

**COURT OF APPEAL
SUPREME COURT OF QUEENSLAND**

CA NUMBER: 178/09

NUMBER: D75/08

APPELLANT: FLORENCE MAY MORTON
AND
RESPONDENT: QUEENSLAND POLICE SERVICE

SUBMISSIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

1. The Australian Human Rights Commission ('the Commission') has sought leave to appear as amicus curiae in these appeal proceedings. The Commission does not argue for a particular outcome in the appeal, but rather seeks to identify the relevant principles of law 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');¹
 - (b) the recent decision of the Full Court of the Federal Court in *Bropho v State of Western Australia* (2008) 169 FCR 59 ('*Bropho*') 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 this appeal; and
 - (d) the proper construction of s 8 of the RDA with respect to 'special measures'.

¹ *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). CERD entered into force for Australia on 30 October 1975.

APPLICATION TO COURT OF APPEAL

Filed on behalf of the Australian Human Rights Commission

Form 69 Rule 779(2)

**Australian Human Rights
Commission**

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ISSUE TO BE DETERMINED

3. The relevant effects of the *Liquor Act 1992* (Qld) ('Liquor Act') and the *Liquor Regulation 2002* (Qld) ('the Regulations') are to make it an offence for a person to possess on Palm Island more than one case of mid strength or light beer and to prohibit the possession of any other form of alcohol.²
4. The Regulations also declare 17 other Indigenous communities to be restricted areas.³
5. The appellant, who is an Aboriginal woman, was convicted of an offence under s 168B(1) of the Liquor Act, having been found in possession of two bottles of whiskey on Palm Island.
6. The appeal poses the question whether the particular provisions of the Liquor Act and the Liquor Regulations that operate to restrict the possession of alcohol on Palm Island are contrary to the RDA.

OVERVIEW OF RDA AND ITS IMPLEMENTATION OF CERD

7. 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.
8. Section 9(1) of the RDA contains a general provision rendering acts of racial discrimination unlawful. The section reproduces the language of article 1(1) of CERD.
9. Section 10 of the RDA does not replicate any specific provision of CERD;⁴ instead, it creates a general right to equality before the law. It does not prohibit discrimination *per se* but is concerned with ensuring the equal *enjoyment* of rights of all persons under law.⁵

² Section 168B of the *Liquor Act 1992* (Qld) makes it an offence to possess more than a prescribed quantity of a type of liquor in a restricted area. Restricted areas are declared by regulation pursuant to ss 173G and 173H. Schedule 1R of the *Liquor Regulations 2002* (Qld) declares Palm Island to be a restricted area. Paragraph 2 of sch 1R provides that the prescribed quantity of alcohol is 11.25 litres of beer less than 4% alcohol and for any other liquor zero.

³ See Schedules 1A-R of the *Liquor Regulations 2002* (Qld).

⁴ *Gerhardy v Brown* (1985) 159 CLR 70, 99 (Mason J) ('Gerhardy'). See also *Macabenta v Minister for Immigration & Multicultural Affairs* (1998) 154 ALR 591, [599].

⁵ *Gerhardy* (1985) 159 CLR 70, 99 (Mason J); *Ward v Western Australia* (2002) 213 CLR 1, 99 [105] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('Ward').

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.⁶ Further, s 10(1) does not require an impugned law to make an explicit distinction based on race: it 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'*.⁷

10. 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.⁸
11. 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'*.⁹
12. 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

13. The following principles of interpretation are relevant to these proceedings:
 - (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;¹⁰
 - (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;¹¹
 - (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'*;¹²

⁶ *Gerhardy* (1985) 159 CLR 70, 99 (Mason J); *Ward* (2002) 213 CLR 1, 98 [101]-[103] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Vanstone v Clark* (2005) 147 FCR 299, 352 [197] (Weinberg J).

⁷ *Mabo v Queensland (No 1)* (1998) 166 CLR 186, 230 (Deane J) (*'Mabo No 1'*); *Jango v Northern Territory* (2006) 152 FCR 150, 234 [667]; *Ward* (2002) 213 CLR 1, 103 [115] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Gerhardy* (1985) 159 CLR 70, 99 (Mason J).

⁸ *Gerhardy* (1985) 159 CLR 70, 101-2 (Mason J), 125-6 (Brennan J).

⁹ *Ibid*, 85 (Gibbs CJ).

¹⁰ *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230-31 (Brennan CJ).

¹¹ *Pilkington (Australia) Ltd v Minister of State for Justice & Customs* (2002) 127 FCR 92, 100 [26].

¹² *Ibid*, 100 [26] and authorities cited therein.

- (iv) there is a presumption that Parliament intended to legislate in accordance with its international obligations;¹³ and
- (v) a court should not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language.¹⁴

PROPER CONSTRUCTION OF SECTION 10 OF THE RDA

14. Section 10 of the RDA relevantly provides:

(1) 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.

(2) 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.

15. As the Full Court of the Federal Court 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; and
- (b) if so, 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.

16. This second step requires the Court to ask:

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

(a) What are the relevant ‘right’ or ‘rights’ that are affected?

17. It is necessary to approach the meaning of ‘rights’ in a broad way to avoid undermining the

¹³ *Polites v Commonwealth* (1945) 70 CLR 60, 68-69 (Latham CJ), 77 (Dixon J), 80-81 (Williams J); *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 304 (Gummow J).

¹⁴ *Coco v The Queen* (1994) (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); *S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ) and see also *Phippis v Australian Leisure and Hospitality Group Ltd & Anor* [2007] QCA 130, [79] (Phillip McMurdo J).

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.'*¹⁵

18. 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.¹⁶

Equality before the law generally

19. The impugned provisions of the Liquor Act and the Regulations 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 Appellant and other Indigenous people when compared to non-Indigenous people - is sufficient to engage the human right of equality and non-discrimination.

Access to goods

20. The Commission agrees with the Appellant's identification of this right and the submissions made by the Appellant about the right.¹⁷
21. The Commission submits that the Liquor Act and Regulations engage 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

22. The Commission agrees with the Appellant's identification of this right and the submissions made by the Appellant about the right.¹⁸

(b) Is there a limitation on the enjoyment of the right by Indigenous people?

23. The Commission agrees with Appellant's submissions to the effect that there is a limitation

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

¹⁶ *Mabo (No 1)* (1988) 166 CLR 186, 217 (Brennan, Toohey and Gaudron JJ). See also *Gerhardy* (1985) 159 CLR 70,126 (Brennan J).

¹⁷ See Appellant's Outline of Argument ([24]) which largely reflects the Commission's submission on this issue in the District Court appeal (AB 400, [33]-[35]).

¹⁸ See Appellant's Outline of Argument ([25]) which largely reflects the Commission's submission on this issue in the District Court appeal (AB 400, [36]).

on the rights of Indigenous people arising from the Liquor Act and Regulations.¹⁹

(c) Permissible limitations on rights – *Bropho* decision

24. The Commission submits that whilst the Appellant’s submissions address the identification of the rights in question, they do not consider the application of the rights and the extent to which those rights may be limited.
25. 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 the law has a legitimate and non-discriminatory public goal.²⁰
26. 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 interest*’.²¹ The Court also held that ‘*no invalid diminution of property rights occurs where the State acts in order to achieve a legitimate and non-discriminatory public goal*’.²² 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.

(d) Applying *Bropho*

27. A number of points may be noted in applying the decision in *Bropho* and determining what will constitute a ‘legitimate’ interference with rights.²³ The Commission submits that the following steps should be considered.

¹⁹ See Appellant’s Outline of Argument ([28]) which largely reflects the Commission’s submission on this issue in the District Court appeal (AB 400, [43]-[48]).

²⁰ *Bropho v State of Western Australia* (2008) 169 FCR 59,[83] (*‘Bropho’*). Mason J took a similar approach to the right to freedom of movement in *Gerhardy* (1985) 159 CLR 70, 102-4.

²¹ *Bropho* (2008) 169 FCR 59, 82 [80].

²² *Ibid*, [83].

²³ See United Nations Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985) (*‘Siracusa Principles’*).

28. 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.²⁴
29. 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, the Court should 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.
30. 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.²⁵
31. 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 objectives and purposes of CERD and another relevant human rights instrument such as the ICCPR.²⁶

(e) Are any limitations upon the rights in this case legitimate?

32. In this matter, it is important to consider the reasons for the limitation of the relevant rights. Judge Durward noted that the provisions of the Liquor Act and the Regulations reflected the recommendations in the Cape York Justice Study Report in 2001 (‘the Report’). This highlighted the seriousness of the alcohol problem in Indigenous communities in unequivocal terms.²⁷

²⁴ This is consistent with the High Court’s decision in *Ward* (2002) 213 CLR 1, 103 [115] (Gleeson, Gaudron, Gummow and Hayne JJ).

²⁵ Siracusa Principles, [4].

²⁶ Committee on the Elimination of Racial Discrimination (CERD Committee), *General Recommendation 14: Definition of Racial Discrimination*, 42nd sess, UN Doc A/48/18 at 114 (1994), [2] and Human Rights Committee *General Comment 18: Non-discrimination*, 37th sess, UN Doc A/45/40 [13] (1989).

²⁷ See para [14] of the reasons for judgment.

33. Further, it appears that the Legislature’s objective was to ‘prevent harm in community areas caused by alcohol abuse and misuse and associated violence’.²⁸ The explanatory notes to the Indigenous Communities Liquor Licences Bill 2002 noted that the Report had recommended immediate Government intervention and that unless the epidemic of alcohol abuse in Indigenous communities was addressed, reforms in social and economic development and education would not be sustainable.²⁹ The Report recommended that Government should first seek to work with and empower Indigenous communities to take action to address alcohol, but that if this community based approach did not result in improvements within three years, the Government should consider prohibiting alcohol altogether.³⁰
34. The key mechanisms in the Bill were described as the ability to declare limits on carrying and possessing alcohol in restricted areas and the ability to impose new licence conditions on licensed premises in and adjacent to Indigenous communities. The advice of community justice groups was said to be ‘central in determining the particular controls that will be put in place’. It was anticipated that that Alcohol Management Plans developed by community justice groups in conjunction with members of their communities would be the primary source of guidance in implementing the alcohol controls.³¹
35. The Commission submits that the objectives of eliminating alcohol-related harm and violence against women and children are legitimate reasons for limiting the rights in question. Governments have an obligation to protect the right to security of the person³² and to protect and care for the wellbeing of children.³³ They also have an obligation to protect the right to the ‘highest attainable standard of physical and mental health’³⁴ and ‘to ensure to the maximum extent possible the survival and development of the child’.³⁵
36. The critical question, however, is whether the legislative changes are a proportionate

²⁸ Explanatory notes to *Indigenous Communities Liquor Licences Bill 2002*, 1.

²⁹ Explanatory notes to *Indigenous Communities Liquor Licences Bill 2002*, 2.

³⁰ Explanatory notes to *Indigenous Communities Liquor Licences Bill 2002*, 2.

³¹ Explanatory notes to *Indigenous Communities Liquor Licences Bill 2002*, 2.

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, art 9 (entered into force 23 March 1976) (‘ICCPR’).

³³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘CRC’).

³⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, art 12(1) (entered into force 3 January 1976) (‘ICESCR’).

³⁵ CRC, art 6(2).

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. Relevant to this question is what other measures could have been implemented on Palm Island to deal with issues surrounding the abuse/misuse of alcohol and/or the prevention of alcohol-related disturbances and violence.

37. Also relevant to the question of determining whether the limitations upon rights in the present case are legitimate are the wishes of Indigenous people in relation to measures affecting them, reflecting the right of Indigenous people to self-determination.³⁶ In this regard, the Commission notes that the Liquor Act provides for consultation with a community justice group for a particular community area.³⁷ The Minister must consult with the community justice group and consider any recommendations made by the community justice group³⁸ but a failure to do so does not affect the validity of a regulation.³⁹

SPECIAL MEASURES

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. In *Gerhardy*, Brennan J identified the criteria of a special measure as follows:⁴⁰

A special measure (1) confers a benefit on some or all members of a class (2) the membership of which is based on race, colour, descent, 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.

39. In the same case, Mason J and Deane J indicated that the special measure had to be reasonably ‘appropriate and adapted’ to achieving the sole purpose of advancing a particular group.⁴¹

³⁶ Reflected in art 1 of both the ICCPR and ICESCR. The *Declaration on the Rights of Indigenous Peoples* (adopted by GA Res 295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/Res/61/295 (2007)) affirms this right and art 19 endorses the standard of ‘free, prior and informed consent’ in dealings with Indigenous peoples.

³⁷ *Liquor Act 1992* (Qld), s 173I.

³⁸ *Liquor Act 1992* (Qld), s 173I(2).

³⁹ *Liquor Act 1992* (Qld), s 173I(4).

⁴⁰ *Gerhardy* (1985) 159 CLR 70, 133 (Brennan J).

⁴¹ *Gerhardy* (1985) 159 CLR 70, 105 (Mason J), 149 (Deane J).

40. While it is appropriate to consider the legislation as a whole when determining whether it is a ‘special measure’, the individual parts must still be ‘appropriate and adapted’ to the permissible purpose. In *Vanstone v Clark*,⁴² Weinberg J (with whose reasons Black CJ agreed) considered a submission that all legislative provisions forming part of a special measure were incapable of being racially discriminatory under the RDA. His Honour did not accept the submission, and observed that if it were correct then ‘any provision of an ancillary nature that inflicted disadvantage upon the group protected under a “special measure” would itself be immune from the operation of the RDA simply by reason of it being attached to that special measure.’⁴³ Consistently with this authority, it was necessary for the Court to consider whether the declaration of Palm Island as a restricted area satisfied the test for a special measure, as opposed to the introduction of the general provisions of the Liquor Act and the Regulations and their application to Indigenous communities generally.
41. It was also necessary to consider the wishes of the particular beneficiaries of the special measure. In *Gerhardy*, Brennan J highlighted the importance of consultation with the prospective beneficiaries in this way:⁴⁴

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.

42. His Honour’s approach is consistent with general principles of international law and the circumstances in which special measures should apply.⁴⁵ The Commission submits if a measure must be ‘appropriate and adapted’ to the purpose of advancing a particular group, then it is impossible to form a view as to whether a measure is ‘appropriate and adapted’ to

⁴² (2005) 147 FCR 299.

⁴³ *Ibid*, 354 [209].

⁴⁴ *Gerhardy* (1985) 159 CLR 70, 135 (emphasis added).

⁴⁵ CERD Committee, *General Recommendation 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, 75th sess, UN Doc CERD/C/GC/32 [18] (2009); CERD Committee, *General Recommendation 23 concerning Indigenous Peoples*, 51st sess, UN Doc A/52/18 [4(d)] (1992). See also CERD Committee, *General recommendation 21 on the Right to Self-Determination*, 48th sess, UN Doc A/51/18 [2] (1996). The European Union’s Racial Equality Directive 2000/43/EC provides for special measures (art 5) and the concept of social dialogue (art 11) wherein all interested parties engage in a dialogue.

the relevant purpose of advancing the particular group⁴⁶ without considering the wishes of the group.

43. In this case, the legislation is intended to benefit a racial group or members of it, but it does so by limiting certain rights of some, or all, of that group. In these circumstances, the consent of the group is of heightened importance and any failure to seek or obtain such consent is of particular significance. This approach is required to adequately protect the rights of minorities and the right of Indigenous peoples to self-determination.⁴⁷

STATUTORY FACTS

44. In *Gerhardy*, Brennan J indicated that in determining whether a law was inconsistent with a Commonwealth law for the purpose of s 109 of the Constitution, the Court was not limited to the facts placed before it by the parties.⁴⁸ That position is consistent with earlier and later authorities on constitutional fact-finding.⁴⁹ Subject to affording the parties the opportunity to respond to the material upon which the Court proposes to rely,⁵⁰ the Court can take into account matters relevant to the validity of the impugned legislation. That includes the extent and adequacy of consultation with the proposed beneficiaries.

G Del Villar

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10 February 2010

⁴⁶ *Gerhardy* (1985) 159 CLR 70, 105 (Mason J), 149 (Deane J).

⁴⁷ ICCPR, arts 27 and 1 respectively; ICESCR, art 1; *United Nations Declaration on the Rights of Indigenous People*, art 19; CERD Committee, *General Recommendation 23 concerning Indigenous Peoples*: States parties are to ‘ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decision directly relating to their rights and interests are taken without their informed consent...’ [4(d)].

⁴⁸ *Gerhardy* (1985) 159 CLR 70, 141-142.

⁴⁹ See, for example, *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292 (Dixon CJ); *Breen v Sneddon* (1961) 106 CLR 406, 411 (Dixon CJ); *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559, 622 (Jacobs J); *Thomas v Mowbray* (2007) 233 CLR 307, 514-522 [620]-[637] (Heydon J).

⁵⁰ *Thomas v Mowbray* (2007) 233 CLR 307, 513 [618], 521 [637] (Heydon J).