

**COURT OF APPEAL  
SUPREME COURT OF QUEENSLAND**

**CA NUMBER: 13499/08**

**NUMBER: 516/08**

**APPELLANT:** AURUKUN SHIRE COUNCIL

AND

**RESPONDENT:** CHIEF EXECUTIVE, OFFICE OF LIQUOR GAMING AND RACING  
IN THE DEPARTMENT OF TREASURY

**CA NUMBER: 13501/08**

**NUMBER: 528/08**

**APPELLANT:** KOWANYAMA ABORIGINAL SHIRE COUNCIL

AND

**RESPONDENT:** CHIEF EXECUTIVE, OFFICE OF LIQUOR GAMING

**SUBMISSIONS OF THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION**

1. The Human Rights and Equal Opportunity Commission (**'the Commission'**) has sought leave to appear as amicus curiae in the hearing of both appeal proceedings. The Commission does not argue for a particular outcome in the appeal, but rather seeks to identify the relevant principles of law as they apply to the appeal for the assistance of the Court.
  
2. These submissions address the following issues:
  - (a) the proper construction of s 10 of the *Racial Discrimination Act 1975* (Cth) (**'RDA'**) based on the text of the *International Convention on the Elimination of all Forms of Racial Discrimination* (**CERD**);<sup>1</sup>

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<sup>1</sup> CERD entered into force for Australia on 30 October 1975 and article 14 with effect from 28 January 1993.

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APPLICATION TO COURT OF APPEAL

Filed on behalf of the Human Rights and Equal  
Opportunity Commission

Form 69 Rule 779(2)

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**Human Rights and Equal  
Opportunity Commission**

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- (b) the recent decision of the Full Court of the Federal Court in *Bropho v State of Western Australia* (2008) 169 FCR 59 which considered the proper construction of s 10 of the RDA and the application of CERD rights;
- (c) the application of the relevant principles to these appeals; and
- (d) the proper construction of s 8 of the RDA with respect to ‘special measures’.

**Issue to be determined**

- 3. The appeals therefore pose the question whether these particular provisions of the *Liquor Act* that suspend indefinitely the ability of residents of Aboriginal communities to attend, socialise in, purchase alcohol from and consume alcohol in licensed premises located in their community are contrary to the RDA.

**RDA and CERD**

- 4. CERD aims to eliminate discrimination and achieve equality without distinction as to race, colour, descent or national or ethnic origin. These objects reflect a longstanding and widely recognised international human right of non-discrimination and equality. The RDA gives effect to CERD and the text of CERD is set out in the schedule of the RDA.
- 5. Section 9(1) contains a general provision rendering any racial discrimination unlawful. The language of article 1(1) of CERD is reproduced in section 9 of the RDA.
- 6. Section 10 does not replicate any specific provision of CERD.<sup>2</sup> Section 10 of the RDA creates a general right to equality before the law. Section 10 does not prohibit discrimination *per se* but is concerned with ensuring the equal *enjoyment* of rights of all persons under law.<sup>3</sup> Section 10 operates as a stand-alone provision in the RDA in the sense that it does not require the Court to determine whether the impugned law contravenes s 9(1) and/or (1A) of the RDA.<sup>4</sup> Further, s 10(1) does not require an impugned law to make an explicit distinction based on race. As Sackville J observed in *Jango v Northern Territory*

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<sup>2</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 99 (Mason J) (‘*Gerhardy*’). See also *Macabenta v Minister for Immigration & Multicultural Affairs* (1998) 154 ALR 591,[9].

<sup>3</sup> *Gerhardy* (1985) 159 CLR 70, 99 (Mason J), *Ward v Western Australia* (2002) 213 CLR 1,[105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>4</sup> *Ward* (1985) 159 CLR 70 99 (Mason J), 279-281 and 285-286 (Callinan J); *Vanstone v Clark* (2005) 147 FCR 299, 352 [197].

(2006) 152 FCR 150 at 324, s 10(1) is directed at ‘*the practical operation and effect*’ of the impugned legislation and is ‘*concerned not merely with matters of form but with matters of substance*’.<sup>5</sup>

7. Sections 9 and 10 of the RDA engage a wide range of human rights and freedoms, which are not limited to the human rights described in article 5 of CERD.<sup>6</sup>
8. Sections 11 to 15 of the RDA proscribe race discrimination in specific areas of public life, including access to places and facilities and the provision of goods and services. Those sections do not limit the generality of s 9 and have been described as ‘*amplifying and applying to particular cases the provisions of s 9*’.<sup>7</sup>
9. The RDA provides very limited exceptions to race discrimination. Relevantly, there is an exception to discrimination, if the conduct is a special measure: see s 8 of the RDA.

#### **Principles of interpretation relevant to RDA**

10. The following principles of interpretation apply where proceedings involve the interpretation of international human rights law, such as CERD:
  - (i) where the RDA uses the same language as CERD, the provisions of the RDA should be construed in the same way as the relevant provision of CERD is construed;<sup>8</sup>
  - (ii) when ascertaining the meaning of CERD, primacy should be given to the text of CERD with consideration of the context, objects and purposes of CERD;<sup>9</sup>
  - (iii) the manner of interpreting an international treaty is one which is more liberal than that ordinarily adopted by a court construing exclusively domestic statutes. It is undertaken in a manner unconstrained by technical local rules or precedent, but on broad principles of ‘general acceptance’;<sup>10</sup>
  - (iv) there is a presumption that Parliament intended to legislate in accordance with its international obligations;<sup>11</sup>
  - (v) a court should not impute to the legislature an intention to abrogate or curtail

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<sup>5</sup> *Jango v Northern Territory* (2007) 159 FCR 531 [115], *Gerhardy* (1985) 159 CLR 70,99 (Mason J), *Ward* (2002) 213 CLR 1, 107 at [126] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also *Sahak v Minister for Immigration & Multicultural Affairs* [2002] FCAFC 215, [34].

<sup>6</sup> *Gerhardy* (1985) 159 CLR 70, 101-2 (Mason J), 125-6 (Brennan J).

<sup>7</sup> *Ibid*, 85 (Gibbs CJ).

<sup>8</sup> *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230-31 (Brennan CJ).

<sup>9</sup> *Pilkington (Australia) Ltd v Minister of State for Justice & Customs* (2002) 127 FCR 92, [26].

<sup>10</sup> *Ibid*, [26] and authorities cited therein.

<sup>11</sup> *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 305.

fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language.<sup>12</sup>

**Proper construction of section 10 of the RDA**

11. The Commission agrees generally with the parties' submissions with respect to s 10 of the RDA.
12. As the Full Court of the Federal Court recently observed in *Bropho v State of Western Australia* (2008) 169 FCR 59 at 83 [81] – [83], the application of s 10 of the RDA requires the Court to consider:
  - (a) whether there is a relevant 'right' or 'rights' that are affected by the impugned law;
  - (b) whether persons of a particular race do not enjoy that right or enjoy it to a more limited extent than persons of another race by reason of the impugned law.

This requires asking:

- (i) whether there is a limitation upon the enjoyment of a right by people of a particular race by reason of law; and
- (ii) whether there is any limitation upon the right a legitimate one, intended to achieve a non-discriminatory purpose?

***What are the relevant 'right' or 'rights' that are affected?***

13. It is necessary to approach the meaning of 'rights' in a broad way to avoid undermining the purpose of s 10(1) of the RDA. As its title makes clear, s 10 is intended to guarantee equality before the law. Such purpose is also clear from the second reading speech of the Racial Discrimination Bill 1975: *'The Bill will guarantee equality before the law without distinction as to race.'*<sup>13</sup>
14. As the parties to the appeal note, the 'rights' protected by s 10(1) are not limited to the rights set out in CERD. It is also clear that the term 'right' as used in s 10(1) does not necessarily refer to a legal right recognised in domestic law.<sup>14</sup>

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<sup>12</sup> *S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [29] (Gleeson CJ) and see also *Phipps v Australian Leisure and Hospitality Group Ltd & Anor* [2007] QCA, [79] (McMurdo J).

<sup>13</sup> Commonwealth, *Parliamentary Debates*, Senate, 15 April 1975, 999 (the Hon Mr JJ McClelland, Minister for Manufacturing Industry).

<sup>14</sup> *Mabo No 1* (1988) 166 CLR 186, 217 (Brennan, Toohey and Gaudron JJ). See also *Gerhardy* (1985) 159 CLR 70,126 (Brennan J).

15. The Commission agrees with the Appellants' identification of the relevant rights. The Commission submits that the Respondent has adopted a narrow approach which is contrary to the approach identified by Deane J in *Mabo No 1*. The Commission submits that the identification of the human right in question is not answered by simply asking, 'what does the Appellant or its members wish to *do*?'. Rather, the focus should be on the impugned law and the impact that law will have on the manner in which the members of the relevant community interact with each other and the individual members' rights to live free from discrimination.

***Equality before the law generally***

16. The Commission agrees with the Appellants' submission that the impugned provisions of the *Liquor Act* have the practical effect of making a distinction between Indigenous and non-Indigenous people in Queensland. The distinction which in practical terms imposes a different regime of alcohol regulation for the Appellants is sufficient to engage the human right of equality and non-discrimination.

***Access to goods***

17. The right to access goods is explicitly recognised by the RDA in s 13. It is unlawful to refuse to supply goods or services *or* to refuse to supply goods or services except on less favourable terms or conditions, by reason of the race of a person. This right is not concerned with the nature of the particular goods in question. Rather it is concerned with the right to access the goods which are generally offered for sale.
18. The Commission submits that s 106(4) of the *Liquor Act* engages the right of access to goods. That right includes the terms and conditions upon which a person may access those goods – including limitations on the ability to possess them.

***The right to engage freely in public activity***

19. It is alternatively open to the Court to find that the relevant provisions of the *Liquor Act* engage the rights of members of the Aurukun and Kowanyama communities to 'engage freely in public activity', namely access to alcohol. This is consistent with broad approach that the High Court has held is appropriate to the rights protected by s 10(1).

***Right to property***

20. The Commission notes the Appellants' submissions addressing the right to property. The Commission does not agree with the narrow approach taken by the Respondents. The human right to property is described in article 5(d)(v) of CERD and article 17 of the 1948 Universal Declaration of Human Rights.
21. The High Court in *Ward v Western Australia* (2002) 213 CLR 1 at 103-104 [116] held that the relevant right to property encompassed an immunity from arbitrary deprivation of property and that property '*includes lands and chattels as well as interests therein*', including native title rights and interests. The High Court observed that the CERD rights are identified in terms of 'complete generality'.<sup>15</sup>
22. The Commission submits that the question of 'ownership' takes its meaning and shape from the nature of the property. In the present matter, it is open to the Court to accept that rights in relation to a licence are a form of property.

#### **Permissible limitations on rights – *Bropho* decision**

23. The Commission submits that both parties' submissions address the identification of the rights in question but do not consider the application of the rights and the extent to which those rights may be limited. The Commission notes that the Respondents do raise countervailing rights in the context of its submissions about special measures, but it is appropriate to consider those rights at this stage.
24. Very few human rights have an absolute character, in the sense that there may be no limitation or restriction of the right. Where there are claims of competing rights or interests, a court may be called on to strike a balance between the competing claims and determine when and how certain rights may be limited. In *Bropho*, the Full Court accepted that some forms of differential treatment resulting from the operation or effect of a State law are permissible if it has a legitimate and non-discriminatory public goal.<sup>16</sup>
25. In *Bropho* the Court identified the permissible limits could be placed upon the right to property at international law. The Court held that '*a State has a right to enforce such laws as it deems necessary to control the use of property in accordance with the general*

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<sup>15</sup> At 105 [119].

<sup>16</sup> At [83]. Mason J took a similar approach to the right to freedom of movement in *Gerhardy* (1985) 159 CLR 70, 102-4.

*interest*'. The Court held that '*no invalid diminution of property rights occurs where the State acts in order to achieve a legitimate and non-discriminatory public goal*'.<sup>17</sup> The Court found that the laws in that case interfered with the rights of the Indigenous residents, but did so for the purpose of protecting the safety and welfare of the residents, particularly women and children. They were therefore not invalidated by s 10(1) of the RDA.

### **Applying *Bropho***

26. A number of points may be noted in applying the decision in *Bropho* and determining what will constitute a 'legitimate' interference with rights.<sup>18</sup> The Commission submits that the following steps should be considered.
27. First, when determining the legitimacy of a limitation of a right, the assessment is an objective one – it is not sufficient, for example, that the legislature lacked a discriminatory motive or intention.
28. Second, proportionality will be a vital factor in making assessments of what is 'legitimate', 'reasonable' or 'justifiable' – a measure will not be legitimate if its impact upon rights is disproportionate to the claimed purpose or benefit of the measure. In considering proportionality it is appropriate to consider the following:
  - Is the measure applied only for a specific purpose and directly related to a specific need?
  - Is the regime the least restrictive one available to achieve the lawful objectives pursued? The court should consider whether the measure can reasonably be said to involve the least possible interference with the right to be free from race discrimination.
29. Third, the legitimacy of any limitation upon a right must be assessed in the context of the right in question: not all rights can necessarily be limited in the same ways.<sup>19</sup>
30. Fourth, because the 'balancing' of rights is taking place in the context of the right to racial equality before the law and non-discrimination, legitimacy should be judged against the

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<sup>17</sup> At [83].

<sup>18</sup> see United Nations Economic and Social Council Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN4/1985/4, Annex (1985) ('Siracusa Principles').

<sup>19</sup> Siracusa Principles, [4].

objectives and purposes of CERD and another relevant human rights instrument such as the ICCPR.<sup>20</sup>

**Relevance of limitations to the issues raised in the appeals – is there a limitation on the enjoyment of the right by Indigenous people?**

31. The terms of s 106(4) of the *Liquor Act* are directed to those bodies listed in the section ('local government, corporatised corporation or relevant public sector entity'), and members of the Aurukun and Kowanyama communities are therefore affected in their ability to exercise their rights (outlined above) in circumstances where 'the only local governments holding such licences are Aboriginal Councils'.<sup>21</sup>
32. Whilst s 106(4) of the *Liquor Act* does not prevent the premises in question from being licensed, only that a 'local government, corporatised corporation or relevant public sector entity' is unable to apply for or hold a licence,<sup>22</sup> the practical operation and effect of the section is that the limitation exists until such time as a new licence is granted. The limitation is a complete one and for an uncertain period of time.<sup>23</sup>
33. The Commission agrees with the Appellant<sup>24</sup> that the comparison undertaken by Jones J of the effect of s 106(4) on the ability of Indigenous and non-Indigenous people who accessed the goods and services offered by the Three Rivers Tavern was erroneous. The relevant legislative changes were explicitly aimed at those local governments who held a liquor licence, all of whom were Aboriginal councils who manage predominantly Indigenous communities, in order to 'break the nexus between profits from the sale of alcohol and delivery of services'.<sup>25</sup> The correct approach, therefore, is to consider the effect of the prohibition on the rights of the predominantly Indigenous residents of these communities in comparison to the rights of non-Indigenous people in other parts of the Queensland rather

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<sup>20</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation 14: Definition of Racial Discrimination* (Forty-second session), UN Doc A/48/18 at 114 (1994), [2] and Human Rights Committee *General Comment 18: Non-discrimination*, (Thirty –seventh session), UN Doc A/45/40 (1989), [13].

<sup>21</sup> *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2008] QSC 305, [19].

<sup>22</sup> See also Respondent's Outline of Argument in relation to Aurukun and Kowanyama appeals, [21].

<sup>23</sup> Particularly given what is said in relation to the likely delays in finding a replacement licensee given that alternate licensees are not readily available in the short term in isolated indigenous communities: Appellants' Outline of Argument in Aurukun ([45]) and Kowanyama ([42]).

<sup>24</sup> Appellants' Outline of Argument in Aurukun ([46]-[47]) and Kowanyama ([43]-[44]).

<sup>25</sup> Explanatory notes to *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Bill 2008*, 16.



than in comparison to the rights of visitors, such as workers employed at a nearby mine site.<sup>26</sup>

**Are any limitations upon the rights in this case legitimate?**

34. In the present matter, it is important to consider the reasons for the limitation of the relevant rights. Justice Jones accepted that the ‘trigger’ for the amending legislation was an attempt to minimize the harmful effects of alcohol abuse that had been observed in Aboriginal Council lands: see para [41] of the reasons for judgment.
35. Further, it appears that the Legislature’s objective was to divest canteens from local governments because the government considered it inappropriate for ‘local government social services being reliant on the level of profit from a business whose purpose is to sell alcohol, particularly when alcohol-related harm is driving the need for those services.’<sup>27</sup>
36. The Commission notes that whether the objective includes the promotion and protection of the rights of others, such as eliminating violence against women and children, where there is evidence that the violence flows in large part from alcohol use, are all legitimate reasons for seeking to limit the rights in question.
37. The critical question is whether the legislative changes are a proportionate response. This involves the Court asking whether the relevant provisions of the *Liquor Act* can reasonably be considered to involve the least possible interference with the rights outlined in order to achieve their stated purpose or whether the measures in question exceed what is necessary to achieve the stated objectives. Relevant to this question is what other measures could have been implemented to deal with the issues sought to be addressed by the legislative changes ie breaking the nexus between profits from the sale of alcohol and delivery of services against a background of a wider government legislative and non-legislative strategies to reduce the level of alcohol related harm in Indigenous communities.

**Special measures**

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<sup>26</sup> *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2008] QSC 305, [25]. This accords with the approach taken in *Ward* (2002) 213 CLR 1, 104 [117] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>27</sup> Explanatory notes to *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) and Other Acts Amendment Bill 2008*, 9.

38. The expression ‘special measures’ is not defined in s 8 of the RDA and it takes its meaning directly from article 1(4) of CERD. It is generally accepted that the four elements identified by Brennan J in *Gerhardy* must exist before a measure is a special measure.<sup>28</sup>
39. In *Gerhardy*, Brennan J highlighted the importance of consultation with the prospective beneficiaries.<sup>29</sup> Brennan’s approach is consistent with general principles of international law and the circumstances in which special measures should apply.<sup>30</sup> If it is accepted that is necessary for a measure to be ‘appropriate and adapted’ to the relevant purpose of advancing the particular group,<sup>31</sup> the Commission submits that it is not possible to reach that conclusion without considering the wishes of the beneficiaries. To take any other approach contemplates a paternalism that considers irrelevant the views of a group as to their wellbeing and decisions materially affecting them.
40. The wishes of the beneficiaries may not be determinative of whether the measure in question is a special measure. The extent of consultation and the need for consent must be considered in the context of each particular case. Consulting with, and seeking the consent of, the group that is to be the subject of the special measure is consistent with the protection of the rights of minorities and the right to self-determination.<sup>32</sup>

K.L. Eastman

Counsel for the Commission

2 July 2009

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<sup>28</sup> at 133.

<sup>29</sup> at 135.

<sup>30</sup> CERD Committee, General Recommendation XXIII concerning Indigenous Peoples, (Fifty-first session) UN Doc A/52/18 (1992), [4(d)]. See CERD Committee, General recommendation XXI on the right to self-determination, (Forty-eighth session), UN Doc A/51/18 (1996),[2]. The European Union’s Racial Equality Directive 2000/43/EC provides for special measures (article 5) and the concept of social dialogue (article 11) wherein all interested parties engage in a dialogue.

<sup>31</sup> *Gerhardy* (1985) 159 CLR 70 105 (Mason J), 149 (Deane J).

<sup>32</sup> Articles 27 and 1 respectively of the International Covenant on Civil and Political Rights.