

# Alcohol management plan not caught by *Racial Discrimination Act 1975* *Maloney v The Queen* [2013] HCA 28

By Peter McDonald

## KEY POINTS

The High Court set out two key requirements for design programs targeting the needs of particular races or ethnic groups that don't breach the *Racial Discrimination Act* (RDA).

Governments, both state and federal, have greater certainty about the types of targeted protective programs and laws they can implement for racial and ethnic groups following the High Court's decision in *Maloney v The Queen* [2013] HCA 28.

## THE ALCOHOL BAN ON PALM ISLAND

On Palm Island you are not permitted to possess alcohol other than light or mid-strength beer.

An alcohol management plan is in place on the Island, made under the *Liquor Act 1992* (Qld) and the *Liquor Regulation 2002* (Qld).

Palm Island is declared a 'restricted area' under the Regulation and, by force of the Act, it is an offence to possess alcohol (other than in the prescribed quantities) on a restricted area.

Palm Island is populated overwhelmingly by Aboriginal people. Ms Maloney is a resident there. She was convicted of being in possession of alcohol on the Island in excess of the prescribed quantity. She was found with a bottle of bourbon and a partly consumed bottle of rum. She appealed against her conviction.

Although she was convicted by a magistrate, and lost both her appeal to the District Court and the Queensland Court of Appeal, Ms Maloney must have been reasonably confident of success in the High Court.

After all, these laws did discriminate against the people of Palm Island when compared to the majority of the Queensland population (who may possess bourbon and rum if they want to) by depriving the people of Palm Island of the right to possess this type of alcohol on their Island.

And aren't the people of Palm Island mainly of the Aboriginal race?

And aren't laws that discriminate against a person of a particular race, by causing them to enjoy a right to a more limited extent than a person of another race, inoperative under s10 of the *Racial Discrimination Act 1975*?

In *Maloney v The Queen*, the High Court has now provided answers to these intriguing questions.

## WHAT THE HIGH COURT HELD IN MALONEY

By a majority (Justice Kiefel *contra*) the justices found that the laws to implement the alcohol management plan on Palm Island, by their practical operation and effect, are directed to people of the Aboriginal race and have a discriminatory effect on the rights of those people to own property. Discrimination of this type is contrary to Article 5 of the International Convention on the Elimination of All

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Forms of Racial Discrimination. So the laws were, on their face, subject to the operation of s10 of the RDA.

But, by s8(1) of the RDA, s10 does not apply to 'special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals'.

Unanimously, the High Court found that the laws in question were enacted for the sole purpose of dealing with a serious social problem affecting Indigenous communities in North Queensland, including Palm Island, namely alcohol-fuelled violence in the communities.

There were difficult judgments to be made about what was necessary to address that problem.

Within the boundaries of the RDA, such judgments were a matter for the parliament and the executive government.

The measures taken were held to be properly characterised as special measures for the purposes of s8(1) of the RDA. They satisfied the 'two characteristics' of 'necessary in order to protect' and 'directed at the sole purpose of securing' that protection.

Each of the justices arrived at the conclusion that the laws amounted to special measures for the purposes of the RDA, although each via a slightly different path of reasoning. The key seems to be that the measures were accepted as being directed at an appropriate sole purpose and they were not disproportionate in their pursuit of that purpose. By way of example Justice Crennan said:

'Materials (before the Court) justify the conclusion that the Aboriginal people of the Palm Island community require the protection afforded by the impugned provisions and those provisions are reasonably necessary to achieve that protection. The sole purpose of the impugned provisions is the adequate development or advancement of the community of Palm Island, and the individuals within it, and their protection from alcohol-related violence and public disorder. That protection is integral to the rights

of all members of the group to personal security and freedom from violence and bodily harm. Accordingly these provisions are a special measure within the meaning of Art 1(4) of the Convention.'

Ms Maloney's appeal was dismissed.

Now she must pay her \$150 fine for possessing her two bottles of sly grog.

**KEY LESSONS FOR GOVERNMENTS**

The decision of the High Court is consistent with the case law on s8(1). But for government it is still a welcome affirmation of the operation of the law on racial discrimination and it offers some certainty.

To avoid engaging the operation of the RDA when designing programs targeting the needs of particular races or ethnic groups, governments should be conscious of the key requirements needed to attract the protection of s8(1):

- that the special measure is 'necessary in order to protect' the group; and
- that it is 'directed at the sole purpose of securing' that protection.

If the program or measure does not meet one or both elements, then it may need to be redesigned, or the racial or ethnic element rethought, for the program or measure to pass scrutiny under the current racial discrimination regime. ■

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