionality and Judicial Review

The principle of proportionality provides an important ‘test of the limits of legislative power’<sup>98</sup> to ensure that a law that restricts a freedom does not go so far as to result in that freedom being ‘lost.’<sup>99</sup> It ‘requires [the Court to perform] a precise balancing of the impact of a measure with the stated intent of the measure,’<sup>100</sup> asking: ‘Is the proposed measure the only one, or the least restrictive one, which will achieve the

---

<sup>91</sup> Ibid 256-7 [237].

<sup>92</sup> Ibid 260 [247]. Such interventions are hardly a ‘special measure’ since they do not appear to be ‘capable of being reasonably considered to be appropriate and adapted to the sole purpose of securing the group’s adequate advancement.’ However, since there was widespread agreement on the Island that an AMP was needed – although there was no agreement about its specifics – her Honour determined that this agreement was sufficient: at [247].

<sup>93</sup> There is not sufficient room here to discuss these cases. For the list of cases including an overview of each, see AHRC, above n 7, 5-6 [18]-[22].

<sup>94</sup> See, for example, *Morton v Queensland Police Service* [2010] QCA 160, [31] (McMurdo P) and [114] (Chesterman J, with Holmes J agreeing) regarding difficulty reconciling competing views within the group; at [31] (McMurdo P) regarding inability of some beneficiaries to provide a free and informed opinion. See also *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37 at [81] (McMurdo P) regarding inability of some beneficiaries to provide a free and informed view.

<sup>95</sup> *Maloney* (2013) 252 CLR 168, 256-7 [237]. Note the stereotyping inherent in this argument. This is one of the social and policy implications of the case, discussed in a later section.

<sup>96</sup> *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37 at [81]-[82] (McMurdo P); AHRC, above n 7, 6 [22].

<sup>97</sup> *Maloney* (2013) 252 CLR 168, 260-1 [249].

<sup>98</sup> Ibid 232 [166] (Kiefel J) (citations omitted).

<sup>99</sup> Ibid.

<sup>100</sup> AHRC, above n 7, 7 [26]; *Maloney* (2013) 252 CLR 168, 232 [166] (Kiefel J).

stated intent of the measure?’<sup>101</sup> When determining the validity of a ‘special measure’, consideration should be given to the ‘effect of the legislation as a whole’ and well as whether its component parts are ‘appropriate and adapted’ to the stated purpose.<sup>102</sup>

In *Maloney*, the impugned provisions were based on an undisputed legislative finding that certain Indigenous communities in Queensland require State protection from the harms caused by alcohol.<sup>103</sup> Thus, when assessing the validity of these alcohol restrictions as a ‘special measure’, it would seem that consideration should be given to this stated proposed benefit and whether it outweighs commonly known detrimental effects,<sup>104</sup> such as increased Indigenous contact with the criminal justice system, fines, prison in default of payment of fines, State control as opposed to Indigenous self-determination.

Maloney submitted that the impugned provisions could not be a ‘special measure’ because they were a ‘disproportionate means of achieving their stated purpose’<sup>105</sup>: they criminalised conduct which was legal elsewhere and were thus disproportionate to the need for some kind of AMP on the Island.<sup>106</sup> The Court was unanimous in rejecting that the criminalisation element of this ‘special measure’ made it disproportionate.<sup>107</sup>

Significantly, there was no resolution on the basis of proportionality analysis for ‘special measures.’ The authoritative criteria for ‘special measures’ laid down by Brennan J in *Gerhardy v Brown*<sup>108</sup> were revisited and read down in light of the Court’s positivist approach to clear statutory text. Bell J contended that the statutory criteria of a ‘special measure’ – RDA s 8(1) – does not contain a proportionality test.<sup>109</sup> All a ‘special measure’ needs is the ‘sole purpose of securing the adequate advancement’ the rights of a racial group which is in need of ‘such protection’,<sup>110</sup> as per the definition of ‘special measures’ provided in *Convention* Article 1(4) to which RDA s 8(1) refers. If it has this, then the judicial review of a measure must conclude in the affirmative.<sup>111</sup> Note the term ‘adequate advancement’ in *Convention* Article

---

<sup>101</sup> AHRC, above n 7, 7 [26].

<sup>102</sup> Ibid; *Gerhardy v Brown* (1985) 159 CLR 70, 105 (Mason J), 149 (Deane J).

<sup>103</sup> Section 173F of the *Liquor Act 1992* (Qld) states that ‘The purpose of this part is to provide for the declaration of areas for minimising – (a) harm caused by alcohol abuse and misuse and associated violence; and (b) alcohol-related disturbances, or public disorder, in a locality.’ The Schedules to the *Liquor Regulations 2002* (Qld) explicitly target Indigenous communities. Schedule 1R of the *Liquor Regulations 2002* (Qld) identifies Palm Island as an Indigenous community in need of State protection from the harms of alcohol, read in conjunction with *Liquor Act 1992* (Qld) ss 168B, 173F, 173G, 173H.

<sup>104</sup> Such as those detailed in the 339 Recommendations of the Royal Commission Report into Aboriginal Deaths in Custody, see Commonwealth, Royal Commission Report into Aboriginal Deaths in Custody, *National Report* (1991) <<http://www.alrm.org.au/information/General%20Information/Royal%20Commission%20into%20Aboriginal%20Deaths%20in%20Custody.pdf>>.

<sup>105</sup> *Maloney* (2013) 252 CLR 168, 214 [113] (Crennan J).

<sup>106</sup> *Maloney*, above n 23, 11 [47]–[48].

<sup>107</sup> *Maloney* (2013) 252 CLR 168, 193–4 [46] (French CJ); 211–2 [103] (Hayne J); 222–3 [137] (Crennan J); 238 [186] (Kiefel J); 260–1 [249] (Bell J); 300–01 [357] (Gageler J).

<sup>108</sup> (1985) 159 CLR 70 at 133, 139–40 (Brennan J). These are listed in footnote 128 below.

<sup>109</sup> *Maloney* (2013) 252 CLR 168, 258 [243], 259–60 [246]–[247] (Bell J).

<sup>110</sup> Ibid 258 [243], 259–60 [246]. These are the provisions of *Convention* art 1(4).

<sup>111</sup> *Maloney* (2013) 252 CLR 168, 260 [247].

1(4) is not defined and the RDA does not define it either, which leads to difficulties assessing it from a positivist approach. Gageler J strongly disagreed with Bell J, arguing that tests of proportionality and reasonable necessity do not go far enough and, in fact, undermine contemporary international law's 'carefully tailored regime for permissible special measures.'<sup>112</sup> Hayne and Crennan JJ contended that proportionality of s 8 requires considerations of whether there are less restrictive means of achieving the same objectives, however, judicial review was inhibited in this case because there was no evidence before the Court of equally effective and less restrictive options,<sup>113</sup> nor was there evidence that the impugned provisions were not directed to their stated purpose.<sup>114</sup>

In light of the *Cape York Justice Study*<sup>115</sup> – which formed the premise for the impugned provisions of the *Liquor Act* to become law in 2002<sup>116</sup> – and the Explanatory Notes to the impugned provisions,<sup>117</sup> the Court determined that it is reasonable to conclude that certain Indigenous communities in Northern Queensland need State protection from the harms caused by alcohol.<sup>118</sup> The impugned provisions' sole purpose was confirmed to be what the Queensland Parliament and Executive determined it to be in Part 6A of the *Liquor Act 1992* (Qld): ensuring the 'adequate advancement' of Palm Island's Indigenous community, specifically their 'equal enjoyment or exercise of human rights and fundamental freedoms'<sup>119</sup> including the right to live 'a life free from alcohol-related violence and strife.'<sup>120</sup> The impugned statutory provisions were thereby affirmed by the Court as a 'special measure,' which confers the benefit of the right 'to a life free of alcohol-related violence and strife'<sup>121</sup> on residents of the Island.

French CJ<sup>122</sup> emphasised that the precedent of *Gerhardy*<sup>123</sup> 'delineate[s] the respective functions of the political branch of government and the courts in determining whether

<sup>112</sup> Ibid 298 [348], 295-6 [340]-[342]. Any justification for different treatment based on race must be 'affirmatively established' by demonstrating to the Court that it meets contemporary Convention understandings: at 296 [341]-[342].

<sup>113</sup> Ibid 211 [102] (Hayne J); 220 [132], 222-3 [137] (Crennan J).

<sup>114</sup> Ibid 220 [132], 222-3 [137] (Crennan J).

<sup>115</sup> Published as a Report to the Executive Government of Queensland and read with the Explanatory Notes to the Amendment Regulation, see *Liquor Amendment Regulation (No 4) 2006* (Qld). See Justice Tony Fitzgerald, Department of Premier and Cabinet, Queensland 'Cape York justice study' (2001) 6(4) *Australian Indigenous Law Reporter* 56.

<sup>116</sup> Explanatory Notes, Indigenous Communities Liquor Licenses Bill 2002 (Qld) 1-2.

<sup>117</sup> Explanatory Notes, *Liquor Amendment Regulation (No 4) 2006* (Qld).

<sup>118</sup> Affirming the purpose of Part 6A s 173F of the *Liquor Act 1992* (Qld).

<sup>119</sup> Referring to *Convention* art 1(4) and 5(b). *Convention* art 5(b) sets forth: '[t]he right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.'

<sup>120</sup> *Maloney* (2013) 252 CLR 168, 239 [188] (Kiefel J), referring to Part 6A of the *Liquor Act 1992* (Qld). Hayne J agreed, stating at 212-3 [107]: 'Those who live in fear of violence cannot exercise their rights. They are not free, and when the violence is spread through a community, the members of that community cannot exercise their rights and freedoms.'

<sup>121</sup> Ibid 239 [188] (Kiefel J), referring to Part 6A of the *Liquor Act 1992* (Qld).

<sup>122</sup> *Maloney* (2013) 252 CLR 168, 183-4 at [20]. Other judges agreeing with this precedent at 260-1 [243] (Bell J); 280-1 [302] (Gageler J).

<sup>123</sup> (1985) 159 CLR 70, 139 (Brennan J); 149 (Deane J).

a law is a special measure.’<sup>124</sup> It is not the Court’s role to assess what it sees as political decisions, so long as they are reasonable. Accordingly, his Honour recounts:

[w]hen the character of a special measure depends in part upon a political assessment about the need for advancement of a racial group and the measure that is likely to secure the advancement necessary, the Court must accept the assessment made by the political branch of government.<sup>125</sup>

The Court’s strong reliance on the legislature to determine the validity of this unusual ‘special measure’ is thus apparent in *Maloney*. Implications are discussed later in this article. For now, suffice to say that after publication of the Court’s reasons, the Parliamentary Joint Committee on Human Rights expressed its opinion on the requirements for ‘special measures’,<sup>126</sup> stating that in *Maloney*, the High Court ‘adopt[s] a number of conclusions which are arguably not in conformity with the current state of international law and practice relating to special measures.’<sup>127</sup>

Maloney’s third avenue attacking the validity of the Queensland Government’s ‘special measure’ – and therefore her criminal conviction for possession of alcohol – was the absence of a temporal limitation on the alcohol restrictions.<sup>128</sup> This was deemed to be a non-issue, given the tabling of subsequent reports in Parliament which indicate such measures are still needed.<sup>129</sup>

## 6 Constitutional Fact Finding and the High Court

French CJ asserted that constitutional fact finding for a judicial review of the merits of a ‘special measure’ should not be concerned with details.<sup>130</sup> There is no burden of evidence on the Executive or Parliament.<sup>131</sup> All that is necessary is judicial determination that: the ‘special measure’ rests upon a Legislative finding about the need to protect a racial group; that Legislative finding was reasonably open; the sole purpose of the law is to secure the adequate advancement of a racial group; and the

<sup>124</sup> *Maloney* (2013) 252 CLR 168, 183-4 [20] (French CJ); 260-1 [243] (Bell J); 280-1 [302] (Gageler J). All referring to *Gerhardy v Brown* (1985) 159 CLR 70, 139 (Brennan J); 149 (Deane J).

<sup>125</sup> *Maloney* (2013) 252 CLR 168, 184 [20] (French CJ) referring to *Gerhardy v Brown* (1985) 159 CLR 70, 138 (Brennan J).

<sup>126</sup> See *Stronger Futures*, above n 75, 23-31.

<sup>127</sup> *Ibid* 24 [1.85].

<sup>128</sup> This was based on the fifth criteria for ‘special measures’ laid down by Brennan J in *Gerhardy v Brown* (1985) 159 CLR 70, 133, 139-40. A special measure must: 1) ‘Confer a benefit’; 2) ‘on some or all members of a class’ of persons whose ‘membership... is based on race, colour, decent, or national or ethnic origin’; 3) ‘for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms’; 4) ‘in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms’; and 5) ‘[t]he measure must not lead to the maintenance of [permanent] separate rights for different racial groups nor be continued after...[its] objectives... have been achieved’<sup>128</sup>, that is, its objectives must not yet have been achieved. It is also based on the latter part of *Convention* Article 1(4) which reads: ‘...such measures [should] not... lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved...’

<sup>129</sup> See for example, *Liquor Amendment Regulation (No 3) 2008* (Qld). See also *Maloney* (2013) 252 CLR 168, 261 [252]-[253] (Bell J). Gageler J’s handling of the issue is illustrative: at 280-01 [302].

<sup>130</sup> *Maloney* (2013) 252 CLR 168, 193 [45].

<sup>131</sup> *Ibid*.

law is reasonably capable of being appropriate and adapted to that sole purpose.<sup>132</sup> Gageler J argued that when finding constitutional facts, the Court reaches its necessary conclusions ‘largely on the basis of its knowledge of the society of which it is a part’ and supplements that knowledge by ‘processes which do not readily lend themselves to the normal procedures for the reception of evidence.’<sup>133</sup> It can be noted here that a number of factors distinguish Aboriginal peoples from Western society: distinct cultures, different experiences of Western law, and the impacts of colonisation and discrimination embodied by them both individually and collectively. Each of these distinguishing factors are likely to be interpreted differently by different judges, rendering the art of constitutional fact finding and the drawing of conclusions on matters involving Aboriginal peoples imprecise at best.

### 7 *International Law And The Enacting Domestic Law*

This area of reasoning was mentioned earlier and the specifics are touched on only briefly here.<sup>134</sup> The Court decided subsequent developments in international law do not permit the Court to alter the meaning of the enacting domestic legislation.<sup>135</sup> International understandings of ‘special measures’ were to be limited to those that existed in 1975 when the RDA brought domestic effect to the *Convention*. Hayne, Crennan, Kiefel and Bell JJ held that extraneous material, including international law obligations, are authoritative only to the extent that they existed at the time the Act was passed.<sup>136</sup> Hayne J recognised that later developments in international law<sup>137</sup> may be suggestive of arguments which complainants may advance but are not conclusive.<sup>138</sup> Bell J was similarly vague, adding it is ‘appropriate to give weight to the construction that the international community places upon the Convention’ as its meaning is refined over time, however she still limited consideration of extraneous material to those in place when the Act was enacted.<sup>139</sup> Gageler J was the sole voice arguing for the construction of statutory text to be consistent with contemporary international understandings.<sup>140</sup> He nevertheless dismissed the appeal on the basis that the impugned provisions were properly characterised as a ‘special measure.’<sup>141</sup> French CJ was in agreement with Hayne, Crennan, Kiefel and Bell JJ, with his Honour noting that ‘[o]bligations imposed by international instruments on States do not necessarily take account of the division of functions between their branches of government.’<sup>142</sup>

## III SOCIAL AND POLICY IMPLICATIONS

This case was the first of its kind in the High Court of Australia. On the one hand, it was unremarkable. *Maloney* can be understood as a straightforward case of statutory

<sup>132</sup> Ibid 184-5 [21].

<sup>133</sup> Ibid 298-9 [351] (citations omitted).

<sup>134</sup> For a detailed discussion of the Court’s use of international material, see Wall, above n 3.

<sup>135</sup> *Maloney* (2013) 252 CLR 168, 181-2 [15] (French CJ); 198-99 [61] (citations omitted) (Hayne J); 221-2 [134] (Crennan J); 235 [176] (Kiefel J); 255-6 [235] (Bell J). The implications of this reasoning is discussed in a later section of this article.

<sup>136</sup> Ibid.

<sup>137</sup> Such as United Nations Committee Reports.

<sup>138</sup> *Maloney* (2013) 252 CLR 168, 198-9 [61].

<sup>139</sup> Ibid 256 [236].

<sup>140</sup> Ibid 292-3 [326]-[328].

<sup>141</sup> Rice provides a critique of Gageler’s unique reasoning in this regard, see Rice, above n 3, 30.

<sup>142</sup> *Maloney* (2013) 252 CLR 168, 182 [15].



interpretation.<sup>143</sup> At the same time, on the other hand, *Maloney* presented the High Court with the opportunity to engage with so much more.<sup>144</sup> Given the complete absence of constitutional basis, the Court decided it would rather not engage.<sup>145</sup> The resulting silence of what is left undiscussed has been described as ‘deafening’ and as exemplifying ‘administrative violence in the procedure.’<sup>146</sup>

This section provides a values-based critique of the decision, focussing on a number of key social and policy implications. These are: stereotypes go largely unquestioned; Indigenous self-determination is fractured; ‘special measures’ may criminalise beneficiaries without their consent and without judicial review; and statutory interpretation is ‘frozen in time.’

### *A Stereotypes Go Largely Unquestioned*

The judgment is astonishing in its undifferentiated conceptualisation of Indigenous persons. The entire population of Palm Island – indeed, the entire Indigenous population of Queensland – is rolled together and viewed as dysfunctional, problematic and in need of State protection.<sup>147</sup> Gageler J summarised the undisputed legislative finding which the Court affirmed:

The *Liquor Regulation* was brought into existence in an attempt to prevent harm arising from alcohol-related conditions and behaviours *perceived generally to exist within indigenous communities but not perceived generally to exist elsewhere in Queensland*.<sup>148</sup>

Kiefel and Bell JJ are the only judges who differentiated women and children,<sup>149</sup> yet in doing so, presented them as victims: wholly without agency and in need of State protection from alcohol-fuelled Indigenous men.<sup>150</sup> The fact that the appellant was a woman, with no prior criminal conviction, who was appealing the validity of her criminal conviction for the mere possession of alcohol which was not a crime

<sup>143</sup> Gaze, above n 39; Coel Kirkby, ‘Why Consult Communities? On the Nature of Democracy in Australia’ (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014).

<sup>144</sup> Ibid.

<sup>145</sup> Gaze, above n 39.

<sup>146</sup> Kirkby, above n 143.

<sup>147</sup> Mark McMillan, ‘*Maloney v R*: The Political Context and Fallout for Pursuing Individual Rights for Indigenous People’ (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014); Paula O’Brien, ‘The Implications of *Maloney* for Alcohol Control for Indigenous People’ (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014). This conceptualisation of Palm Island residents is unfortunately typical, see Joanne Watson, *Palm Island Through A Long Lens* (Aboriginal Studies Press, 2010).

<sup>148</sup> *Maloney* (2013) 252 CLR 168, 302 [362] (emphasis added).

<sup>149</sup> *Maloney* (2013) 252 CLR 168, 235-6 [178], 237-8 [184] (Kiefel J) (citations omitted); 246 [208] (Bell J, discussing *Bropho v Western Australia* (2008) 169 FCR 59, 83 [82]) (citations omitted). See also O’Brien, above n 147.

<sup>150</sup> Ibid. Kiefel J is repeating the views of the Queensland Legislative Assembly, see Queensland, *Parliamentary Debates*, Legislative Assembly, 17 September 2002, 3595 (Ms Phillips): ‘Whilst [the provisions] impose restrictions on drinkers, its aim is as much to protect the innocent victims – the women who are constantly beaten and raped and the children who are abused, neglected and undernourished. I am proud that the government I am part of is prepared to stand up for these victims.’

elsewhere in Queensland save for race, did not seem to register as contradicting these assumptions carried forward from the Queensland Government.<sup>151</sup>

Only one judge<sup>152</sup> noted that according to official reports,<sup>153</sup> more Indigenous people abstain from alcohol than non-Indigenous people in Australia. This point was quickly lost with reference to those same reports stating that Indigenous people who do drink alcohol consume more than non-Indigenous Australians.<sup>154</sup> Judicial preconceptions precluded clear-sightedness in weighing this evidence of differentiation: evidence indicates a need for nuance in interventions and that there will be a range of community members well-positioned to collaborate with the government to address alcohol-related problems. Generally speaking, some Indigenous persons want criminal possession laws enacted against fellow community members regarding alcohol, others do not, still others want other things.<sup>155</sup> In light of this diversity, consultation, consent and local decision-making are paramount. There is a fundamental need for the Executive, Parliament and the Courts to see the distinction between criminalising alcohol and criminalising Aboriginality.<sup>156</sup> Attending to this distinction is impossible when stereotyping runs unchecked.

None of the evidence regarding the damaging effects of alcohol in Indigenous communities contained evidence from Palm Island. But the High Court of Australia accepted that the evidence presented – the *Cape York Justice Study*<sup>157</sup> and the Explanatory Notes to the impugned provisions<sup>158</sup> – was conclusively sufficient in establishing it was reasonably open to the Legislature to conclude that certain Indigenous communities in Queensland need State protection.<sup>159</sup> Maloney had pointed out that the Cape York report should be deemed irrelevant because it was based on the community of Cape York, not Palm Island.<sup>160</sup> Despite bountiful evidence of differentiation, the High Court affirmed the stereotypes and assumptions about Indigenous peoples by Queensland's Executive and Parliament.

### *B Indigenous Self-Determination is Fractured*

Maloney wanted Indigenous self-government on the Island to be recognised, with the Island's elected representatives treated as equals in decision-making with the State.<sup>161</sup>

<sup>151</sup> McMillan, above n 147. The other intervening governments – the Commonwealth, Western Australia and South Australia – are also guilty of similar assumptions, see *Maloney* (2013) 252 CLR 168, 173-175.

<sup>152</sup> *Maloney* (2013) 252 CLR 168, 240 [194] (Bell J).

<sup>153</sup> Race Discrimination Commissioner, *Race Discrimination, Human Rights and the Distribution of Alcohol* (Australian Government, 1995) 15; Australian Institute of Health and Welfare, *2010 National Drug Strategy Household Survey Report* (Australian Government, 2011), 60.

<sup>154</sup> *Ibid.* See also (2013) 252 CLR 168, 240 [194] (Bell J).

<sup>155</sup> O'Brien, above n 147.

<sup>156</sup> McMillan, above n 147.

<sup>157</sup> Published as a Report to the Executive Government of Queensland and read with the Explanatory notes to the Amendment Regulation, see *Liquor Amendment Regulation (No 4) 2006* (Qld). See Fitzgerald, above n 115.

<sup>158</sup> Explanatory Notes, *Liquor Amendment Regulation (No 4) 2006* (Qld).

<sup>159</sup> Bell J's reasoning is illustrative, see *Maloney* (2013) 252 CLR 168, 260 [248].

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid* 254-5 [233], 289 [318]. See especially Maloney, above n 23, 17-18 [75]-[76] and the affidavits cited therein.

The Queensland Government's unilateral imposition of its AMP rode roughshod over the Island's community structure: the very same legal structure that the Queensland Government had previously instigated on the Island.<sup>162</sup> The Queensland Government decided Aboriginal communities needed to have AMPs and had given communities a level of choice regarding their scope.<sup>163</sup> There were also a number Government of incentives on offer to communities for their agreement: the Queensland Premier had announced the package and urged communities to go 'as dry as possible'.<sup>164</sup> If a given community could not agree on the terms of an AMP or their proposal didn't satisfy the Government, an AMP of the Government's choosing was imposed upon them. This is what occurred on Palm Island. It is undisputed that the Island's residents did not yet agree to the specifics of an AMP. However, the resident's collective lack of consent to a kind of AMP imposed upon them became an 'excuse for administrative despotism'.<sup>165</sup> None of these processes reflect obtaining the 'free, prior and informed consent' of the beneficiaries of a 'special measure' required in international law.<sup>166</sup> The final step of imposing the ban via Schedule 1R of the *Liquor Regulations 2002* (Qld) served to fracture Indigenous self-determination further.<sup>167</sup>

The Queensland Government's unilateral action and the High Court's confirmation of it reveal how all three branches of government failed the residents of Palm Island.<sup>168</sup> Because of the *Maloney* decision, community government structures have been fractured throughout all Indigenous communities where the Queensland Government established them.<sup>169</sup> This outcome is contrary to common justice and to otherwise widespread intergovernmental consensus that representative community management and community-lead initiatives are good for Indigenous communities.<sup>170</sup> The High Court's interpretation of the RDA allows the Queensland Executive to unilaterally impose a 'special measure' which does not reflect the community's insights nor desires.<sup>171</sup> The *Maloney* precedent means the RDA now acts as a barrier to implementing Indigenous communities wishes regarding the misuse of alcohol.<sup>172</sup> These outcomes are well outside the intentions of Parliament when it enacted the RDA to give domestic effect to the *Convention* over 40 years ago.

---

<sup>162</sup> The Queensland Government declared Palm Island a 'community government area' within the meaning of the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld) s 4.

<sup>163</sup> The criteria for community-designed AMPs that the Government would accept were unknown. It seems each community had to guess.

<sup>164</sup> *Maloney* (2013) 252 CLR 168, 269 [277] (citations omitted).

<sup>165</sup> Kirkby, above n 143.

<sup>166</sup> Section 4 '*Special Measures*': *Alcohol Restrictions and Consultation with Beneficiaries*' provides an overview of international human rights law regarding 'special measures.'

<sup>167</sup> McMillan, above n 147.

<sup>168</sup> Kirsty Gover, '*Maloney v R*: What's In It For Us?' (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014).

<sup>169</sup> McMillan, above n 147.

<sup>170</sup> *Ibid.*

<sup>171</sup> Maureen Tehan, 'Some Historical Reflections On Land Rights, Alcohol Management And The Problem of Special Measures' (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014).

<sup>172</sup> *Ibid.*

C 'Special Measures': Criminalise Beneficiaries, No Consent, No Judicial Review

At the time of the *Maloney* decision, approximately 10% of the Island's population were charged under the same statutory provisions and were awaiting the outcome to determine their own criminal convictions.<sup>173</sup> As a result of *Maloney*, a significant percentage of the Island's population has incurred a criminal conviction for the mere possession of alcohol. This begs the question of when a time will come when society will expunge these convictions, much like the criminal convictions for homosexuality for gay men that are being expunged?<sup>174</sup> The criminal conviction for possession of alcohol on the Island brings with it a criminal record which lasts for a person's lifetime, restricting travel, work opportunities, and the ability to work with children.<sup>175</sup> People elsewhere in Queensland and Australia may possess other kinds and amounts of alcohol without acquiring a criminal record. Prior to the 'special measure', there were already high rates of Aboriginal contact with police and the criminal justice system through over-policing in Aboriginal communities and public space laws: the Royal Commission into Aboriginal Deaths in Custody recommendations were aimed at reducing this contact.<sup>176</sup> Criminalisation brings Indigenous peoples within the purview of police, the courts and the prison system: all are known to lead to serious injury and death of Indigenous persons.<sup>177</sup> So how exactly does the criminalisation of personal conduct 'benefit' Indigenous peoples so as to qualify as a 'special measure'? With stakes this high, the High Court could reasonably be expected to afford a high level of judicial review.

Bell J noted *Maloney*'s argument that imposing criminal restrictions on a community for their protection without genuine consultation and consent smacks of 'outdated paternalism'.<sup>178</sup> *Maloney* contended that with more time, consultation and community engagement, consensus regarding an acceptable AMP for the Island might have been reached.<sup>179</sup> However, the Queensland Government made a political judgment that community divisions were inhibiting agreement on an AMP,<sup>180</sup> and the High Court determined that '[t]he validity of the liquor restrictions as special measures' do not 'turn on the rightness of... [that] judgment'.<sup>181</sup> As discussed earlier in this article, French CJ<sup>182</sup> emphasised the precedent of *Gerhardy*<sup>183</sup> in delineating the 'respective functions of the political branch of government and the courts in determining whether a law is a special measure'.<sup>184</sup> The impugned legislation and regulations were enacted

<sup>173</sup> O'Brien, above n 147.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

<sup>176</sup> See the 339 Recommendations in Commonwealth, Royal Commission Report into Aboriginal Deaths in Custody, *National Report* (1991) <<http://www.alrm.org.au/information/General%20Information/Royal%20Commission%20into%20Aboriginal%20Deaths%20in%20Custody.pdf>>.

<sup>177</sup> Ibid; O'Brien, above n 147.

<sup>178</sup> *Maloney* (2013) 252 CLR 257, [238].

<sup>179</sup> *Maloney*, above n 23, 17-19 [75]-[77]. See also *Maloney* (2013) 252 CLR 168, 257 [238].

<sup>180</sup> Explanatory Notes, *Liquor Amendment Regulation (No 4)* 2006 (Qld) 2-3 [9]. See also *Maloney* (2013) 252 CLR 168, 257 [239], 267-8 [276].

<sup>181</sup> *Maloney* (2013) 252 CLR 168, 257 [239]-[240] (Bell J).

<sup>182</sup> Ibid 183-4 [20]. Other judges agreeing with this precedent: at 258 [243] (Bell J); 280-01 [302] (Gageler J).

<sup>183</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 139 (Brennan J); 149 (Deane J).

<sup>184</sup> *Maloney* (2013) 252 CLR 168, 183 [20] (French CJ); 243 [243] (Bell J); 280-01 [302] (Gageler J).

All referring to *Gerhardy v Brown* (1985) 159 CLR 70, 139 (Brennan J); 149 (Deane J).

to address the ‘serious social problem identified as affecting Indigenous communities in North Queensland, including Palm Island.’<sup>185</sup> Difficult judgments were to be made and as long as those judgments are reasonable, the separation of powers means ‘those judgments were a matter, in this case, for the Parliament and the Executive Government of Queensland.’<sup>186</sup> Thus, in the absence of a clear constitutional basis, the High Court decided it would rather not engage,<sup>187</sup> leaving the legal validity of this penalising ‘special measure’ to the heads of government who crafted it.

Surely the absence of consultation with and consent by the affected community should lead to increased judicial scrutiny, not the removal of it.<sup>188</sup> Here we have a ‘special measure’ being used unilaterally and paternally against beneficiaries,<sup>189</sup> resulting in contact with the criminal justice system which is well known to have deleterious effects for Indigenous peoples.<sup>190</sup> The absence of alternative effective measures that are less restrictive<sup>191</sup> should not inhibit the Court from rigorously examining the measure put before it. What was needed was the laying down of criteria to deal adequately with the issue of proportionality of ‘special measures’ that criminalise beneficiaries without their consent. The question of whether the possession offence was actually working was left wholly to the Executive and Parliament.<sup>192</sup> Maloney stated in her appeal: ‘The necessity for and justification of a claimed special measure cannot depend upon the mere say-so of a self-justificatory document prepared by the Executive for an entirely different purpose.’<sup>193</sup>

There was a lot at stake for the Commonwealth and State Governments in *Maloney*,<sup>194</sup> given that it was the first time the High Court was presented with these issues. The Commonwealth’s notorious ‘intervention’ in the Northern Territory<sup>195</sup> rested in part on its characterisation as a ‘special measure.’<sup>196</sup> Two recent cases from the Queensland Court of Appeal involved alcohol control and Indigenous peoples. In *Morton v Queensland Police Service*<sup>197</sup> it was unanimously held that the insertion of Schedule 1R into the *Liquor Regulations 2002* (Qld) via amending regulation – an impugned provision in *Maloney* – was properly characterised as a ‘special measure.’ In *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury*,<sup>198</sup> it was determined that consultation and consent of beneficiaries was not needed for a ‘special measure’ to be valid. Two years prior to

---

<sup>185</sup> *Maloney* (2013) 252 CLR 168, 196-7 [47] (French CJ).

<sup>186</sup> *Maloney* (2013) 252 CLR 168, 193-5 [45]-[47] (French CJ).

<sup>187</sup> Gaze, above n 39.

<sup>188</sup> Gover, above n 168.

<sup>189</sup> *Ibid.*

<sup>190</sup> See generally Commonwealth, Royal Commission Report into Aboriginal Deaths in Custody, *National Report* (1991) <<http://www.alrm.org.au/information/General%20Information/Royal%20Commission%20into%20Aboriginal%20Deaths%20in%20Custody.pdf>>.

<sup>191</sup> *Ibid.*

<sup>192</sup> O’Brien, above n 147.

<sup>193</sup> *Maloney*, above n 23, 17 [73].

<sup>194</sup> Rice, above n 3, 32.

<sup>195</sup> *Stronger Futures in the Northern Territory Act 2012* (Cth). For an overview of the Northern Territory Emergency Response, see *Stronger Futures* above n 75, 4-6.

<sup>196</sup> *Stronger Futures in the Northern Territory Act 2012* (Cth) ss 7, 33, 37. See also Rice, above n 3, 32.

<sup>197</sup> [2010] QCA 160.

<sup>198</sup> [2010] QCA 37.

these Queensland Court of Appeal decisions, the Full Court of the Federal Court of Appeal in *Bropho v Western Australia*<sup>199</sup> held that RDA's s 10 was:

...not to be engaged by an exercise of statutory discretion under a Western Australian statute which had the effect of excluding certain persons from an Aboriginal reserve in order to obviate risks to the safety and welfare of women and children residing on the reserve. The excluded persons were all Aboriginal.<sup>200</sup>

In *Maloney*, the High Court's heavy reliance on the Legislature to determine the validity of a 'special measure' means that the Commonwealth and State Governments have been given broad latitude to foist unwanted 'special measures' on communities without their consultation or consent, specifically via the Court 'significantly narrow[ing] any basis for challenge' by the beneficiaries.<sup>201</sup>

When tabled in the Queensland Parliament, the Legislature failed to disallow the Executive's declaration regarding liquor restrictions on the Island: declarations made possible under ss 173G and 173H of the *Liquor Act 1992* (Qld) and *Liquor Regulation 2002* (Qld) ss 37A, 37B and Schedule 1R. Thus Parliament, 'that former bastion of support for fundamental freedoms, has adopted laws that explicitly violate common law rights that are as old as the Magna Carta itself.'<sup>202</sup> The High Court failed 'to consider how their decisions work in practice [and] to ensure that common law rights have an independent and intrinsic weight of their own.'<sup>203</sup> In these ways and more, the High Court of Australia failed to constrain the excesses of Governmental overreach. All three branches of government thus failed the residents of Palm Island.<sup>204</sup>

Crennan J suggested that the constituency of Palm Island can exercise their dissent and influence Queensland Parliament's decisions through the democratic process.<sup>205</sup> How exactly the Island's marginalised population of approximately 2000 residents can accomplish this feat remains to be seen. Appealing to the democratic process as the appropriate forum seems rather more far-fetched, given that most politicians have limited understanding of Aboriginal peoples diverse cultures and desires, and are incognisant that these differ in many respects from those of the mainstream.

### D Statutory Interpretation: 'Frozen in Time'

The Court initially took a purposive approach to statutory interpretation<sup>206</sup> by concluding that the impugned statutory provisions had the *effect* of limiting

<sup>199</sup> (2008) 169 FCR 59.

<sup>200</sup> *Maloney* (2013) 252 CLR 168, 285-6 [309] (Gagelor J). See also *Bropho v Western Australia* (2008) 169 FCR 59, 83-4 [81], [83].

<sup>201</sup> Rice, above n 3, 32.

<sup>202</sup> Triggs, above n 40. Professor Triggs is speaking broadly about Australia's retreat from its commitment to fundamental freedoms and human rights in the new millennium. These general comments about Australian Courts are applicable to *Maloney*.

<sup>203</sup> Ibid.

<sup>204</sup> Gover, above n 168.

<sup>205</sup> *Maloney* (2013) 252 CLR 168, 222 [135]; Kirkby, above n 143.

<sup>206</sup> D F Jackson and J C Conde, 'Statutory Interpretation in the First Quarter of the Twenty-First Century' (2014) 38 *Australian Bar Review* 168, 173 (emphasis added).

Aboriginal persons' human right to own property despite the absence of express terms singling out Aboriginal persons.<sup>207</sup> However, the approach changed to being 'frozen in time'<sup>208</sup> when considering 'special measures.' The Court would only consider material from international law that existed when the RDA was enacted over 40 years ago. The Court thus ignored the work of those whose job it is to develop these provisions, both internationally<sup>209</sup> and domestically.<sup>210</sup> The result was that the overwhelming affirmation that States should consult with, and secure the 'free, prior and informed consent' of Indigenous peoples before adopting measures that effect them<sup>211</sup> was muted. This proved deleterious to Maloney's case.

The narrow, positivist approach to statutory interpretation regarding discrimination and human rights is highly unlikely to be what the Australian Parliament intended when it enacted the *Convention* via the RDA.<sup>212</sup> Indeed, after publication of the *Maloney* decision, the Parliamentary Joint Committee on Human Rights stated as much.<sup>213</sup> Because of the *Maloney*, we now must wait for Parliament to update our domestic laws – the very same laws which were enacted to give effect to our international legal obligations – each time international law develops, at least in respect of human rights and discrimination.<sup>214</sup>

The Parliamentary Joint Committee on Human Rights also recommended s 10 of the RDA be reviewed in light of the 'constrained' interpretation in *Maloney* to clarify that proportionality is inherent to this provision.<sup>215</sup> The Committee agreed that criminalising the conduct of beneficiaries in order to promote the benefit of the group is not a 'special measure'<sup>216</sup> and such a classification has no precedent in international law.<sup>217</sup> Given the current political climate, it is unlikely that the RDA would be amended to protect Indigenous peoples from laws similar to alcohol restrictions. If

<sup>207</sup> *Maloney* (2013) 252 CLR 168, 191-2 [38]-[39] (French CJ); 206 [84]-[85] (Hayne J); 219 [128]-[129] (Crennan J, agreeing the restriction on *possession*, not property, is more restrictive on Palm Island than elsewhere in Queensland *but that this is acceptable* in light of the legion of laws effecting Australian society and alcohol); 241 [197] (Bell J); 301-2 [360]-[362] (Gageler J).

<sup>208</sup> McMillan, above n 146; Gaze, above n 39.

<sup>209</sup> See, for example, Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Rights of Indigenous Peoples*, 51<sup>st</sup> sess, UN Doc A/52/18 (18 August 1997) annex V para 4(d); Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, 75<sup>th</sup> sess, UN Doc A/64/18 (August 2009) annex VIII; Expert Mechanism on the Rights of Indigenous Peoples, *Expert Mechanism Advice No 2 (2011): Indigenous peoples and the right to participate in decision-making* [21] <[http://www.ohchr.org/documents/issues/ipeoples/emrip/advice2\\_oct2011.pdf](http://www.ohchr.org/documents/issues/ipeoples/emrip/advice2_oct2011.pdf)>. See also *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 107<sup>th</sup> plen mtg, UN Doc A/61/295 (13 September 2007).

<sup>210</sup> Such as the Australian Human Rights Commission, who were an intervening party in *Maloney*, see *Maloney* (2013) 252 CLR 168, 171-2.

<sup>211</sup> Expert Mechanism on the Rights of Indigenous Peoples, *Expert Mechanism Advice No 2 (2011): Indigenous peoples and the right to participate in decision-making* [21] <[http://www.ohchr.org/documents/issues/ipeoples/emrip/advice2\\_oct2011.pdf](http://www.ohchr.org/documents/issues/ipeoples/emrip/advice2_oct2011.pdf)>. See generally S J Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers, 2014).

<sup>212</sup> Gaze, above n 39.

<sup>213</sup> See *Stronger Futures*, above n 75, 24 [1.85].

<sup>214</sup> Rice, above n 3, 32.

<sup>215</sup> See *Stronger Futures*, above n 75, 18-19 [1.70]-[1.71], 24 [1.85], 30 [1.109], 31 [1.115], 44 [1.159].

<sup>216</sup> *Ibid* 28 [1.99].

<sup>217</sup> *Ibid* 30-1 [1.110]-[1.111]).

anything, the RDA would be amended to clarify that such laws are indeed valid ‘special measures’ and that tests of proportionality are not required. The Australian Legislature is swift in changing laws to make the ‘offending provision’ in their favour if a Court challenges them.<sup>218</sup>

Australia’s continuing exceptionalism to international law means Australia is becoming increasingly isolated.<sup>219</sup> Jurisprudence from comparative jurisdictions and international law is often not considered – and if considered, not considered weighty – by Australian Courts.<sup>220</sup> Consequently, other countries do not cite Australian jurisprudence.<sup>221</sup>

Australia is the only country in the world without a Bill of Rights.<sup>222</sup> With very few constitutional protections for our fundamental rights and freedoms, we rely on our Courts for their protection.<sup>223</sup> In *Maloney*, the High Court failed to protect these rights by failing to challenge the Government’s overreach. The rights of one of the countries’ most vulnerable populations have been significantly encroached, resulting in a raft of negative consequences that were outlined above. Given the excesses of the Executive and Parliament, now is an opportune time to strongly consider ‘the need for a federal legislated Bill of Rights.’<sup>224</sup>

#### IV CONCLUSION

The *Maloney case* ‘joins a long unbroken series of cases’ in which the ‘complainant is denied a discrimination remedy by the High Court.’<sup>225</sup> This commentary has highlighted a number of social and policy implications arising from the decision.<sup>226</sup> *Maloney’s* appeal of her criminal conviction was unsuccessful: the High Court of Australia decided that the statutory provisions which lead to her conviction did limit her right to own property, but were lawfully characterised as a ‘special measure.’ The outcome reveals reluctance of the Court to get involved in politically charged details such as consultation and consent, and thereby failing to provide scrutiny and protection to people from legislation that negatively affects their rights.<sup>227</sup> This case also illustrates the disturbing legal reality that pursuing individual rights for Indigenous peoples can have dire consequences for the group.<sup>228</sup> Advocates for Indigenous rights are left with the challenge to conceptualise arguments in ways that the High Court of Australia can accept.<sup>229</sup>

---

<sup>218</sup> Triggs, above n 40.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*

<sup>224</sup> *Ibid.* These comments were general in nature but are applicable to the present case.

<sup>225</sup> Rice, above n 3, 32.

<sup>226</sup> *Maloney* (2013) 252 CLR 168.

<sup>227</sup> Gaze, above n 39.

<sup>228</sup> McMillan, above n 147.

<sup>229</sup> Gaze, above n 39.



## BIBLIOGRAPHY

### *A Books/Articles/Reports*

Australian Human Rights Commission, *2011 Guidelines to understanding 'Special measures' in the Racial Discrimination Act 1975 (Cth): Implementing 'special measures' under the Racial Discrimination Act 1975 (Cth)* <<https://www.humanrights.gov.au/publications/guidelines-understanding-special-measures-racial-discrimination-act-1975-cth-2011#fnB8>>

Australian Institute of Health and Welfare, *2010 National Drug Strategy Household Survey Report* (Australian Government, 2011)

Commonwealth, Royal Commission Report into Aboriginal Deaths in Custody, *National Report* (1991) <<http://www.alrm.org.au/information/General%20Information/Royal%20Commission%20into%20Aboriginal%20Deaths%20in%20Custody.pdf>>

Fitzgerald, Tony, Department of Premier and Cabinet, Queensland 'Cape York justice study' (2001) 6(4) *Australian Indigenous Law Reporter* 56

Jackson, D F and J C Conde, 'Statutory Interpretation in the First Quarter of the Twenty-First Century' (2014) 38 *Australian Bar Review* 168

Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013)

Race Discrimination Commissioner, *Race Discrimination, Human Rights and the Distribution of Alcohol* (Australian Government, 1995)

Rice, Simon 'Case Note: Joan Monica Maloney v The Queen [2013] HCA 28' (2013) 8(7) *Indigenous Law Bulletin* 28

Rombouts, S J, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers, 2014)

Wall, Patrick, 'Case Note: The High Court of Australia's Approach to the Interpretation of International Law and Its Use of International Legal Materials in *Maloney v The Queen* [2013] HCA 28' (2014) 15(1) *Melbourne Journal of International Law* 228

Watson, Joanne, *Palm Island Through A Long Lens* (Aboriginal Studies Press, 2010)

### *B Cases*

*Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37

*Bropho v Western Australia* (2008) 169 FCR 59

*Bruch v Commonwealth* [2002] FMCA 29

*Gerhardy v Brown* (1985) 159 CLR 70

*Maloney v The Queen* (2013) 252 CLR 168

*Morton v Queensland Police Service* [2010] QCA 160

*Western Australia v Ward* (2002) 213 CLR 1

#### C Legislation and Legislative Materials

*Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (Qld)  
*Australian Constitution*

Explanatory Notes, Indigenous Communities Liquor Licenses Bill 2002 (Qld)

Explanatory Notes, *Liquor Amendment Regulation (No 4) 2006* (Qld)

*Liquor Act 1992* (Qld)

*Liquor Amendment Regulation (No 3) 2008* (Qld)

*Liquor Amendment Regulation (No 4) 2006* (Qld)

*Liquor Regulation 2002* (Qld)

*Pitjantjatjara Land Rights Act 1981* (SA)

Queensland, *Parliamentary Debates*, Legislative Assembly, 17 September 2002, 3595

*Racial Discrimination Act 1975* (Cth)

*Stronger Futures in the Northern Territory Act 2012* (Cth)

#### D International Materials

Committee on the Elimination of Racial Discrimination, *General Recommendation No 23: Rights of Indigenous Peoples*, 51<sup>st</sup> sess, UN Doc A/52/18 (18 August 1997) annex V

Committee on the Elimination of Racial Discrimination, *General Recommendation No 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, 75<sup>th</sup> sess, UN Doc A/64/18 (August 2009) annex VIII

Expert Mechanism on the Rights of Indigenous Peoples, *Expert Mechanism Advice No 2 (2011): Indigenous Peoples and the Right to Participate in Decision-Making* <[http://www.ohchr.org/documents/issues/ipeoples/emrip/advice2\\_oct2011.pdf](http://www.ohchr.org/documents/issues/ipeoples/emrip/advice2_oct2011.pdf)>

*International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)

*United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 107<sup>th</sup> plen mtg, UN Doc A/61/295 (13 September 2007)

E *Other*

Department of Human Services, Australian Government, *ABSTUDY* <<https://www.humanservices.gov.au/customer/services/centrelink/abstudy>>

Gaze, Beth, 'What Vision Of Equality And Racial Discrimination Law Does *Maloney v R* Reveal?' (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014)

Gover, Kirsty, '*Maloney v R*: What's In It For Us?' (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014)

Kirkby, Coel, 'Why Consult Communities? On the Nature of Democracy in Australia' (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014)

Maloney, Joan Monica, 'Appellant's Submissions', Submission in *Maloney v The Queen*, B57/2012, 26 October 2012

McMillan, Mark, '*Maloney v R*: The Political Context and Fallout for Pursuing Individual Rights for Indigenous People' (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014)

O'Brien, Paula, 'The Implications of *Maloney* for Alcohol Control for Indigenous People' (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014)

Tehan, Maureen, 'Some Historical Reflections On Land Rights, Alcohol Management And The Problem of Special Measures' (Paper presented at the Roundtable Making Sense of *Maloney v R* (2013), Melbourne Law School, The University of Melbourne, 31 October 2014)

Triggs Gillian, 'International Human Rights and Australian Exceptionalism' (Sir Anthony Mason Lecture, Melbourne Law School, The University of Melbourne (4 August 2016)

