The Northern Territory Court of Appeal Goes Off the Beaten Track

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BY CHRIS RONALDS SC AND CRAIG LONGMAN

In the recent decision of *Munkara v Bencsevich & Ors*, the Northern Territory Court of Appeal appears to have adopted an interpretation of s 10 of the *Racial Discrimination Act 1975 (Cth)* (**RDA**) that could limit First Nations people's protection against racial discrimination in

the Northern Territory, a place which already has the largest proportion of First Nation prisoners in the country. Distinguishing the High Court's decision in *Joan Monica Maloney v The Queen* (***Maloney***), the Northern Territory Court of Appeal held that a legislative scheme regulating the control of alcohol, which had been deployed overwhelmingly against First Nation people, was not discrimination prevented by s 10 of the RDA.

Protection against Racial Discrimination

The RDA protects Australian citizens from discrimination based on race. Section 10 of the RDA plays a specific and essential role in that protection, by prohibiting Federal, State or Territory governments from passing or applying laws that deny or restrict persons of a particular race from enjoying protected human rights or fundamental freedoms. The section provides that where a law has such an effect, the RDA will step in to make good the difference. Unlike many of the legal protections in discrimination law, it is concerned not with the actions of an individual, but with the operation and effect of laws that have been passed by elected representatives at Federal, State and Territory levels, and so provides an important protection against the oppression of the few by the many. Importantly, the text of s 10 makes it clear that the differential treatment does not have to based on, or by reason of, race. The issue is the impact of the law.

Interpreting s 10 of the RDA

In 2013, in *Maloney*, the High Court set out how s 10 should be approached. The case involved laws passed by the Queensland Government that restricted the possession of alcohol by residents on Palm Island, a small island off the coast of Townsville that has an almost entirely First Nation population. The effect of the law was that anyone resident on Palm Island was prohibited from possessing certain types and volumes of alcohol. Ms Maloney was charged with possessing spirits contrary to the laws, in response to which she argued that the laws were contrary to s 10. She was

convicted at first instance in the Magistrates Court and her subsequent appeals to the District Court and Court of Appeal were dismissed. The High Court granted special leave to hear her case. At hearing, both the Federal and Queensland governments argued that the laws did not attract the operation of s 10 because the restrictions applied to all residents of Palm Island, whether they were First Nation or not. The High Court rejected that argument and held that s 10 did apply, holding it was of primary importance to identify the effect of the impugned law. French CJ, Bell, Hayne, Gageler and Crennan JJ all noted that the language and therefore the test under s 10 does not refer to race. As noted by French CJ (at [11]):

> An important feature of s 10 is that it does not require that the law to which it applies make a distinction expressly based on race. The section is directed to the discriminatory operation and effect of the legislation.

As stated by Hayne J (with whom Crennan J agreed), it is "the effect" that remains of the "very first importance" (at [79] – [81], [84]). In her judgment, Bell J [204] referred to *Western Australia v Ward*, asserting it is the "the practical operation and effect" of the law which will determine whether its purpose or effect is to create racial discrimination. Consequently, it was sufficient to attract the protections of s 10 that the law had the effect that a racial group had their right to property restricted in a different way, that did not have to be the purpose of the law. Notwithstanding the attraction of the protections of s 10, the High Court ultimately found the laws valid, contending that they met the criteria of a "special measure" as contemplated by s 8 of the RDA.

The idea of special measures is essentially that of the American idea of affirmative action. The exception in s 8 permits discriminatory laws that are passed for the sole purpose of securing the adequate advancement of certain racial or ethnic groups to ensure their equal enjoyment or exercise

of human rights and fundamental freedoms. Section 8 of the RDA states that such laws are exempt from the operation of the protections in ss 9 and 10 of the RDA. In *Maloney*, the majority of the Court adopted a restrictive approach to the interpretation of special measures, finding that contemporaneous international jurisprudence could not be used to inform the criteria of special measures under the RDA. In particular, consultation with Indigenous peoples to generate free, prior and informed consent (a widely-accepted precondition for a special measure in contemporary international law) was held by the Court not to be an essential element of a special measure in Australian law. The decision resulted in the curious case that Australian domestic law remains stuck in 1975 whilst the Convention it seeks to implement has developed with accepted international norms. As racial discrimination becomes increasingly intolerable to the world at large, it remains consistently tolerable in Australia.

It might be concluded then that, as at 2013, a legislative scheme that denied or limited the right to possess and consume alcohol would attract the operation of s 10. In 2014, Mr Munkara found himself face to fact with such a scheme: Alcohol Protection Orders.

Mr Munkara's Case

Mr Munkara, a First Nation man from the Tiwi Islands, came to the Northern Territory Court of Appeal in July 2016 when he was 47 years old. He had been arrested two years previously for stealing $4.20 worth of food and orange juice from a supermarket in Darwin. He was an alcoholic who lived in the long grass in and around Darwin and got his meals from St Vincent's at Stuart Park and the Food Truck on the Esplanade. He had been drinking for 20 years and most days he drank till he was drunk. As he was intoxicated when he stole the groceries, in addition to a charge of stealing, Police chose to issue him with an Alcohol Protection Order (**APO**). APOs were orders that Police could issue under the now repealed *Alcohol Protection Orders Act 2013 (NT)*. The orders prohibited recipients from possessing or consuming alcohol for a specific amount of time and a breach

was a strict liability offence that carried a penalty of 25 penalty units or imprisonment for three months. In order for Police to issue an order, a recipient had to have committed a "qualifying offence" and the officer issuing it had to have a belief that recipient was intoxicated at the time of committing the offence. A "qualifying offence" was any offence carrying a minimum penalty of six months imprisonment or more. The charge of stealing that Mr Munkara faced carried up to seven years. Police served the first APO on Mr Munkara on 8 July 2014 at 2.51 in the morning. Within three days, Mr Munkara was seen drinking in a park in Darwin and was arrested and charged for breaching it. The day after, Police issued a second APO. The "qualifying offence" for the second APO was the breach of the first. Six days later Mr Munkara was taken into protective custody because he was, predictably, intoxicated in public. At the end of that protective custody he was charged with the breach of the second APO. He drank the next day and was again charged with a breach of the second APO and received a third APO. The stealing charge that started the entire process was subsequently withdrawn. It is evident that the numerous APOs made no difference to Mr Munkara's drinking. At the time of the hearing of his matter in the Court of Appeal, he had been arrested and charged with breaching the second APO order 17 times and the third APO three times (at [77]).

When he got to the Court of Appeal, Mr Munkara's legal representatives made a series of arguments on his behalf as to why the APO regime was unlawful. Some of these relied upon the RDA, some on administrative law grounds and some on common law arguments. Our interest is with the RDA claims, and, his principal argument, which was that the APO regime was inconsistent with s 10 of the RDA because ([95] per Blokland J):

> the persons who come within the net of…the *Alcohol Protection Orders Act* are overwhelmingly Aboriginal people. They are overwhelmingly more likely to be arrested, summonsed or served with a notice to appear in court in respect of a qualifying

> offence, and similarly more likely to be affected by alcohol at the time of the offending conduct, and thus be the subject of a police officer's belief to that effect.

As noted by the Court, that argument relied on an uncontested finding of the trial judge that 86 per cent of the APOs were issued to Indigenous persons (though later this was put at 90 per cent by Her Honour), notwithstanding they represent only 27 per cent of the population of the Northern Territory ([96] and [99]). Consequently, Her Honour summarised Mr Munkara's argument as [97]:

> though the statute may be racially neutral, its operational effect or its 'legal and practical operation' is to disadvantage Territory Aboriginal people and cause them to enjoy certain rights to a more limited extent than the persons of other races in the Northern Territory.

The decision of the Northern Territory Court of Appeal

The Court rejected Mr Munkara's arguments and held that s 10 was not engaged by the APO regime. The leading judgment of the Court on this issue was that of Blokland J, with which both Kelly and Barr JJ agreed. In her judgment, Blokland J gave two reasons for rejecting Mr Munkara's arguments. First, Her Honour adopted and endorsed the reasoning of the trial judge who said that the laws did not attract the protection of s 10 because it was not the law that created the impact, but the behaviour of the individual (at [96]):

> The *Alcohol Protection Orders Act* 2013 has no operation or effect unless an adult engages in conduct which amounts to a qualifying offence while affected by Alcohol and is arrested, summonsed or served with a notice to appear in court. Neither

> criminal offending, nor the consumption of alcohol, is a function of race. The operation of the Act is neutral as to race….

This conclusion appears to be tied to the Trial Judge's observation that the law applied to the conduct of both First Nation and non-First Nation people. However, this is not the right question according to *Maloney*, and indeed is precisely the approach the High Court appeared to reject. Nonetheless, in her judgment, Blokland J endorsed this reasoning, and went on to distinguish *Maloney* by adopting the trial judge's reference to the element of the "qualifying offence" (at [99]):

> The primary judge was correct in holding that any adverse effect suffered by Aboriginal persons as a result of the imposition of an alcohol protection order is not as a result of the law itself but as a result of the person committing a qualifying offence whilst affected by alcohol. The situation is clearly distinguishable from the circumstances considered in *Maloney* because, in that case, the Queensland legislative and regulatory scheme was directed at the largely Aboriginal population of one community, Palm Island, the residents of which were almost all Indigenous persons. They suffered disadvantage without any wrongdoing or qualifying conduct on their part.

In support of her argument that the prerequisite of "qualifying conduct" was sufficient to distinguish the APO regime from the legislative scheme considered in *Maloney*, Her Honour posited a hypothetical (at [104]):

> Aboriginal people make up about 30 percent of the population of the Northern Territory yet make up more than 80 percent of the prison population. To take a further example, an Aboriginal person is statistically many times more likely than a non-Aboriginal person to be imprisoned for the offence of causing

> serious harm contrary to s 181 of the *Criminal Code*. Yet it could not be sensibly argued that by reason of s 181 of the *Criminal Code* Aboriginal persons enjoy the right to personal freedom to a more limited extent than persons of another race. The reason is obvious. Section 181 does not limit the right to freedom – it merely prescribes consequences for a person's actions – as did the *Alcohol Protection Orders Act*.

There are three observations to make about this approach. First, the endorsing of Her Honour of the trial judge's reasoning necessitates adopting too the trial judge's observations regarding the fact that the Act is "neutral as to race". Yet the decision of *Maloney* makes it clear that the question is not whether the operation of the law is neutral as to race, but what the impact of the law is on the enjoyment or exercise, by people of a particular race, of the relevant right or freedom. Moreover, Her Honour's summary of the basis for the determination in *Maloney* invites scepticism. The High Court did not rely on the fact the law was directed at Palm Island as an evidential basis for finding that the differential treatment was based on race, and therefore offended s 10. The fact that the population of Palm Island was 97 per cent Indigenous was proof that the impact was differently felt by a racial group, something that is required by the terms of s 10. Ultimately it does not matter what the intention of the law is, or whether it operates by reference to race, it matters what the impact is. Once that conclusion is accepted, then the fact that the APO regime required what the Court referred to as "wrongdoing or qualifying conduct" makes no difference because s 10 does not differentiate between the mechanics of a law or not. If the law, in its entirety (including any criteria for "qualifying conduct") operates to limit Indigenous people's rights to possess or consume alcohol, s 10 is engaged and the question then turns to whether the law might be said to be a special measure. Given the Court's acceptance of the evidence demonstrating that the law impacted differentially on First Nation people, one would have thought that prima facie s 10 applied.

Secondly, it is not clear where the distinction lies in the reliance on "qualifying conduct", nor the suggestion that the APO regime "merely prescribes consequences for a person's actions", with the nature of any law that criminalises conduct. One could contend that all laws operate by prescribing consequences for a person's actions, that is the very nature of the Law's prohibition of certain behaviour and the basis for the principles for specific and general deterrence.

Thirdly, even if this distinction were accepted, there is nothing in the decision of *Maloney* or the approach of the High Court to the interpretation of s 10 to support the statement that such a conclusion could not be "sensibly" argued. The RDA is clear – if the law results in a denial or limitation of a right of a racial group, then s 10 is attracted, and the question becomes whether the law is a special measure. It is not clear on Her Honour's reasoning why it would not be the case that a prohibition under a criminal law that had the effect of differently denying people of a particular race the enjoyment of a human right or freedom would not fall foul of s 10 and certainly there is nothing in *Maloney* that compels that conclusion.

Ultimately, the decision in Mr Munkara's case is concerning because it appears to open up the possibility that laws could deliberately discriminate against First Nation people provided they have committed an offence first, a position countenanced neither by s 10 nor the High Court. Given the dramatic level of First Nation incarceration in Australia and in the Northern Territory, such a watering down of the RDA creates the potential for validating laws that deliberately target First Nation people. The protections guaranteed by the RDA are already under strain as a result of being cut-off from the international norms that birthed them, we can ill afford for them to watered down even further.

Chris Ronalds AO SC is a Sydney barrister, specialising in discrimination and harassment law, employment law, and administrative law. Craig Longman is a Sydney barrister and the Head of Legal Strategies at Jumbunna Institute for Indigenous Education and Research at UTS.

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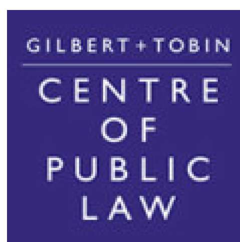

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auspublaw@unsw.edu.au

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