

## 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

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### I INTRODUCTION

In *Maloney v The Queen* ('*Maloney*'),<sup>1</sup> the High Court of Australia assessed the alcohol management laws in place on Palm Island for compliance with the *Racial Discrimination Act 1975* (Cth) ('*Act*'), which gives domestic effect to Australia's international obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*Convention*').<sup>2</sup> The six judgments are notable for their approaches to the interpretation of international law, their use of non-binding international legal materials (especially treaty body output) and for the way in which these approaches informed the interpretation of the *Act* and the *Convention*. This note focuses on these interpretive approaches, rather than the Court's ultimate conclusion as to the requirements of the *Act* and the *Convention*,<sup>3</sup> and concludes that the majority of the members of the Court have adopted an approach to the interpretation of international law that is unjustifiably narrow.

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<sup>1</sup> *Maloney v The Queen* [2013] HCA 28 (19 June 2013) ('*Maloney*').

<sup>2</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*').

<sup>3</sup> For a more detailed consideration of the merits of the Court's conclusion, see Simon Rice, 'Case Note: *Joan Monica Maloney v The Queen* [2013] HCA 28' (2013) 8(7) *Indigenous Law Bulletin* 28. See also Alex Lockie, 'Palm Island Alcohol Restrictions are "Special Measures"' (2013) 86 *Human Rights Law Centre — Rights Agenda* 18.

## II FACTS

Palm Island lies off the Queensland coast, just to the north of Townsville, and has an almost exclusively Indigenous population of approximately 2000 people. On 31 May 2008, Joan Monica Maloney, one of the island's Indigenous residents, was discovered to be in possession of a bottle of Jim Beam bourbon and a partly-full bottle of Bundaberg Rum, which were found in a backpack in the boot of her car on Park Road, Palm Island. Possessing more than 11.25 litres of light or mid-strength beer (ie thirty 375 ml cans) or any quantity of any other liquor in the 'community areas' of Palm Island (of which Park Road was part) was an offence by the combined operation of ss 168B, 173G and 173H of the *Liquor Act 1992 (Qld)* ('*Liquor Act*'), as well as regs 37A, 37B and sch 1R of the *Liquor Regulation 2002 (Qld)*.<sup>4</sup> Ms Maloney was charged and convicted of such an offence in her absence by the Magistrates Court for the District of Townsville, ordered to pay a fine of \$150 within two months and to spend one day in prison in default of payment.

Ms Maloney appealed against the conviction to the District Court of Queensland<sup>5</sup> and the Queensland Court of Appeal.<sup>6</sup> Both appeals were dismissed. By special leave, she appealed to the High Court. In all three courts, her argument consisted of the same three steps.

First, she argued that the legislative provisions that gave effect to the prohibition ('the impugned provisions') were inconsistent with her rights to equality before the law under s 10 of the *Act*. Section 10 provides, to the extent relevant, as follows:<sup>7</sup>

- (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*.

Article 5 of the *Convention* provides as follows, to the extent relevant:

In compliance with the fundamental obligations laid down in article 2 of this *Convention*, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

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<sup>4</sup> See the consideration of the legislative framework in *Maloney* [2013] HCA 28 (19 June 2013) [27]–[31] (French CJ).

<sup>5</sup> *Maloney v Queensland Police Service* [2011] QDC 139 (27 July 2011).

<sup>6</sup> *R v Maloney* [2013] 1 Qd R 32.

<sup>7</sup> For a general overview of the Court's jurisprudence concerning s 10, see *Maloney* [2013] HCA 28 (19 June 2013) [298]–[308] (Gageler J). Gageler J also reviews other relevant Australian decisions: at [309]–[316].

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- ...
- (d) Other civil rights, in particular:
  - ...
  - (v) The right to own property alone as well as in association with others;
  - ...
- (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.

The second step in Ms Maloney's argument was that the impugned provisions were not saved by the exception for 'special measures' in s 8 of the *Act*. Section 8 provides that s 10 'does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the *Convention* applies'. Article 1(4) of the *Convention* states that:

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. (Emphasis added for reasons that will become apparent.)

The final step in Ms Maloney's argument was that, because they were inconsistent with s 10 and not saved by s 8, the impugned provisions were invalid by operation of s 109 of the *Australian Constitution*. Section 109 provides that '[w]hen a law of a State [here, the impugned provisions] is inconsistent with a law of the Commonwealth [here, the *Act*], the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

The High Court, by majority (Kiefel J dissenting), found in Ms Maloney's favour in relation to the first proposition, but unanimously rejected the balance of her argument and dismissed the appeal. All six judges who comprised the Court wrote separate judgments.<sup>8</sup>

Since the Court's reasons were published, the Parliamentary Joint Committee on Human Rights ('the Parliamentary Committee')<sup>9</sup> has expressed its views on the requirements for special measures in the *Act* and the *Convention*.<sup>10</sup> It has also reflected on *Maloney* and concluded that the High Court 'adopt[ed] a number of conclusions which are arguably not in conformity with the current state of international law and practice relating to special measures'.<sup>11</sup> As noted above, however, this note focuses on the Court's approach to the interpretation of

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<sup>8</sup> The judgments of each member of the Court are as follows: *Maloney* [2013] HCA 28 (19 June 2013) [1]–[48] (French CJ), [49]–[111] (Hayne J), [112]–[139] (Crennan J), [140]–[189] (Kiefel J), [190]–[254] (Bell J), [255]–[380] (Gageler J).

<sup>9</sup> Established pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 4.

<sup>10</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Stronger Futures in the Northern Territory Act 2012 and related Legislation* (2013).

<sup>11</sup> *Ibid* 24 [1.85].

international law, not the accuracy of the Court's conclusion on any substantive question of law.

### III THE ROLE OF INTERNATIONAL LAW AND INTERNATIONAL MATERIALS IN THE INTERPRETATION OF THE *RACIAL DISCRIMINATION ACT*<sup>12</sup>

The disposition of the case turned in large part on the interpretation to be given to ss 8 and 10 of the *Act*. The preamble to the *Act* sets out its purposes, including, 'in particular, to make provision for giving effect to the *Convention*' and both ss 8 and 10 refer directly to the *Convention*.

All members of the Court recognised the legitimacy of referring to international law and, specifically, the *Convention* in interpreting the *Act*, but did so on two different bases.<sup>13</sup> Hayne, Crennan and Kiefel JJ did so on the basis that legislation incorporating a treaty is to be interpreted in accordance with the ordinary canons of statutory construction, one of which is that the statute should be interpreted as far as possible in accordance with international law.<sup>14</sup> French CJ and Bell J, on the other hand, cited the following comments of Brennan CJ in *Applicant A v Minister for Immigration and Ethnic Affairs*:

If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.<sup>15</sup>

Gageler J's approach appears to have been similar to that of French CJ and Bell J.<sup>16</sup>

Thus, although divided on the means by and extent to which international law was relevant to the interpretation of ss 8 and 10, all members agreed on the need to ascertain the content of international law and, in particular, the meaning of the *Convention* on the topics of racial discrimination and special measures. In order to interpret the *Act*, therefore, the Court needed to interpret the *Convention*. Unfortunately, when it came to determining the materials that may be used when interpreting the *Convention* (and, derivatively, the *Act*), their Honours overlooked the role that customary international law had to play and, to varying degrees, sought to reduce or eliminate the relevance of extrinsic international

<sup>12</sup> See generally Stephen Tully, '25.2 International Law' in Perry Herzfeld, Thomas Prince and Stephen Tully (eds), *Interpretation and Use of Legal Sources: The Laws of Australia* (Thomson Reuters, 2013) 403.

<sup>13</sup> See, eg, *Maloney* [2013] HCA 28 (19 June 2013) [23] (French CJ), [61] (Hayne J), [134] (Crennan J), [263] (Gageler J).

<sup>14</sup> *Ibid* [61] (Hayne J), [134] (Crennan J), [174]–[175] (Kiefel J). For the first of these two propositions, their Honours cited *Minister for Home Affairs v Zentai* (2012) 246 CLR 213, 238 [65] (Gummow, Crennan, Kiefel and Bell JJ), which in turn cited *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ) and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

<sup>15</sup> (1997) 190 CLR 225, 230–1 (Brennan CJ) (citations omitted), citing *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 265, cited in *Maloney* [2013] HCA 28 (19 June 2013) [14] (French CJ), [235] (Bell J).

<sup>16</sup> *Maloney* [2013] HCA 28 (19 June 2013) [326].

legal materials, such as the output of treaty bodies, that have legitimate interpretive value as a matter of international law.

### A *The Role of Customary International Law*

No member of the Court considered the role that customary international law might have to play in interpreting the *Convention*. Customary international law is, however, a legitimate source of interpretive guidance:<sup>17</sup> art 31(3)(c) of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*') provides that 'any relevant rules of international law applicable in the relations between the parties' to a treaty 'shall be taken into account' when interpreting that treaty.<sup>18</sup> Article 31(3)(c) contains an 'implicit reference' to art 38(1) of the *Statute of the International Court of Justice*, which is 'generally regarded as a complete statement of the sources of international law'<sup>19</sup> and which includes 'international custom'.<sup>20</sup> Customary international law is therefore relevant to treaty interpretation and using it for that purpose helps to prevent the fragmentation of international law.<sup>21</sup>

Ms Maloney,<sup>22</sup> the Commonwealth Attorney-General,<sup>23</sup> the Australian Human Rights Commission,<sup>24</sup> the Attorney-General for Western Australia<sup>25</sup> (all intervening) and the National Congress of Australia's First Peoples Ltd

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<sup>17</sup> See Joan Monica Maloney, 'Appellant's Submissions', Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 10 [46].

<sup>18</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(c) ('*Vienna Convention*').

<sup>19</sup> Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7<sup>th</sup> ed, 2008) 5. See also *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 559 (Brennan J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 590 [64] (McHugh J); Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (Longman, 9<sup>th</sup> ed, 1992) vol 1, 24; Malcolm N Shaw, *International Law* (Cambridge University Press, 6<sup>th</sup> ed, 2008) 70; Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2008) 4.

<sup>20</sup> *Statute of the International Court of Justice* art 38(1)(b).

<sup>21</sup> Oliver Dörr, 'Article 31: General Rule of Interpretation' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 521, 561.

<sup>22</sup> Joan Monica Maloney, 'Appellant's Submissions', Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 13–14 [56]–[58].

<sup>23</sup> Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth (Intervening)', Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 18–19 [72] ('The *United Nations Declaration on the Rights of Indigenous People* is a resolution of the UN General Assembly and as such, not legally binding on states and does not affect existing Australian law').

<sup>24</sup> Australian Human Rights Commission, 'Australian Human Rights Commission's Submissions Seeking Leave to Intervene', Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 11 [60], 15–17 [82].

<sup>25</sup> Attorney-General (WA), 'Written Submissions of the Attorney-General for Western Australia (Intervening)', Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 7–8 [26] ('In terms of Article 31(3) of the *Vienna Convention*, the *United Nations Declaration on the Rights of Indigenous People* is not an agreement between the parties to the *Convention* regarding its interpretation. Nor is it (in the terms of Article 31(3) of the *Vienna Convention*) subsequent practice in the application of the *Convention* which establishes the agreement of the parties regarding its interpretation. Nor is it (in terms of Article 31(3) of the *Vienna Convention*) a relevant rule of international law applicable in the relations between the parties').

(‘National Congress’)<sup>26</sup> (appearing as *amicus curiae*) all referred to the *United Nations Declaration on the Rights of Indigenous People* (‘*Declaration*’)<sup>27</sup> which, as a UN General Assembly resolution, may ‘provide evidence important for establishing the existence of a rule [of customary international law]’<sup>28</sup> and be useful, therefore, in interpreting relevant treaties. Only Bell J directly addressed its interpretive value, giving it the same status as treaty body output.<sup>29</sup> Crennan J, who mentioned only that the *Declaration* was relied upon, was the only other member of the Court to mention it.<sup>30</sup> This was in stark contrast with the approach of the Parliamentary Committee, which relied heavily on the *Declaration*. It noted that

many international lawyers and others accept that in many respects the *Declaration* spells out the details of relevant obligations under [the *Convention*, amongst others]. It is also considered to represent customary international law binding on Australia in many, though not all, respects.<sup>31</sup>

That the High Court overlooked the role to be played by customary international law in interpreting the *Convention* is to be regretted.

### B Approach to Extrinsic Materials

The majority approached with significant caution the extrinsic international legal materials to which the Court was referred, particularly the output of treaty bodies such as the Committee on the Elimination of Racial Discrimination (‘the Racial Discrimination Committee’).<sup>32</sup> French CJ, Crennan, Kiefel, Bell and Hayne JJ, respectively, warned of “‘interpretations” which rewrite the [treaty] text’;<sup>33</sup> the elevation of ‘non-binding extraneous materials over the language of the text’;<sup>34</sup> the risk that states parties may ‘be taken to have agreed that which they have not’;<sup>35</sup> the threat of the treaty text being ‘supplemented’ by non-binding committee recommendations;<sup>36</sup> and the usefulness of committees in asking questions of interpretation (but not, it seems, in suggesting answers).<sup>37</sup>

<sup>26</sup> National Congress of Australia’s First Peoples Ltd, ‘Submissions of the National Congress of Australia’s First Peoples Ltd Seeking Leave to Appear as *Amicus Curiae*’, Submission in *Maloney v The Queen*, B57/2012, 27 November 2012, 1–2 [6], 8–9 [23]–[25].

<sup>27</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) (‘*Declaration*’).

<sup>28</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 254–5.

<sup>29</sup> *Maloney* [2013] HCA 28 (19 June 2013) [235].

<sup>30</sup> *Ibid* [121].

<sup>31</sup> Parliamentary Joint Committee on Human Rights, above n 10, 15 [1.57].

<sup>32</sup> The Racial Discrimination Committee is established by art 8 of the *Convention*. It is to consist of ‘eighteen experts of high moral standing and acknowledged impartiality elected by States Parties’. By art 9(2), the Racial Discrimination Committee ‘may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties’. Articles 11–13 establish a mechanism for the lodgement and resolution of inter-State disputes and art 14 provides for an optional procedure for the resolution of complaints made by individuals.

<sup>33</sup> *Maloney* [2013] HCA 28 (19 June 2013) [23] (French CJ).

<sup>34</sup> *Ibid* [134] (Crennan J).

<sup>35</sup> *Ibid* [175] (Kiefel J).

<sup>36</sup> *Ibid* [235] (Bell J).

<sup>37</sup> *Ibid* [61] (Hayne J).

Hayne and Crennan JJ adopted the most restrictive approaches to this material. Hayne J considered that the only extrinsic materials that may be used in interpretation are those that existed when the statute was enacted. Subsequent material (such as reports of treaty bodies) ‘may usefully direct attention to possible arguments about how the [Act] should be construed but any debate about its construction is not concluded by reference to or reliance upon material of that kind’.<sup>38</sup> It should be noted that, in this respect, his Honour cited the doubts expressed by Gleeson CJ in *Coleman v Power* about the usefulness of referring to the *International Covenant on Civil and Political Rights* (‘ICCPR’)<sup>39</sup> when interpreting a statute that was enacted almost 50 years before the ICCPR entered into force for Australia.<sup>40</sup> That case did not consider extrinsic material of any kind, much less the output of bodies established by a treaty in the performance of the functions conferred on them by that treaty, nor did it consider a statute that was enacted for the express purpose of giving domestic effect to a treaty.

In the judgment of Crennan J, the only role for extrinsic materials specifically mentioned was to guide states parties in respect of their reporting obligations.<sup>41</sup> She did not concede to them any interpretive role.

In denying any role for subsequently-produced material, the restrictive approach of Hayne and Crennan JJ assumes that international law is static. It overlooks the rules of treaty interpretation that allow for evolving interpretations by reference to subsequent practice,<sup>42</sup> emerging customary international law<sup>43</sup> and ‘supplementary means of interpretation’,<sup>44</sup> as well as the more general principle, enunciated by the International Court of Justice in the *Namibia* advisory opinion, that ‘an international legal instrument has to be interpreted and applied within the framework of the entire legal system prevailing *at the time of the interpretation*’.<sup>45</sup>

This restrictive approach also stands in contrast to previous statements of the Court concerning these types of international legal materials. In *Queensland v Commonwealth*, for example, six members of the Court considered that a municipal court could not simply determine the legal effect of the *Convention for the Protection of the World Cultural and Natural Heritage*<sup>46</sup> by reference to its

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<sup>38</sup> Ibid.

<sup>39</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

<sup>40</sup> *Coleman v Power* (2004) 220 CLR 1, 27–30 [17]–[24], cited in *Maloney* [2013] HCA 28 (19 June 2013) [61] (Hayne J).

<sup>41</sup> *Maloney* [2013] HCA 28 (19 June 2013) [134].

<sup>42</sup> *Vienna Convention* art 31(3)(b).

<sup>43</sup> See the discussion of the role of customary international law in treaty interpretation above.

<sup>44</sup> *Vienna Convention* art 32.

<sup>45</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 19 [53] (emphasis added). See also Committee on the Elimination of Racial Discrimination, *Communication No 26/2002*, 62<sup>nd</sup> sess, UN Doc CERD/C/62/D/26/2002 (14 April 2003) [7.3] (‘*Hagan v Australia*’).

<sup>46</sup> *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 23 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

own ‘construction of its terms or by its opinion as to the *Convention’s* operation’.<sup>47</sup> Rather,

[t]he existence of an international duty depends upon the construction which the international community would attribute to the *Convention* and on the operation which the international community would accord to it in particular circumstances. The municipal court must ascertain that construction and operation as best it can.<sup>48</sup>

Pursuant to such a construction, the majority deferred to the World Heritage Committee on the question of whether Australia had an international obligation to protect and conserve certain property.<sup>49</sup> Similarly, Kirby J considered in *Minister for Immigration and Multicultural and Indigenous Affairs v B* that the output of the Human Rights Committee (which exercises functions similar to those of the Racial Discrimination Committee under the *ICCPR* and the *Optional Protocol* thereto)<sup>50</sup> carries the weight of ‘persuasive influence. No more; but no less’.<sup>51</sup>

In contrast to Hayne and Crennan JJ, French CJ, Kiefel and Bell JJ were willing to accept a role — albeit limited — for extrinsic material. French CJ concluded that such material ‘may illuminate the interpretation of [a] provision where it has been incorporated into the domestic law of Australia’.<sup>52</sup> ‘That does not mean’, the Chief Justice continued, ‘that Australian courts can adopt “interpretations” which rewrite the incorporated text or burden it with glosses which its language will not bear’.<sup>53</sup>

Kiefel J considered that views expressed in extrinsic materials were of relevance, so long as ‘they are well founded and can be accommodated in the process of construing the domestic statute’.<sup>54</sup>

Bell J emphasised her view that committee recommendations (and the *Declaration*) were not materials of the kind referred to in art 31 of the *Vienna Convention*.<sup>55</sup> She did not refer to art 32 concerning the ‘supplementary means of interpretation’ that may be used to confirm or determine the meaning of a provision and, as I have explained above, the *Declaration* is capable of forming part of the ‘rules of international law’ referred to in art 31(3)(c). Bell J also stressed that they were not materials of the kind referred to in s 15AB(2) of the *Acts Interpretation Act 1901* (Cth),<sup>56</sup> but did not refer to s 15AB(1), which allows for consideration to be given to ‘any material not forming part of the Act [that] is capable of assisting’ in the interpretation of a provision. Despite this, her

<sup>47</sup> *Queensland v Commonwealth* (1989) 167 CLR 232, 240 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid* 240–2.

<sup>50</sup> *ICCPR* arts 28–45; *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>51</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 418 [148].

<sup>52</sup> *Maloney* [2013] HCA 28 (19 June 2013) [23].

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid* [175].

<sup>55</sup> *Ibid* [235].

<sup>56</sup> *Ibid.*



Honour accepted that ‘it is appropriate to give weight to the construction that the international community places on the *Convention*’,<sup>57</sup> citing the comments of Brennan J in *Gerhardy v Brown* that, in time, international law may further refine the interpretation of the *Convention*.<sup>58</sup> Bell J also claimed that committee recommendations were directed to the executive and legislative organs of states parties and not, by implication, to judicial organs.<sup>59</sup> Her Honour did not articulate how this view aligns with (a) the *Convention*’s right to equal treatment before the courts,<sup>60</sup> (b) the Racial Discrimination Committee’s recommendations concerning that right, including the recommendation that judges not manifest any bias on the grounds of race,<sup>61</sup> (c) the fact that a treaty is ‘an international agreement concluded between States’<sup>62</sup> (not particular organs thereof), and (d) the fact that the conduct of the courts of a State is attributable to that State.<sup>63</sup>

Gageler J was the most receptive of extrinsic materials. His Honour, whose approach focused on the fact that the *Act* was designed to ‘give effect to Australia’s obligations under ... the *Convention*’,<sup>64</sup> considered that the *Act* was to be ‘construed to give effect to those obligations ... to the maximum extent that its terms permit’.<sup>65</sup> His Honour noted that making ‘suggestions and general recommendations’ was a function expressly conferred on the Racial Discrimination Committee by art 9 of the *Convention*<sup>66</sup> and examined in some

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<sup>57</sup> *Ibid* [236].

<sup>58</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 126 (*‘Gerhardy’*).

<sup>59</sup> *Maloney* [2013] HCA 28 (19 June 2013) [239].

<sup>60</sup> *Convention* art 5(a).

<sup>61</sup> *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 60<sup>th</sup> sess, Supp No 18, UN Doc A/60/18 (19 August 2005) ch IX (*‘General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System’*) paras 31–3 (*‘General Recommendation XXXI’*), citing Dato’ Param Kumaraswamy, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN ESCOR, 59<sup>th</sup> sess, Agenda Item 11(d), UN Doc E/CN.4/2003/65 (10 January 2003) annex (*‘The Bangalore Principles of Judicial Conduct’*).

<sup>62</sup> *Vienna Convention* art 2(1)(a).

<sup>63</sup> International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56<sup>th</sup> sess, Supp No 10, UN Doc A/56/10 (2001) ch IV(E) (*‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’*) art 4(1) (*‘The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State’*).

<sup>64</sup> *Maloney* [2013] HCA 28 (19 June 2013) [325].

<sup>65</sup> *Ibid* [326].

<sup>66</sup> *Ibid* [288].

detail the general recommendations bearing on the issues in the case.<sup>67</sup> His Honour accepted the non-binding nature of the Racial Discrimination Committee's output, but argued that the Racial Discrimination Committee's general recommendations 'have elaborated a coherent understanding of the meaning and interrelationship' of various articles of the *Convention*.<sup>68</sup> His Honour also noted that no party or intervener suggested that the Racial Discrimination Committee's interpretation was not generally accepted amongst states parties to the *Convention*.<sup>69</sup> When it came to the interpretation of individual articles of the *Convention*, Gageler J accepted that '[w]hat is required by those obligations turns on the content attributed to them by the community of nations'.<sup>70</sup> His Honour was also willing to accept that the 'international understanding' of the *Convention* has evolved, thanks in part to the 'clear and consistent' jurisprudence of the Racial Discrimination Committee.<sup>71</sup> His Honour concluded that the purposes of the *Act* 'would not be achieved were constructional choices now presented by its text not to be made consistently with that contemporary international understanding'.<sup>72</sup>

Although the majority of the Court accepted some interpretive role for treaty body output, no judge articulated a formal reason why, as a matter of international law, that should be so (nor was this the subject of any detailed submissions). In *Thiel v Commissioner of Taxation*, McHugh J said that a treaty 'is to be interpreted in accordance with the rules of interpretation recognised by international lawyers'.<sup>73</sup> In that case, all members of the Court accepted that the Organisation for Economic Co-operation and Development's commentary on one of its own conventions was a 'supplementary means of interpretation' for the purposes of art 32 of the *Vienna Convention*.<sup>74</sup> Similarly, Perram J considered in *Minister for Immigration and Citizenship v Anochie* that the views of the Human

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<sup>67</sup> Ibid [290]–[295]. Gageler J examined the following general recommendations: *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 48<sup>th</sup> sess, Agenda Item 107, Supp No 18, UN Doc A/48/18 (15 September 1993) ch VIII(B) ('*General Recommendation XIV (42) on Article 1, Paragraph 1, of the Convention*') ('*General Recommendation XIV*'); *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 59<sup>th</sup> sess, Supp No 18, UN Doc A/59/18 (20 August 2004) ch VIII ('*General Recommendation XXX: Discrimination against Non-Citizens*') ('*General Recommendation XXX*'); *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 51<sup>st</sup> sess, Supp No 18, UN Doc A/51/18 (30 September 1996) annex VIII(A) ('*General Recommendation XX (48)*'); *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 64<sup>th</sup> sess, Supp No 18, UN Doc A/64/18 (28 August 2009) annex VIII ('*General Recommendation No 32 (2009): The Meaning and Scope of Special Measures in the International Convention on the Elimination of Racial Discrimination*') ('*General Recommendation 32*'); *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 52<sup>nd</sup> sess, Supp No 18, UN Doc A/52/18 (26 September 1997) annex V ('*General Recommendation on the Rights of Indigenous Peoples*') ('*General Recommendation 23*').

<sup>68</sup> *Maloney* [2013] HCA 28 (19 June 2013) [289].

<sup>69</sup> Ibid.

<sup>70</sup> Ibid [326]. See also at [327]–[328].

<sup>71</sup> Ibid [327].

<sup>72</sup> Ibid [328].

<sup>73</sup> (1990) 171 CLR 338, 356 (McHugh J) ('*Thiel*'). See also at 344 (Mason CJ, Brennan and Gaudron JJ); *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 230–31 (Brennan CJ), 251–52 (McHugh J).

<sup>74</sup> *Thiel* (1990) 171 CLR 338, 357 (McHugh J). See also at 344 (Mason CJ, Brennan and Gaudron JJ), 350 (Dawson J).

Rights Committee as to the interpretation to be given to the *ICCPR* were ‘supplementary means’ pursuant to art 32.<sup>75</sup>

Perram J further considered that the output of the Human Rights Committee may qualify as ‘the teachings of the most highly qualified publicists’ and, therefore, may be ‘subsidiary means for the determination of rules of [international] law’ pursuant to art 38(1)(d) of the *Statute of the International Court of Justice*.<sup>76</sup> His Honour considered that the Human Rights Committee’s qualifications and role may render it suitably qualified, quoting the observations of the International Court of Justice in *Ahmadou Sadio Diallo* that, although the Human Rights Committee does not have the final say on the interpretation of the *ICCPR*, its interpretation should be ascribed ‘great weight’.<sup>77</sup>

The Court was not referred in *Maloney* to any of the Racial Discrimination Committee’s opinions concerning individual communications made pursuant to art 14 of the *Convention*. Nonetheless, it should be noted that the Full Court of the Federal Court considered the equivalent functions of the Human Rights Committee to be ‘particularly relevant’ to treaty interpretation in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*.<sup>78</sup>

In addition to overlooking the role of customary international law, therefore, the majority’s approach to treaty interpretation did not make as much use of extrinsic international legal materials as international law allows. This is not to say that the Court’s interpretation was incorrect, or that the Court was obliged to adopt the interpretation contained in extrinsic materials, but rather that such materials are capable of greater relevance to treaty interpretation than the majority were willing to accept.

This note will now examine how international law and international legal materials informed the Court’s approach to Ms Maloney’s line of argument.

#### IV SECTION 10: RIGHTS TO EQUALITY BEFORE THE LAW

As noted above, the first step in Ms Maloney’s argument was that the impugned provisions violated s 10 of the *Act*. All members of the Court except Kiefel J accepted this argument.

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<sup>75</sup> *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497, 508–9 [42]–[48] (Perram J) (*Anochie*). In the interests of full disclosure, I should note that I was Perram J’s Associate when *Anochie* was heard and decided.

<sup>76</sup> *Statute of the International Court of Justice*, cited in *Anochie* (2012) 209 FCR 497, 509 [49]. I have explained above the manner in which the sources of law in art 38(1) are relevant to treaty interpretation.

<sup>77</sup> *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Judgment)* [2010] ICJ Rep 639, 664 [66], quoted in *Anochie* (2012) 209 FCR 497, 510 [49]:

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the *Covenant* on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

<sup>78</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 91 [148].

### A Constructing s 10

Section 10 has, of course, been considered by the Court before.<sup>79</sup> The general approach taken by Mason J in *Gerhardy v Brown*<sup>80</sup> and applied by the majority in *Western Australia v Ward*<sup>81</sup> was again endorsed by the majority.<sup>82</sup> This approach was explained by French CJ as follows:

- If a State law creates a right which is not universal because it is not conferred on people of a particular race, then s 10 will supply the right the subject of that omission and confer that right upon persons of that race. The right conferred by s 10 will be complementary to the rights conferred by the State law and the Commonwealth and State laws can stand together.
- If a State law prohibits persons of a particular race from enjoying a human right or fundamental freedom enjoyed by persons of another race, s 10 will confer that right upon the persons the subject of the prohibition. In that application, s 10 permits that which the State law prohibits and so will be inconsistent with the State law and, by reason of s 109 of the *Constitution*, will prevail.<sup>83</sup>

All judges emphasised that s 10 is not only directed to laws that draw an express distinction based on race or laws that have a discriminatory purpose, but also to laws that have a ‘discriminatory operation and effect’.<sup>84</sup> Gageler J, having noted that the High Court had not previously been confronted by the latter situation,<sup>85</sup> considered that determining whether a law has a discriminatory operation and effect was ‘a question of degree’;<sup>86</sup> section 10 will be violated where the difference in the relative enjoyment of a right amongst persons of two different races ‘is of such a degree as to be inconsistent with persons of those two races being afforded equal dignity and respect’.<sup>87</sup> Gageler J’s view was informed by the Racial Discrimination Committee’s extensive consideration of the notion of ‘discrimination’.<sup>88</sup>

Hayne, Bell and Gageler JJ expressly rejected the submission of the respondent (ie the State of Queensland) that the impugned provisions could not violate s 10 because they operated on geography, not race, and affected Indigenous and non-Indigenous people on Palm Island equally.<sup>89</sup> Gageler J, having referred to the views of the Racial Discrimination Committee on this

<sup>79</sup> For a general overview of the Court’s jurisprudence concerning s 10, see *Maloney* [2013] HCA 28 (19 June 2013) [298]–[308] (Gageler J). Gageler J also reviews other relevant Australian decisions: at [309]–[316].

<sup>80</sup> *Gerhardy* (1985) 159 CLR 70, 97–9.

<sup>81</sup> *Western Australia v Ward* (2002) 213 CLR 1, 99–109. See also *Mabo v Queensland (No 1)* (1988) 166 CLR 186; *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373.

<sup>82</sup> *Maloney* [2013] HCA 28 (19 June 2013) [10] (French CJ), [64]–[66] (Hayne J), [149] (Kiefel J), [303] (Gageler J). See also at [200] (Bell J).

<sup>83</sup> *Ibid* [10].

<sup>84</sup> *Ibid* [11] (French CJ). See also at [65], [68], [78], [84] (Hayne J), [148] (Kiefel J), [200]–[201] (Bell J), [331] (Gageler J).

<sup>85</sup> *Ibid* [308].

<sup>86</sup> *Ibid* [335].

<sup>87</sup> *Ibid*.

<sup>88</sup> *Ibid* [290]–[291], [293], [308].

<sup>89</sup> *Ibid* [77]–[80], [84] (Hayne J), [198]–[200] (Bell J), [331], [363]–[364] (Gageler J).

point,<sup>90</sup> opined that ‘[r]acial targeting is not negated by some persons of other races being caught in the net’ and that, in the context where the island’s population was overwhelmingly Indigenous, ‘[g]eography was used as a proxy for race’.<sup>91</sup>

The respondent further submitted that a law will not violate s 10 if enacted to serve a legitimate public interest.<sup>92</sup> The Commonwealth Attorney-General, the Attorney-General for South Australia (intervening) and the Australian Human Rights Commission submitted that there should be a proportionality analysis that balances any differential enjoyment of rights between races with the legitimate public interest.<sup>93</sup> Reference was made in this respect to the Racial Discrimination Committee’s *General Recommendation XIV*,<sup>94</sup> *XXXI*<sup>95</sup> and 32,<sup>96</sup> as well as the

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<sup>90</sup> Ibid [308], citing *General Recommendation XIV*, UN Doc A/48/18, 115 [2].

<sup>91</sup> Ibid [362]–[363]. See also at [79]–[80], [84] (Hayne J). Although the impugned provisions were not, on their face, directed to Indigenous persons, the Court appears to have accepted (on the basis of extrinsic materials) that this was their intent: see at [27] (French CJ), [58] (Hayne J), [374] (Gageler J).

<sup>92</sup> The Queen, ‘Respondent’s Submissions’, Submission in *Maloney v The Queen*, B57/2012, 16 November 2012, 9 [47], citing *Bropho v Western Australia* (2008) 169 FCR 59, 84 (‘*Bropho*’). Ms Maloney sought to distinguish *Bropho* on the basis that it concerned a benefit being conferred on Indigenous peoples, not the criminalisation of conduct by them: Joan Monica Maloney, ‘Appellant’s Submissions’, Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 7–8 [32]–[33].

<sup>93</sup> Attorney-General (Cth), ‘Submissions of the Attorney-General of the Commonwealth (Intervening)’, Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 5–8 [21]–[28]; Attorney-General (SA), ‘Submissions of the Attorney-General for the State of South Australia (Intervening)’, Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 8–9 [26]–[27]; Australian Human Rights Commission, ‘Australian Human Rights Commission’s Submissions Seeking Leave to Intervene’, Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 9–12 [50]–[65]. See also Joan Monica Maloney, ‘Appellant’s Reply’, Submission in *Maloney v The Queen*, B57/2012, 30 November 2012, 3–4 [9]–[13]; *Maloney* [2013] HCA 28 (19 June 2013) [210], [212] (Bell J).

<sup>94</sup> *General Recommendation XIV*, UN Doc A/48/18, ch VIII(B) para 2 (‘The Committee observes that a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the *Convention*, are legitimate or fall within the scope of article 1, paragraph 4, of the *Convention*’), cited in Australian Human Rights Commission, ‘Australian Human Rights Commission’s Submissions Seeking Leave to Intervene’, Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 12 [65].

<sup>95</sup> *General Recommendation XXXI*, UN Doc A/60/18, ch IX para 5(a) (‘States parties should pursue national strategies the objectives of which include the following: ... To eliminate laws that have an impact in terms of racial discrimination, particularly those which target certain groups indirectly by penalizing acts which can be committed only by persons belonging to such groups, or laws that apply only to non-nationals without legitimate grounds or which do not respect the principle of proportionality’), cited in Australian Human Rights Commission, ‘Australian Human Rights Commission’s Submissions Seeking Leave to Intervene’, Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 10 [54].

<sup>96</sup> *General Recommendation 32*, UN Doc A/64/18, annex VIII para 8 (‘The term “non-discrimination” does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment’), cited in Attorney-General (Cth), ‘Submissions of the Attorney-General of the Commonwealth (Intervening)’, Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 6 [22].

Human Rights Committee's *General Comment 18*.<sup>97</sup> Such a requirement was also said by the Commission to flow from the words 'enjoy a right' in s 10, which required a consideration of the 'scope of the right and any limitations which may attach to the right'.<sup>98</sup> The Commonwealth submitted that the inclusion of a proportionality requirement was more consistent with the overarching aim of 'substantial and genuine equality',<sup>99</sup> explaining that many human rights 'are not absolute in nature and may need to be balanced against other competing rights and interests — that being quintessentially a matter for the legislative branch'.<sup>100</sup>

This submission was rejected. Hayne, Crennan, Kiefel and Bell JJ were of the view that, in the words of Kiefel J, '[n]othing in s 10 requires or permits a justification for a legal restriction on a human right or fundamental freedom'.<sup>101</sup> It is an absolute provision whose effect is moderated only by s 8 (concerning special measures).<sup>102</sup> In coming to this conclusion, Kiefel J considered that the views of the Racial Discrimination Committee and the Human Rights Committee 'travel beyond' the text of the *Convention* and should not be followed.<sup>103</sup> Hayne J (Crennan J agreeing) suggested a similar view through the use of a confer citation.<sup>104</sup> Bell J also referred to the committees' views without following them.<sup>105</sup>

Gageler J considered that s 10 did contain an exception for laws that are proportionate to legitimate aims, but that the exception was limited to the 'carefully tailored regime for permissible special measures'.<sup>106</sup> His Honour did so by reference to '[t]he *Convention* principles of dignity and equality and the *Convention* objective of securing substantive racial equality in the enjoyment of

<sup>97</sup> *Report of the Human Rights Committee*, 45<sup>th</sup> sess, Supp No 40, UN Doc A/45/40 (4 October 1990) annex VI ('*General Comment No 18: Non-Discrimination*') para 13 ('*General Comment 18*') ('the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the *Covenant*'), cited in Australian Human Rights Commission, 'Australian Human Rights Commission's Submissions Seeking Leave to Intervene', Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 10 [54].

<sup>98</sup> Australian Human Rights Commission, 'Australian Human Rights Commission's Submissions Seeking Leave to Intervene', Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 6 [32]–[33], 10 [53]. See also *Maloney* [2013] HCA 28 (19 June 2013) [168] (Kiefel J), [211] (Bell J).

<sup>99</sup> Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth (Intervening)', Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 5–7 [21]–[25]. See also *Maloney* [2013] HCA 28 (19 June 2013) [212] (Bell J).

<sup>100</sup> Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth (Intervening)', Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 7–8 [27].

<sup>101</sup> *Maloney* [2013] HCA 28 (19 June 2013) [167] (Kiefel J). See also at [68] (Hayne J), [163]–[173] (Kiefel J), [213]–[214] (Bell J).

<sup>102</sup> *Ibid* [68] (Hayne J), [126] (Crennan J), [167], [173] (Kiefel J), [213] (Bell J), [348] (Gageler J). In this respect, Kiefel and Gageler JJ advocated a narrow reading of the decision of the Full Court of the Federal Court of Australia in *Bropho* (2008) 169 FCR 59: *Maloney* [2013] HCA 28 (19 June 2013) [166] (Kiefel J), [334] (Gageler J).

<sup>103</sup> *Ibid* [170]–[173], [176].

<sup>104</sup> *Ibid* [68], n 110.

<sup>105</sup> *Ibid* [211].

<sup>106</sup> *Ibid* [327], [339]–[348].

human rights',<sup>107</sup> as well as Racial Discrimination Committee output that 'underlines an international understanding that the range of differential treatment that is capable of justification is closely circumscribed'.<sup>108</sup>

By contrast, the Parliamentary Committee concluded that 'differential treatment will not constitute discrimination if it can be shown to be justifiable, that is, if it can be shown to be based on objective and reasonable grounds and is a proportionate measure in pursuit of a legitimate objective', citing the Racial Discrimination Committee's *General Recommendation XIV* and 32.<sup>109</sup> It recommended that the formulation of s 10 be reviewed in light of the Court's 'constrained' interpretation.<sup>110</sup>

### B Applying s 10

Ms Maloney argued that the impugned provisions restricted her enjoyment (and the enjoyment of other Indigenous people on Palm Island) of three rights enumerated in art 5 of the *Convention*. It was, therefore, unnecessary for the Court to consider what rights beyond those in art 5 may also be protected by s 10.<sup>111</sup> In particular, the Court did not need to determine whether, as the Australian Human Rights Commission and the National Congress submitted, there is a free-standing right to be free from racial discrimination (though Kiefel J thought that there is not and Gageler J appears to have accepted that there is).<sup>112</sup>

The first basis on which Ms Maloney claimed that the impugned provisions violated s 10 was that protected by art 5(a) of the *Convention*: '[t]he right to equal treatment before the tribunals and all other organs administering justice'.<sup>113</sup> Ms Maloney claimed that, like art 26 of the *ICCPR*,<sup>114</sup> art 5(a) extends not only to equality between races in matters of access to and procedure before courts and tribunals, but also to equality in the substantive provisions of

<sup>107</sup> Ibid [341].

<sup>108</sup> Ibid [327]. See also at [290]–[291].

<sup>109</sup> Parliamentary Joint Committee, above n 10, 18–19 [1.70]–[1.71], 30 [1.109], 31 [1.115], 44 [1.159].

<sup>110</sup> Ibid 30 [1.109], 31 [1.115].

<sup>111</sup> *Maloney* [2013] HCA 28 (19 June 2013) [9] (French CJ), [72] (Hayne J), [145]–[146] (Kiefel J), [219] (Bell J), [286], [336] (Gageler J).

<sup>112</sup> Australian Human Rights Commission, 'Australian Human Rights Commission's Submissions Seeking Leave to Intervene', Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 8–9 [43]–[47]; National Congress of Australia's First Peoples Ltd, 'Submissions of the National Congress of Australia's First Peoples Ltd Seeking Leave to Appear as Amicus Curiae', Submission in *Maloney v The Queen*, B57/2012, 27 November 2012, 5–6 [14]–[17]; *Maloney* [2013] HCA 28 (19 June 2013) [72] (Hayne J), [160]–[162] (Kiefel J), [216]–[223] (Bell J), [286], [336], [361] (Gageler J).

<sup>113</sup> Joan Monica Maloney, 'Appellant's Submissions', Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 8 [34]–[36].

<sup>114</sup> *ICCPR* art 26 reads as follows:

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

See also *General Comment 18*, UN Doc A/45/40, annex VI.

the law applied by them.<sup>115</sup> The Court rejected this submission, confining the operation of art 5(a) to the former.<sup>116</sup> Bell J relied on the views of the Human Rights Committee in concluding that art 5(a) was analogous to art 14 of the *ICCPR*, as opposed to art 26,<sup>117</sup> while Gageler J was informed by the Racial Discrimination Committee's approach to the whole of art 5.<sup>118</sup> As Ms Maloney made no complaint about the manner in which the courts of Queensland had treated her,<sup>119</sup> the Court found no violation of s 10 on this basis.

The second basis on which, according to Ms Maloney, the impugned provisions violated s 10 was that referred to in art 5(d)(v), namely '[t]he right to own property alone as well as in association with others'.<sup>120</sup> All members of the Court except Kiefel J accepted this submission. They held that

the impugned provisions had the effect that Indigenous persons who were the Palm Island community, including the appellant, could not enjoy a right of ownership of property, namely alcohol, to the same extent as non-Indigenous people outside that community.<sup>121</sup>

Kiefel J, on the other hand, found that the impugned provisions did not engage s 10 for two reasons: first, because the impugned provisions did not impact on Ms Maloney's right to own alcohol, only her right to possess it on Palm Island,<sup>122</sup> and, secondly, because there is no fundamental right to possess alcohol or to possess it for consumption.<sup>123</sup>

The third right that Ms Maloney enjoyed to a more limited extent, she argued, was '[t]he right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafés, theatres and parks' articulated in art 5(f) of the *Convention*.<sup>124</sup> She argued that the impugned provisions denied her this right by removing her 'ability to purchase and consume alcohol other than light or mid-strength beer' at the Palm Island Canteen.<sup>125</sup>

French CJ and Kiefel J rejected this submission, reasoning that the impugned provisions did not affect access to any place on Palm Island or any service enjoyed by others; they merely restricted the possession of liquor.<sup>126</sup>

<sup>115</sup> Joan Monica Maloney, 'Appellant's Submissions', Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 8 [36].

<sup>116</sup> *Maloney* [2013] HCA 28 (19 June 2013) [36] (French CJ), [151] (Kiefel J), [215] (Bell J), [287], [336] (Gageler J). Hayne J considered that the issue did not need to be decided: at [73]. See also Natan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Sijthoff & Noordhoff, 1980) 56.

<sup>117</sup> *Maloney* [2013] HCA 28 (19 June 2013) [215], [222].

<sup>118</sup> *Ibid* [292], [336].

<sup>119</sup> Joan Monica Maloney, 'Appellant's Submissions', Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 8 [36].

<sup>120</sup> *Ibid* 7–8 [30]–[33].

<sup>121</sup> *Maloney* [2013] HCA 28 (19 June 2013) [38]–[39] (French CJ). See also at [74]–[76], [83]–[84] (Hayne J), [224] (Bell J), [360]–[361] (Gageler J).

<sup>122</sup> *Ibid* [153], [155]–[156]. Hayne J considered that 'the impugned provisions prohibit the exercise of one of the bundle of rights which together make up ... "ownership"': at [83].

<sup>123</sup> *Ibid* [157]–[158].

<sup>124</sup> *Ibid* [73]. Because s 10 had already been engaged due to the impugned provisions' impact on property rights, Hayne J considered that this issue did not need to be decided.

<sup>125</sup> Joan Monica Maloney, 'Appellant's Submissions', Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 8–9 [37].

<sup>126</sup> *Maloney* [2013] HCA 28 (19 June 2013) [41] (French CJ), [152] (Kiefel J).



Bell J held that art 5(f) was engaged on the basis that, although the impugned provisions did not on their face limit access to any place or service, their ‘operation and effect’<sup>127</sup> was to ‘make it unlawful for the licensed premises on Palm Island to supply its adult patrons with any form of alcohol apart from mid-strength or low alcohol beer’.<sup>128</sup> For this reason,

[a]ccess to a service of the kind that is available to non-Aboriginal members of the general public elsewhere in Queensland — the supply at licensed premises of wine, spirits and full strength beer — is denied to the Aboriginal community of Palm Island by reason of the liquor restrictions.<sup>129</sup>

Gageler J agreed with this conclusion.<sup>130</sup>

Kiefel J was, therefore, alone in concluding that s 10 was not engaged on any of the bases alleged.

## V SECTION 8: ‘SPECIAL MEASURES’<sup>131</sup>

Having established that the impugned provisions were inconsistent with s 10 of the *Act*, the second step in Ms Maloney’s line of argument was that the impugned provisions were not saved by s 8, which directly incorporates the exception for ‘special measures’ in art 1(4) of the *Convention* (extracted above).

Ms Maloney argued that the impugned provisions were not special measures on three bases: an absence of consultation and consent; a lack of proportionality; and an absence of temporal limitation. These arguments were unanimously rejected.

### A *Special Measures and the Requirement of Consultation and/or Consent*

Ms Maloney’s principal argument against the conclusion that the impugned provisions were a special measure (and therefore valid under the *Act*) was that they came into effect without sufficient consultation with the Indigenous population of Palm Island, nor with their free and informed consent.<sup>132</sup> She submitted that there would need to be a compelling justification for — and a high level of judicial scrutiny of — a measure that was enacted without consultation aimed at securing consent. In this respect, she relied on affidavits that challenged the ‘coverage and adequacy’ of the consultation that did occur.<sup>133</sup> The Australian Human Rights Commission and the National Congress went further and claimed that consultation and/or consent had become a legal requirement for special

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<sup>127</sup> Ibid [200]–[201] (Bell J).

<sup>128</sup> Ibid [226] (Bell J).

<sup>129</sup> Ibid.

<sup>130</sup> Ibid [361].

<sup>131</sup> Although it was strictly unnecessary for Kiefel J to consider the questions before the Court concerning special measures because she found s 10 not to have been contravened, her Honour nevertheless considered them: *ibid* [163].

<sup>132</sup> See Joan Monica Maloney, ‘Appellant’s Submissions’, Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 12–15 [51]–[61].

<sup>133</sup> *Ibid* 4 [20], 17–19 [73]–[78]. See also *Maloney* [2013] HCA 28 (19 June 2013) [25] (French CJ), [231] (Bell J), [318] (Gageler J).

measures.<sup>134</sup> The existence of such a requirement was said to flow both from the observations of Brennan J in *Gerhardy* that ‘[t]he 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’<sup>135</sup> and from international ‘jurisprudence’ including the following:

- (a) The Racial Discrimination Committee’s *General Recommendation* 23, which called on states parties to ‘ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent’;<sup>136</sup>
- (b) The Racial Discrimination Committee’s *General Recommendation* 32 and the statement that ‘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>137</sup>
- (c) The advice of the Expert Mechanism on the Rights of Indigenous Peoples established by the UN Human Rights Council that elaborated on the above statements;<sup>138</sup> and
- (d) Article 19 of the *Declaration*, which provides that ‘States shall consult and cooperate in good faith with the indigenous peoples

<sup>134</sup> Australian Human Rights Commission, ‘Australian Human Rights Commission’s Submissions Seeking Leave to Intervene’, Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 15–17 [78]–[84]; National Congress of Australia’s First Peoples Ltd, ‘Submissions of the National Congress of Australia’s First Peoples Ltd Seeking Leave to Appear as Amicus Curiae’, Submission in *Maloney v The Queen*, B57/2012, 27 November 2012, 6–9 [19]–[27].

<sup>135</sup> *Gerhardy* (1985) 159 CLR 70, 135, cited in Joan Monica Maloney, ‘Appellant’s Submissions’, Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 12 [51]; Australian Human Rights Commission, ‘Australian Human Rights Commission’s Submissions Seeking Leave to Intervene’, Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 15 [80]; National Congress of Australia’s First Peoples Ltd, ‘Submissions of the National Congress of Australia’s First Peoples Ltd Seeking Leave to Appear as Amicus Curiae’, Submission in *Maloney v The Queen*, B57/2012, 27 November 2012, 7 [20].

<sup>136</sup> *General Recommendation No 23*, UN Doc A/52/18, annex V para 4(d), cited in Joan Monica Maloney, ‘Appellant’s Submissions’, Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 13 [54]; Australian Human Rights Commission, ‘Australian Human Rights Commission’s Submissions Seeking Leave to Intervene’, Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 15–17 [82]; National Congress of Australia’s First Peoples Ltd, ‘Submissions of the National Congress of Australia’s First Peoples Ltd Seeking Leave to Appear as Amicus Curiae’, Submission in *Maloney v The Queen*, B57/2012, 27 November 2012, 7–8 [22].

<sup>137</sup> *General Recommendation No 32*, UN Doc A/64/18, annex VIII para 18, quoted in Joan Monica Maloney, ‘Appellant’s Submissions’, Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 13 [55]; Australian Human Rights Commission, ‘Australian Human Rights Commission’s Submissions Seeking Leave to Intervene’, Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 15–17 [82]; National Congress of Australia’s First Peoples Ltd, ‘Submissions of the National Congress of Australia’s First Peoples Ltd Seeking Leave to Appear as Amicus Curiae’, Submission in *Maloney v The Queen*, B57/2012, 27 November 2012, 7 [21].

<sup>138</sup> Joan Monica Maloney, ‘Appellant’s Submissions’, Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 14 [58]–[59]; National Congress of Australia’s First Peoples Ltd, ‘Submissions of the National Congress of Australia’s First Peoples Ltd Seeking Leave to Appear as Amicus Curiae’, Submission in *Maloney v The Queen*, B57/2012, 27 November 2012, 9–10 [26]–[27].

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>139</sup> (I have noted above the limited attention received by the *Declaration*.)

There were various references by the Court to the desirability of or practical benefits attending consultation and consent in the adoption of special measures.<sup>140</sup> It was also suggested that an absence of consultation and/or consent may be relevant to ascertaining the purpose of the measure or to determining whether it was appropriate and adapted to that purpose.<sup>141</sup> The Court, however, unanimously rejected any suggestion that this had become a requirement for the validity of a measure.<sup>142</sup> In particular, Bell J pointed out that a requirement of consent would render special measures impossible where their beneficiaries were divided on the question of the appropriate measures to take.<sup>143</sup>

The Parliamentary Committee, on the other hand, considered that the 'obligation to consult with Indigenous peoples in relation to actions which may affect them does appear to be accepted as part of customary international law', but that the position of consent was less clear.<sup>144</sup>

In rejecting this submission, French CJ and Crennan J formed the view that the Racial Discrimination Committee and the Expert Mechanism had sought to create obligations that did not exist in the text of the *Convention*.<sup>145</sup> French CJ cautioned that additional requirements cannot be 'imported into a text which will not bear it by the subsequent opinions of expert bodies, however distinguished'.<sup>146</sup> Bell J referred to, but did not follow, the relevant extrinsic materials.<sup>147</sup>

Gageler J did not agree. His Honour noted that the Racial Discrimination Committee appears to have moderated its views on the question of consultation between *General Recommendation 23* in 1997 and *General Recommendation 32* in 2009 (both of which are quoted in part above).<sup>148</sup> His Honour further considered that the sentence in *General Recommendation 32* quoted above should be read, if not as exhortation, in the context of the Racial Discrimination

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<sup>139</sup> *Declaration*, UN Doc A/RES/61/295, art 19, quoted in Joan Monica Maloney, 'Appellant's Submissions', Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 13 [56]; Australian Human Rights Commission, 'Australian Human Rights Commission's Submissions Seeking Leave to Intervene', Submission in *Maloney v The Queen*, B57/2012, 23 November 2012, 15–16 [82]; National Congress of Australia's First Peoples Ltd, 'Submissions of the National Congress of Australia's First Peoples Ltd Seeking Leave to Appear as Amicus Curiae', Submission in *Maloney v The Queen*, B57/2012, 27 November 2012, 8–9 [23]–[24].

<sup>140</sup> *Maloney* [2013] HCA 28 (19 June 2013) [25] (French CJ), [135] (Crennan J), [237] (Bell J).

<sup>141</sup> *Ibid* [25] (French CJ), [91] (Hayne J), [133] (Crennan J), [247] (Bell J), [357] (Gageler J).

<sup>142</sup> *Ibid* [24] (French CJ), [91] (Hayne J), [128]–[136] (Crennan J), [186] (Kiefel J), [240] (Bell J), [357] (Gageler J).

<sup>143</sup> *Ibid* [237] (Bell J).

<sup>144</sup> Parliamentary Joint Committee on Human Rights, above n 10, 15–16 [1.59], 34 [1.122].

<sup>145</sup> *Maloney* [2013] HCA 28 (19 June 2013) [24] (French CJ), [121], [134]–[135] (Crennan J).

<sup>146</sup> *Ibid* [24].

<sup>147</sup> *Ibid* [234], [240].

<sup>148</sup> *Ibid* [295].

Committee's acceptance that 'special measures may have preventive (of human rights violations) as well as corrective functions'.<sup>149</sup> His Honour continued:

In light of the *Convention* principles of dignity and equality and the *Convention* objective of securing substantive racial equality in the enjoyment of human rights, the inherent complexity of human relations, the infinite variety of human need and the beneficial objective of the obligation in Art 2(2) to take special measures 'when the circumstances so warrant' all tell strongly against the taking of special measures being the subject of a priori procedural constraint. That is especially so in relation to those measures that might need to be taken to prevent human rights violations.<sup>150</sup>

Furthermore, French CJ, Crennan, Bell and Gageler JJ noted that the Minister was required by s 173I(2) of the *Liquor Act* to consult with the relevant community justice group about the restrictions,<sup>151</sup> or to consider any of that group's recommendations (though a failure to consult would not result in the restrictions being invalid).<sup>152</sup> In this regard, the Explanatory Notes to the Regulation that applied liquor restrictions to Palm Island stated that the Palm Island Community Justice Group and the Palm Island Shire Council had recommended limits on alcohol use on the island, but that there was division about the exact form of an alcohol management plan.<sup>153</sup> The Queensland Court of Appeal found this not to be contradicted by the affidavits relied on by Ms Maloney.<sup>154</sup> The plan eventually adopted was described in the Explanatory Notes as a compromise between four separate plans previously presented to the government.

#### B *Special Measures, Proportionality and Criminalisation*

Ms Maloney further argued that the impugned provisions could not be special measures due to want of proportionality.<sup>155</sup> This was particularly so because they criminalised conduct that was legal elsewhere. The National Congress argued that a law that criminalised certain conduct of the beneficiaries of a measure could never be a special measure.<sup>156</sup>

Although all members of the Court accepted the need for a proportionality analysis in assessing special measures,<sup>157</sup> there were differences of opinion on the question of the source of that requirement. In particular, the dispute was over what the phrase 'as may be necessary' in art 1(4) (emphasised above in Part II)

<sup>149</sup> Ibid [357], quoting *General Recommendation No 32*, UN Doc A/64/18, annex VIII para 23.

<sup>150</sup> *Maloney* [2013] HCA 28 (19 June 2013) [357].

<sup>151</sup> Ibid [29] (French CJ), [123]–[124] (Crennan J), [202], [239] (Bell J), [270] (Gageler J).

<sup>152</sup> *Liquor Act 1992* (Qld) s 173I(4).

<sup>153</sup> Explanatory Notes, *Liquor Amendment Regulation (No 4) 2006* (Qld). Relevant sections are extracted by Bell J: *Maloney* [2013] HCA 28 (19 June 2013) [230].

<sup>154</sup> *R v Maloney* [2013] 1 Qd R 32, 68 [112] (Chesterman JA). See also *Maloney* [2013] HCA 28 (19 June 2013) [125] (Crennan J), [370] (Gageler J).

<sup>155</sup> Joan Monica Maloney, 'Appellant's Submissions', Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 11 [47]–[48].

<sup>156</sup> National Congress of Australia's First Peoples Ltd, 'Submissions of the National Congress of Australia's First Peoples Ltd Seeking Leave to Appear as Amicus Curiae', Submission in *Maloney v The Queen*, B57/2012, 27 November 2012, 13–15 [36]–[39].

<sup>157</sup> *Maloney* [2013] HCA 28 (19 June 2013) [20]–[21], [46] (French CJ), [102] (Hayne J), [130], [132], [137] (Crennan J), [177]–[183] (Kiefel J), [244] (Bell J), [340], [358] (Gageler J).

qualified. Crennan, Kiefel and Gageler JJ thought that it qualified the measure and thereby introduced the notion of proportionality,<sup>158</sup> whereas French CJ, Hayne and Bell JJ disagreed, considering that it qualified and thereby further defined the group for whom special measures could validly be taken.<sup>159</sup> French CJ and Bell J considered that the proportionality requirement became relevant when assessing whether the measure in question was ‘taken for the sole purpose of securing adequate advancement’ of the group in question; this could only be the case where the measure was ‘reasonably appropriate and adapted’ to that purpose.<sup>160</sup> For Hayne J, proportionality entered the assessment of special measures through the word ‘adequate’.<sup>161</sup> The output of the Racial Discrimination Committee (which was referred to by Crennan J<sup>162</sup>) does not directly answer this question, but suggests that special measures must be necessary.<sup>163</sup>

Whilst French CJ and Bell J equated the proportionality requirement with the ‘reasonably appropriate and adapted’ test found elsewhere in Australian jurisprudence,<sup>164</sup> Hayne J considered this formulation ‘not to admit of any proportionality analysis’, without explaining further.<sup>165</sup> Crennan, Kiefel and Gageler JJ preferred the formulation ‘reasonably necessary’,<sup>166</sup> which Kiefel J assessed through an examination of reasonably practicable alternative measures.<sup>167</sup> Gageler J noted, in this respect, the views of the Racial Discrimination Committee that special measures should be proportionate.<sup>168</sup>

On the question of criminalisation, no member of the Court accepted that this feature made the impugned provisions disproportionate.<sup>169</sup> Hayne J considered that criminalisation will often be required to ensure compliance with a particular norm created by special measure.<sup>170</sup> While Gageler J considered this conclusion to be consistent with the Racial Discrimination Committee’s approach to the question of special measures,<sup>171</sup> the Parliamentary Committee agreed with the Special Rapporteur on Indigenous Peoples that a measure that criminalises conduct by members of a certain group cannot, as a matter of international law, be a ‘special measure’ for the benefit of that group.<sup>172</sup>

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<sup>158</sup> Ibid [130]–[131], [137] (Crennan J), [177]–[179] (Kiefel J), [358] (Gageler J).

<sup>159</sup> Ibid [18], [21] (French CJ), [92]–[93] (Hayne J), [241] (Bell J).

<sup>160</sup> Ibid [21] (French CJ), [244] (Bell J).

<sup>161</sup> Ibid [102].

<sup>162</sup> Ibid [121] (Crennan J).

<sup>163</sup> *General Recommendation XXX*, UN Doc A/59/18, ch VIII paras 8, 37; *General Recommendation 32*, UN Doc A/64/18, annex VIII paras 16, 31.

<sup>164</sup> *Maloney* [2013] HCA 28 (19 June 2013) [20]–[21], [46] (French CJ), [243]–[249] (Bell J).

<sup>165</sup> Ibid [96].

<sup>166</sup> Ibid [130]–[131], [137] (Crennan J), [180]–[183] (Kiefel J), [340], [358] (Gageler J).

<sup>167</sup> Ibid [180]–[183].

<sup>168</sup> Ibid [295], [358].

<sup>169</sup> Ibid [46] (French CJ), [103] (Hayne J), [137] (Crennan J), [186] (Kiefel J), [249] (Bell J), [357] (Gageler J).

<sup>170</sup> Ibid [103].

<sup>171</sup> Ibid [357].

<sup>172</sup> Parliamentary Joint Committee on Human Rights, above n 10, 28 [1.99], 30–1 [1.110]–[1.111].

### C Special Measures and Temporal Limitations

Ms Maloney further argued that the impugned provisions could not be special measures due to the absence of a temporal limit in the regulation, pointing to the requirement in art 1(4) of the *Convention* that special measures ‘shall not be continued after the objectives for which they were taken have been achieved’.<sup>173</sup>

This argument was rejected. Kiefel and Bell JJ held that ‘a measure is not required to provide for its terminus to qualify as a special measure’; the obligation arises when its objectives have been achieved.<sup>174</sup> French CJ pointed out that the regulation was, in fact, temporary.<sup>175</sup> Only Gageler J referred to the Racial Discrimination Committee’s views on this point.<sup>176</sup>

### D Conclusion on Special Measures

The findings of the Cape York Justice Study Report and the Explanatory Notes to the impugned provisions were held to be sufficient evidence<sup>177</sup> to allow the Court to assess them against the criteria for special measures.<sup>178</sup> The report, prepared by the Hon Tony Fitzgerald, was the basis on which the impugned provisions of the *Liquor Act* were enacted in 2002.<sup>179</sup> That report concluded that ‘[a]lcohol abuse and associated violence are so prevalent and damaging [in the Indigenous communities of Cape York]<sup>180</sup> that they threaten the communities’ existence and obstruct their development’.<sup>181</sup> The report recommended immediate intervention. The Explanatory Notes confirmed to the Court that the sole purpose of the impugned provisions was ‘the adequate advancement of the Palm Island community to ensure their equal enjoyment or existence of human rights and fundamental freedoms’.<sup>182</sup> The fact that there was no challenge to the impugned provisions under s 173G(3) of the *Liquor Act*, which requires the Minister to be satisfied of the need for the restrictions to minimise the harm caused by alcohol, reinforced this conclusion.<sup>183</sup> Furthermore, it could not be said that ‘the impugned provisions were not reasonably capable of being

<sup>173</sup> Joan Monica Maloney, ‘Appellant’s Submissions’, Submission in *Maloney v The Queen*, B57/2012, 26 October 2012, 16 [67]–[69].

<sup>174</sup> *Maloney* [2013] HCA 28 (19 June 2013) [252] (Bell J). See also at [186] (Kiefel J).

<sup>175</sup> *Ibid* [44]. Section 54 of the *Statutory Instruments Act 1992* (Qld) provides that ‘[s]ubordinate legislation expires on 1 September first occurring after the 10th anniversary of the day of its making’ (unless it is sooner repealed or expires, or unless a regulation is made exempting it from expiry). French CJ omitted the reference to the 10th anniversary, thus suggesting that ‘subordinate legislation expires on 1 September first occurring after the day of its making’.

<sup>176</sup> *Maloney* [2013] HCA 28 (19 June 2013) [294].

<sup>177</sup> On the question of evidence, see *ibid* [19]–[21], [45], [47] (French CJ), [341], [350]–[355], [368]–[370] (Gageler J).

<sup>178</sup> *Ibid* [46] (French CJ), [107]–[108] (Hayne J), [139] (Crennan J), [248] (Bell J), [370] (Gageler J). See Explanatory Notes, Indigenous Communities Liquor Licences Bill 2002 (Qld); Explanatory Notes, *Liquor Amendment Regulation (No 4) 2006* (Qld).

<sup>179</sup> Explanatory Notes, Indigenous Communities Liquor Licenses Bill 2002 (Qld) 1–2.

<sup>180</sup> NB: Palm Island is not part of Cape York.

<sup>181</sup> Explanatory Notes, Indigenous Communities Liquor Licenses Bill 2002 (Qld), quoted in *Maloney* [2013] HCA 28 (19 June 2013) [27] (French CJ), [267] (Gageler J).

<sup>182</sup> *Maloney* [2013] HCA 28 (19 June 2013) [46] (French CJ). See also at [58] (Hayne J), [137] (Crennan J), [372] (Gageler J).

<sup>183</sup> *Ibid* [46] (French CJ), [105]–[106] (Hayne J), [123] (Crennan J), [374]–[375] (Gageler J).

appropriate and adapted to their purpose'<sup>184</sup> or were not 'reasonably necessary'.<sup>185</sup> It could not be said that any of the alternatives were as practicable as the impugned provisions, nor that they provided the same level of protection from the damage caused by alcohol abuse.<sup>186</sup> The impugned provisions were unanimously held, therefore, to be special measures.

Because they were held to be special measures, the impugned provisions were not inconsistent with the *Act* and could not be invalidated by the operation of s 109 of the *Australian Constitution*.

## VI CONCLUSION

The above analysis reveals that, although willing to accept a role for extrinsic international legal materials in treaty interpretation, French CJ, Kiefel and Bell JJ did not make much use of them when interpreting the *Convention*. Like Hayne and Crennan JJ — who did not concede to such materials any meaningful interpretive role — French CJ, Kiefel and Bell JJ rarely referred to such materials.<sup>187</sup>

Gageler J, on the other hand, made extensive use of extrinsic international legal materials. His Honour considered the contribution that might be made by Committee output and other relevant international legal materials to almost every interpretive question posed, including fundamental questions about the concept of discrimination,<sup>188</sup> the operation of art 5 of the *Convention*,<sup>189</sup> the origins and purposes of provisions concerning special measures,<sup>190</sup> and specific requirements for special measures,<sup>191</sup> including questions of consultation and consent,<sup>192</sup> proportionality,<sup>193</sup> criminalisation<sup>194</sup> and temporal limitations.<sup>195</sup> His Honour did not blindly follow the interpretations contained in these materials (nor was he obliged to), but he did afford them a role more consistent with that granted to them by international law.

Whilst this note has not sought to weigh in on the accuracy of the Court's conclusion on any question of substantive law, what does emerge is the conclusion that the Court's approach to the interpretation of international law leaves much to be desired. All members of the High Court have overlooked the role of customary international law entirely and the majority have, to varying degrees, limited the range of materials to which reference may be made when interpreting treaties to fewer sources than are recognised by international law as

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<sup>184</sup> Ibid [46] (French CJ). See also at [253] (Bell J).

<sup>185</sup> Ibid [108] (Hayne J), [139] (Crennan J), [188] (Kiefel J), [373]–[375] (Gageler J).

<sup>186</sup> Ibid [109] (Hayne J), [137] (Crennan J), [187] (Kiefel J).

<sup>187</sup> French CJ, Hayne, Crennan and Kiefel JJ each referred to extrinsic material only once for the purposes of interpreting the *Convention*: ibid [24] (French CJ), [68] (Hayne J), [121] (Crennan J), [170]–[173] (Kiefel J). It was referred to by Bell J three times: at [211], [215], [234].

<sup>188</sup> Ibid [279]–[281], [290]–[291], [293], [308].

<sup>189</sup> Ibid [292].

<sup>190</sup> Ibid [281], [293]–[295], [327].

<sup>191</sup> Ibid [327].

<sup>192</sup> Ibid [295], [357].

<sup>193</sup> Ibid [358].

<sup>194</sup> Ibid [357].

<sup>195</sup> Ibid [294].

legitimate. As a consequence, the High Court risks interpreting statutes inconsistently with international law as it evolves, thereby placing Australia in breach of the international obligations to which Parliament intended to give effect.

Chris Ronalds SC and Kate Eastman SC — who appeared in *Maloney* as counsel for Ms Maloney and the Australian Human Rights Commission, respectively — wrote in 1998 that advocacy using international materials requires ‘courage and patience’.<sup>196</sup> More than 15 years later, these qualities appear still to be in order.

PATRICK WALL\*

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<sup>196</sup> Kate Eastman and Chris Ronalds, ‘Using Human Rights Laws in Litigation: A Practitioner’s Perspective’ in David Kinley (ed), *Human Rights in Australian Law: Principles, Practice and Potential* (Federation Press, 1998) 319, 341–2.

\* Commonwealth Attorney-General’s Department. All views here expressed are my own and should not be understood to reflect the views of any past or present employer.