CASENOTE:

JOAN MONICA MALONEY v THE QUEEN [2013] HCA 28

by Simon Rice

INTRODUCTION

In *Joan Monica Maloney v The Queen* ('*Maloney*'), the High Court decided that laws that prohibit an Indigenous person from owning alcohol are a discriminatory limitation on the human right to own property, contrary to the *Racial Discrimination Act* ('*RDA*'), but that the prohibition is allowed as a special measure to ensure the equal enjoyment of human rights and fundamental freedoms. In getting to this decision, the Court says a great deal about special measures under the *RDA*, in a return to 'the old bugbear of cases in which the Court decides a matter not by way of one or more joint judgments but by issuing as many separate opinions as there are judges'.[1]

This relatively brief report notes the principal points made by the Court and concentrates on one: the steps that must be taken for a law to be validly a special measure.

BACKGROUND

Ms Maloney was convicted of possessing a quantity of alcohol that exceeded the type and limit prescribed by the *Liquor Act 1992* (Qld) ('*Liquor Act*') and regulations under it. The prohibition applied only to community areas of Palm Island, populated almost exclusively by Indigenous people.

Ms Maloney's case was that the prohibition is discriminatory treatment on the basis of race, contrary to section 10 of the *RDA* and so, because of that inconsistency between a state and commonwealth law, is invalid under section 109 of the *Constitution*. She was supported by the Australian Human Rights Commission as an intervener and the National Congress of Australia's First Peoples as *amicus curiae*. The State of Queensland, supported by the Commonwealth and the States of South Australia and Western Australia as interveners, argued that the prohibition is not discriminatory treatment on the basis of race contrary to section 10 of the *RDA*, and that if it is, it is permitted as a special measure under section 8 of the *RDA*.

Section 10 is an 'equal treatment' guarantee: if, because of a law, a person of a particular race does not enjoy a human right, or enjoys it to a more limited extent than a person of another race, then section 10 invalidates the law to ensure that the person enjoys that right to the same extent as another person. But section 8 makes an exception if the law is a special measure 'to which paragraph 4 of Article 1 of the [*Convention for the Elimination of All Forms of Racial Discrimination* ('*CERD*')] applies'. Article 1(4) of the *CERD* provides 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...[2]

So there were two principal questions for the Court. The first was the section 10 question: because of the *Liquor Act* and its regulations, does Ms Maloney enjoy a human right to a more limited extent than a person of another race does? The second was the section 8 question: if section 10 is engaged, is the law a special measure as defined in Article 1(4) of the *CERD*? In this casenote, the section 10 question is dealt with relatively briefly; the section 8 question is dealt with more extensively as the more important issue addressed in the case.

SECTION 10 RDA

Although these issues took up a lot of time in argument[3] and in the decision, they are summarised here because the Court's conclusions are largely unremarkable as statements of precedent.

NOT LIMITED TO 'DISCRIMINATION'

It is well understood from *Gerhardy v Brown* ('*Gerhardy*'),[4] and *Western Australia v Ward* ('*Ward*'),[5] that the protection in section 10 is not limited to conduct that is discriminatory but that, more broadly, it covers conduct that limits the enjoyment of human rights. It may be that some of the judges felt the need to make this point again in *Maloney* because the applicant's case was run 'by reference to concepts of 'discrimination'',[6] bringing into the case the unnecessary 'baggage' of discrimination law.[7]

HUMAN RIGHTS LIMITED

A majority of the justices found that the *Liquor Act* and its regulations do operate to limit Ms Maloney's enjoyment of a human right, contrary to section 10 of the *RDA*.[8] The human right that is limited is the right to own property (in this case, alcohol), recognised in Article 5(d)(v) of the *CERD*. Kiefel J was alone in deciding that the right claimed by Ms Maloney was the right to possess alcohol,[9] which is not a recognised human right, and so the *Liquor Act* and its regulations do not offend section 10 of the *RDA*; for Kiefel J, that issue decided the case against Ms Maloney.

Ms Maloney also argued that her human right to equal treatment had been limited, but the Court rejected the argument, pointing out that that right, concerned with 'equal treatment before the tribunals and all other organs administering justice', was not engaged by the facts.[10] Further, Ms Maloney argued that her human right of access to a public place or service had been limited; French CJ (and Kiefel J in *obiter*) found that it had not been limited,[11] while Bell and Gageler JJ found that it had.[12]

EFFECT OF THE LAW

Perhaps over-estimating the Court's positivist leanings, it was argued by both the State of Queensland and the Commonwealth that it was not because of her *race* that Ms Maloney's human right was limited by the *Liquor Act* and its regulations, but because of *where she lived* (Palm Island). This reliance on the sufficiency of formal equality—the law is the same for everyone everywhere—is given short shrift by the two justices who dealt with it, Hayne and Bell JJ.[13] The real question raised by section 10 of the *RDA* is its *effect*: does the law have the same effect on everyone wherever they are? As Bell J points out,[14] the Court had already said as much in *Ward*.[15] The effect of the *Liquor Act* and its regulations is to limit the human right to property for people of Palm Island, where the people are 'overwhelmingly Aboriginal persons',[16] to a greater extent than it limits the right of a person of another race elsewhere in Queensland.

PROPORTIONALITY

The 'proportionality' issue arises more substantially in relation to special measures, discussed below. But the Australia Human Rights Commission argued that section 10 of the *RDA*, too, requires a proportionality analysis, a proposition rejected by Kiefel (in *obiter*) and Bell JJ.[17] Gageler J, on the other hand, considers that proportionality does arise under section 10, as a question of reasonable necessity,[18] but then conflates the undertaking of the analysis with the 'special measures' considerations in section 8.[19]

SECTION 8 RDA

The real novelty in *Maloney* is the approach the High Court takes to deciding whether a law is a special measure. Although a majority of the justices find that the *Liquor Act* and its regulations limit Ms Maloney's enjoyment of the human right to own property, contrary to section 10 of the *RDA*, they decide that the law is a special measure as defined in Article 1(4) of the *CERD* and so is excepted from the operation of the *RDA*, and is valid.

SPECIAL MEASURES IN INTERNATIONAL LAW

Section 8 of the *RDA* makes provision for special measures by referring to the terms of Article 1(4) of the *CERD*. That provision entered into force with the whole of the *CERD* in 1969; Australia ratified the *CERD* in September 1975, and implemented it in the *RDA* in the same year.

Since 1969, the meanings of the terms of the *CERD* have been explored and explained. Specifically in relation to special measures, the *CERD* Committee in 2009, in its General Recommendation No. 32 under a heading 'Conditions for the adoption and implementation of special measures', said that a state:

> 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.[20]

Earlier, in 1997, the *CERD* Committee had said that 'no decisions directly relating to [Indigenous peoples'] rights and interests [should be] taken without their informed consent'.[21] To similar effect, Article 19 of the *Declaration on the Rights of Indigenous Peoples*, formally endorsed by Australia in April 2009, requires states to consult before implementing measures that may affect Indigenous peoples. In 2011, the Expert Mechanism on the Rights of Indigenous Peoples, a panel of independent experts established by the United Nations Human Rights Council to advise on international jurisprudence relating to Indigenous peoples, said that states have a duty to obtain Indigenous peoples' consent through genuine consultation and participation.[22]

THE (IR)RELEVANCE OF INTERNATIONAL LAW

Ms Maloney's case turned on invoking the contemporary understanding of special measures: paragraph 4 of Article 1 of the *CERD*, *read with contemporary international jurisprudence and opinion*. She argued that limitations imposed by the *Liquor Act* and its regulations had not been designed and implemented on the basis of prior consultation.

Against this argument stands the simple text of section 8 of the *RDA*, which refers only to 'special measures to which paragraph 4 of Article 1 of the [*CERD*] applies'. The terms of neither section 8 nor Article 1(4) require any consultation, so Ms Maloney failed in an argument that attacked the validity of the special measure for want of consultation. This strictly positivist approach was endorsed by five of the six justices who sat; Keane J, who had not yet been sworn in, had been a member of a court that recently decided the very similar case of *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing*, where he had doubted the practicality of, if not the need for, consultation.[23]

In *Maloney*, French CJ states that:

> practices occurring since the enactment of legislative provisions implementing [a treaty or convention] into domestic law … cannot be invoked, in this country, so as to authorise a court to alter the meaning of [that] domestic law …[24]

Each of Hayne,[25] Crennan,[26] Keifel,[27] and Bell JJ[28] express the same view, in different terms.

Gageler J may be of a different view, though he does not say so directly. Rather enigmatically, he says that:

> Section 10 of the *RDA* is to be construed to give effect to those obligations under Articles 2(1)(c) and 5 of the Convention to the maximum extent that its terms permit. What is required by those obligations turns on the content attributed to them by the community of nations.[29]

Only a little more definitively, he goes on to say:

> The purpose of section 10 would not be achieved were constructional choices now presented by its text not to be made consistently with that contemporary international understanding.[30]

But having, it seems, opened up the interpretation of section 10 of the *RDA* to the influence of contemporary international understanding, Gageler J comes to his own view of what that international understanding is. He differs from the widely held view[31] that the *CERD* Committee said that the validity of a special measure is conditional on prior consultation, and says that the Committee, in the context of the whole of Recommendation 32, should not be taken to have adopted so rigid an approach.[32] Without explaining why, he implicitly excuses the absence of consultation in this case, and arrives at much the same view as the other justices—consultation is not required for a special measure to be valid—but does so in the circumstances of this case, rather than by excluding consultation as a requirement in any circumstance, as do the other justices. He leaves unanswered the question of what circumstances *do* require some measure of consultation.

In rejecting the legitimacy of referring to post-treaty jurisprudence to give meaning to the *RDA*, the Court relies on *Minister for Home Affairs of the Commonwealth v Zentai* ('*Zentai*'):

> The meaning of the limitation set out in Article 2.5(a) [of a particular, bilateral Extradition Treaty] is to be ascertained by the application of ordinary principles of statutory interpretation … not susceptible of altered meaning reflecting some understanding reached by the Ministry of Justice of Hungary and the Executive branch of the Australian Government.[33]

It is, however, not apt to equate 'some understanding' reached between two executive governments with extensive, expert international jurisprudence and opinion, widely publicised and relied on, as is the case for the *CERD*.

Not only is the analogy with *Zentai* inapt, but its long chain of supporting references, which track back to 1904,[34] are concerned with giving ordinary meaning to terms in legislation. Instead, the interpretation question in *Maloney* is the relevance of evolving interpretation of a treaty which has been given domestic effect: whether, when international standards are adopted domestically, their meaning develops domestically as their meaning develops internationally. The answer from *Maloney* is 'no', and the implication is that until and unless Australia legislates into domestic law, or 'agrees with',[35] each change in the international understanding of treaty obligations, a domestic law implementing a treaty means only what the treaty meant at the time of implementation which, in the case of the *RDA*, is 1975.

It is notable that French CJ explicitly limits his view to the approach that is taken in 'in this country' (Australia);[36] the Court's determinedly inward looking approach to human rights interpretation seems to be nearing the point anticipated by then NSW Chief Justice Spigelman who, in 1998, warned that, because of international human rights jurisprudence:

> both Canada and England, and to a lesser extent New Zealand, may progressively be removed as sources of influence and inspiration. Australian common law is threatened with a degree of intellectual isolation that many would find disturbing.[37]

French CJ has previously intimated, speaking extra-judicially, that he is sympathetic to a less insular, more 'global' approach to statutory interpretation, particularly

when the statute in question is 'part of some international model':

> In the area of statutory interpretation, particularly where statutes of one country are inspired or modelled upon those of another or are part of some international model, there is obvious scope for the use of comparative materials where appropriate ...
>
> The judges, lawyers, academics and law students of [Canada and Australia] live in a global legal neighbourhood … There are many dialogues to be had and many opportunities for the development of criteria for discriminating choice in the use of trans-national legal resources and participation in supra-national legal developments.[38]

Maloney seems not to have been an occasion for interpreting the *RDA* as part of the 'international model' for prohibiting racial discrimination, even though it is twenty years since Brennan J recognised in *Mabo v Queensland (No 2)* the 'imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination'.[39]

THE AUTHORITY OF *GERHARDY V BROWN*

In the absence of any guidance from post-treaty international jurisprudence, the test for special measures under the *RDA* is the strict terms of Article 1(4) of the *CERD*. In *Gerhardy*, Brennan J gave what has long been considered an authoritative account[40] of what Article 1(4) requires. But if that account is still to be relied on, it must be understood that, '[t]he reference made by Brennan J in *Gerhardy v Brown* to the importance of consultation cannot be taken to have elevated consultation to a condition of a special measure'.[41] Rather, Brennan J was saying that the result of any consultation is relevant only to a court's decision as to whether the 'sole purpose' of the measure was to secure the adequate advancement of a racial group in order to ensure their equal enjoyment of human rights.[42]

We might be wary about relying on the approach in *Gerhardy* at all. Although in *Maloney* Gageler J relies on Brennan J's four 'indicia of a special measure',[43] Hayne J points out that those indicia:

> do not refer to that part of Article 1(4) which speaks of the group in question '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'.[44]

In light of the Court's strong preference for reliance on the text, the safest course for assessing a special measure in Australia may be to refer only to the unadorned terms of Article 1(4) of *CERD*.

A court's role in that assessment is, however, limited. As we know from *Gerhardy* and were reminded by the Court in *Maloney*, whether a law is a special measure is a matter for parliament, and the court's role is only to 'determine whether the assessment made by the political branch could reasonably be made'.[45]

WHICH 'HUMAN RIGHT OR FUNDAMENTAL FREEDOM'?

Hayne J makes the point that Article 1(4) refers to ensuring the equal enjoyment of human rights and fundamental freedoms, but the Court in *Maloney* does not clearly agree on a human right and fundamental freedom the equal enjoyment of which was the aim of the special measure. French CJ[46] and Hayne J[47] refer to alcohol abuse, misuse and associated violence that threaten the existence and obstruct the development of Indigenous communities, and that detract from the equal enjoyment and exercise of human rights and fundamental freedoms. Crennan J states that:

> [t]he human right or fundamental freedom sought to be protected ... is the right of Aboriginal persons on Palm Island, in particular women and children, to a life free of violence, harm and social disorder brought about by alcohol abuse.[48]

In addition, Gageler J attributes to the 'Queensland Executive' the desire to ensure equal enjoyment of 'human rights to security of person and protection against violence or bodily harm and to public health'.[49] Although the special measure was undoubtedly well-intended, it remains unclear what the Court considered to be the human rights and fundamental freedoms that were the focus of the special measure.

PROPORTIONALITY

In the limited space available here, there is room to make only brief reference to a significant issue that the Court has left in a state of uncertainty: the time and place for a proportionality analysis. Three justices engage, separately and differently, in a syntactical analysis of the text of *CERD* Article 1(4),[50] in an effort to decide whether any part of it requires a proportionality analysis.

Ms Maloney argued that 'to be a 'special measure', the relevant law must be 'proportionate' to a legitimate end'.[51] On the basis of the text of *CERD* Article 1(4), Hayne J rejects this, but says that a proportionality analysis *is* relevant when assessing whether the 'advancement' is 'adequate'.[52] Crennan J says that a proportionality analysis is, effectively, a test of 'reasonable necessity' which is asked of the proposed 'protection';[53] Kiefel J, in *obiter*, agrees,[54] as does Gageler J.[55] Bell J, however, rejects any call in Article 1(4) for a proportionality analysis or a test of 'reasonable

necessity', relying on Deane J in *Gerhardy*.[56] This issue remains to be resolved definitively on another day.

CONCLUSION

One consequence of the decision in *Maloney* is that yet another complainant is denied a discrimination remedy by the High Court; *Maloney* joins a long, unbroken series of cases in which the High Court 'has decided appeals unfavourably to claimants for relief under anti-discrimination and equal opportunity legislation'.[57] Earlier cases had found for complainants, with reasoning that 'reflected the beneficial interpretation of the laws in question, ensuring [the laws] would achieve their large social objectives'.[58]

More broadly, there was a great deal at stake for the Commonwealth and State Governments; the validity of the 'Northern Territory Emergency Response' turns in part on a deemed special measure characterisation of the laws,[59] and *Maloney* significantly narrows any basis for challenge, by significantly broadening the latitude given to government to 'foist' special measures on communities.

More broadly still, the principal lesson from *Maloney* is that statutory interpretation in the High Court is—and so, throughout Australia, should be[60]—a positivist, textual exercise, increasingly removed from international developments, at least when it comes to dealing with human rights and anti-discrimination law.

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1 See Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2010 statistics' (2011) 34(3) *UNSWLJ* 1037, 1044.
2 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
3 *Maloney v The Queen* [2012] HCATrans 342 (11 December 2012); *Maloney v The Queen* [2012] HCATrans 343 (12 December 2012).
4 (1985) 159 CLR 70, 99.
5 (2002) 213 CLR 1, 99 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
6 [77] (Hayne J).
7 [68] (Hayne J).
8 [38] (French CJ); [85] (Hayne J); [112] (Bell J); [361] (Gageler J).
9 [157].
10 [36] (French CJ); [150]–[151] (Bell J); [361] (Gageler J); and see Hayne J [72] with whom Crennan J agrees [112].
11 [41] (French CJ); [152] (Keifel J); and see Hayne J [72] with whom Crennan J agrees [112].
12 [226] (Bell J); [361] (Gageler J).
13 [84], [204].
14 [204].
15 (2002) 213 CLR 1, 99 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
16 [84] (Hayne J).
17 [167], [173] (Keifel J); [197], [214] (Bell J).
18 [342]-[343].
19 [345].
20 General Recommendation No 32, 'The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination', CERD/C/GC/32 (24 September 2009) [18].
21 Committee on the Elimination of Racial Discrimination, 'General Recommendation on the rights of indigenous peoples', UN Doc A/52/18 (1997) 122.
22 Expert Mechanism Advice No 2, 'Indigenous peoples and the right to participate in decision-making' (2011) [21].
23 [2010] QCA 37, [193]-[194].
24 [15].
25 [61], citing *Minister for Home Affairs of the Commonwealth v Zentai* [2012] HCA 28.
26 [134].
27 [176].
28 [235].
29 [326].
30 [328].
31 See, eg, Human Rights Law Centre, *Fact Sheet 2: Aboriginal and Torres Strait Islander Peoples – Northern Territory Intervention* (2010), n 6.
32 [357].
33 [2012] HCA 28, [65].
34 *Nolan v Clifford* (1904) 1 CLR 439.
35 per Art 31(2) of the *Vienna Convention on the Law of Treaties* (1969), as suggested by Bell J at [235].
36 [15].
37 The Honourable J J Spigelman, Chief Justice of New South Wales, 'Rule of Law: Human Rights Protection' (address to The 50th Anniversary of the Universal Declaration of Human Rights National Conference, Human Rights and Equal Opportunity Commission, Sydney, 10 December 1998) <http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/spigelman_speeches_1998.pdf>.
38 Chief Justice Robert French, 'Home Grown Laws in a Global Neighbourhood – Australia, the United States and the Rest' (Albritton Lecture, University of Alabama School of Law, 18 January 2011) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18jan11.pdf>.
39 (1992) 175 CLR 1, 41–2.
40 See, eg, the 'Palm Island Wages case': *Bligh, Coutts, Coutts, Foster, Lenoy, Sibley, Sibley and Palmer v Queensland* [1996] HREOCA 28; Australian Human Rights Commision, 'The Suspension and Reinstatement of the RDA and Special Measures in the NTER' (2 November 2011) Pt 1.2, 7.
41 [186] (Keifel J).
42 [133] (Crennan J); [247] (Bell J); [357] (Gageler J).
43 [356].
44 [89].
45 [20] (French CJ); and see [19]–[21], [45] (French CJ); [137] (Crennan J); [248] (Bell J); [351] (Gageler J).
46 [46].
47 [107].
48 [178].
49 [375].
50 [92] (Hayne J); [177]–[178] (Keifel J); [241] (Bell J).
51 [93] (Hayne J).
52 [102].
53 [130].
54 [180]-[182].
55 [358].
56 [243]-[246].
57 *New South Wales v Amery* (2006) 230 CLR 174, 200 (Kirby J).
58 Ibid.
59 *Stronger Futures in the Northern Territory Act 2012* (Cth) ss 7, 33, 37.
60 'There is but one common law in Australia which is declared by this Court as the final court of appeal': *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.