

RULE OF LAW INSTITUTE OF AUSTRALIA

Rule of Law, Human Rights and the Racial Discrimination Act

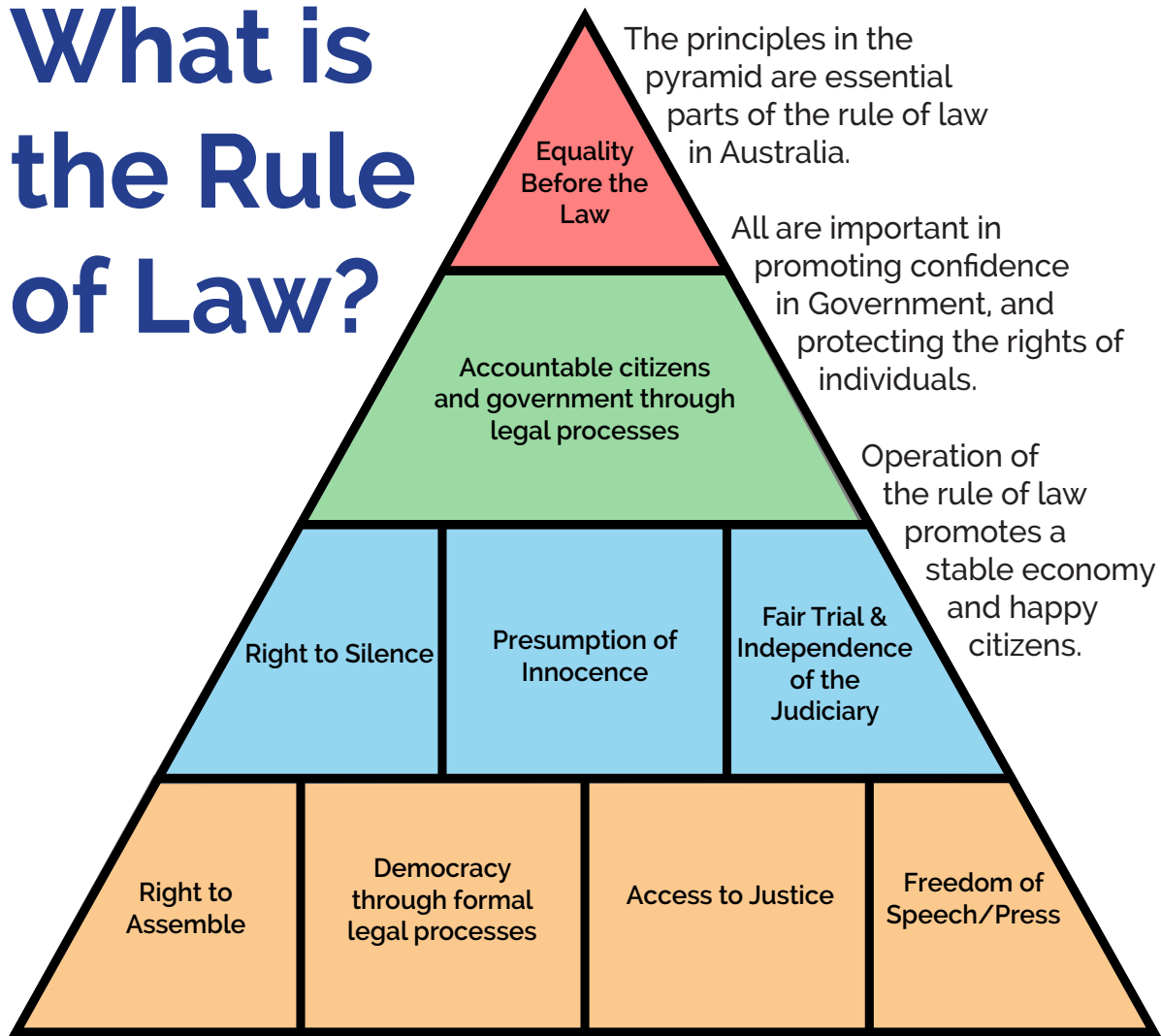
Contents

Overview of Racial Discrimination and the Rule of Law	3
Law, Society, Culture and Discrimination	4
What behaviour can be considered Racial Discrimination?	5
Road Map: International to Domestic Law & Racial Discrimination	6
Case: Racial Discrimination and Alcohol Restrictions in Queensland	8
In Depth: Issues Discussed by the High Court	10
Non-Legal Perspectives on Alcohol Restrictions	11
Activities	12
Cases, Legislation and References	13

The Rule of Law Institute of Australia is an independent, not for profit organisation which seeks to promote discussion of rule of law issues in Australia. It seeks to uphold transparency and accountability in government and strongly supports the presumption of innocence, independence of the judiciary and procedural fairness in the Australian legal system.

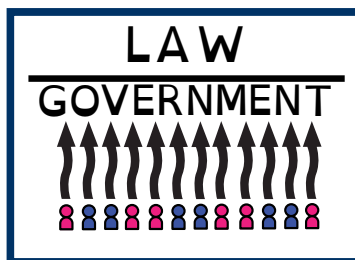
For further information visit our website: www.ruleoflaw.org.au

What is the Rule of Law?



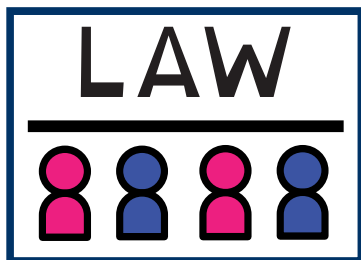
The rule of law is a legal concept which requires the use of power to be controlled by the law to ensure equality before the law.

Maintaining the rule of law is often noted as being the best way to preserve human rights.



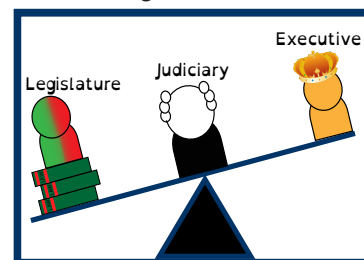
The separation of powers in Australia ensures that power is balanced between the three arms of government and that there are checks on their use of power.

The Judiciary is especially important in ensuring the integrity of the Australian Constitution and that the Legislature and Executive act according to the law.



If people believe the law is unjust, they may not want to follow it. Ideally people should feel the law is just and want to follow it.

The process of changing the law through democratic processes ensures that the law remains up to date with the needs of society.



The Rule of Law and Rights

According to the rule of law **no one is above the law** and a person cannot be punished, or have their rights taken away except by the law.

Some key principles of the rule of law which are commonly expressed as rights are:

- the presumption of innocence
- habeas corpus, the right to be brought before a court
- the use of power should be defined by laws
- the decisions of government should be transparent so they can be questioned (accountability).

OVERVIEW OF RACIAL DISCRIMINATION AND THE RULE OF LAW

Discriminating against people on the basis of their race, ethnic background or culture is a significant issue across the world. The act of discriminating against another person because of their race was taken to a horrifying level during the Second World War when around six million Jews, as well as vast numbers of Romani, Slavs, and Poles were killed in extermination and concentration camps. This event has come to be known as the Holocaust and has been a major inspiration for legal responses to prevent and punish racial discrimination.

Documents such as the *Convention on the Prevention and Punishment of the Crime of Genocide (1948)* and the *Rome Statute of the International Criminal Court (2002)*, which created the International Criminal Court, provide legal sanctions for committing crimes against humanity or other mass atrocity crimes on the basis of race and ethnicity.

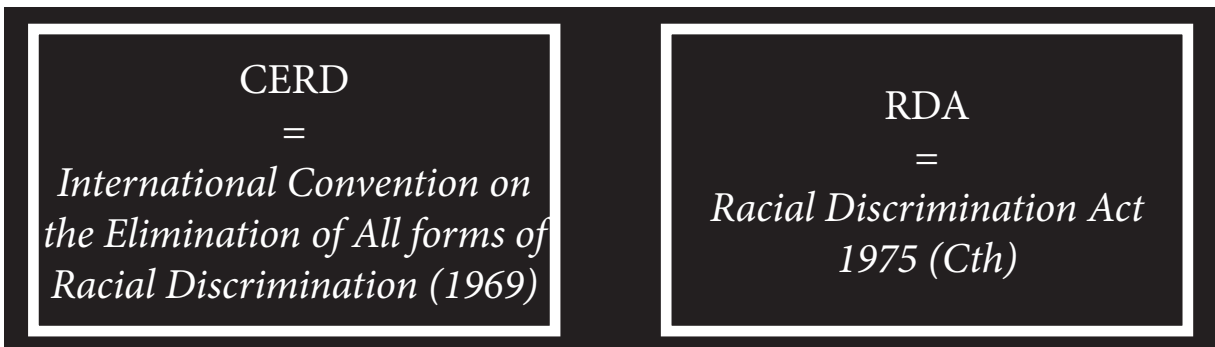
These instruments are designed to deal with situations where extreme and violent instances of discrimination breach international law, and where the perpetrators of such crimes cannot be prosecuted by domestic authorities.

The *International Convention on the Elimination of All forms of Racial Discrimination (1969)*, referred to as CERD, focuses on promoting laws and legal processes in nation states to deal with racial discrimination in the community. The law to deal with this at the federal level in Australia is the *Racial Discrimination Act 1975 (Cth)* and will be referred by the acronym 'RDA'.

Racial discrimination is a **legal term** defined in international law by the CERD, and in Australian law by the RDA. It is narrowly defined in the RDA and has its own body of case law which influences the way in which judges interpret and apply it. It is important to point out that the RDA does not make all behaviour that people may consider racist or discriminatory unlawful, see page 5 for an explanation of this.

'any, distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on a an equal footing, of human rights and fundamental freedoms in the political, social, cultural or any other field of public life'

International Convention on the Elimination of Racial Discrimination (1969)



LAW, SOCIETY, CULTURE AND DISCRIMINATION

This resource does not attempt to comment on broader issues of discrimination in Australia. It focuses on a case where an individual has taken a complaint of discrimination to the highest court in the land. The principle of **access to justice** is key in understanding the importance of the **rule of law**.

The fact that an individual can challenge the Government about whether a law is valid is a strong indicator that the **rule of law** is present in Australian society. The rule of law requires equality before the law and an aspect of this is that an individual should have the right to challenge the Government and its use of power. Questioning the application of law in a democratic society under the rule of law is desirable and ensures the government is following the law and being accountable for its actions.

Cases which reach the High Court are often legally, socially and culturally complex. In the case referred to in this resource, *Maloney v the Queen [2013] HCA 28*, there is no shortage of difficult issues and perspectives to consider. Legally speaking, the decision of the High Court is the 'end of the road' for Mrs Maloney, and while some will not agree with the decision of the High Court, it is extensively legally reasoned, but

also sensitive to the cultural dimensions of the 'special measures' aspect of the case.

See page 11 for a summary of many perspectives on the case, and as a starting point for developing your own opinion and inquiry into the particulars of the case.

Gerhardy v Brown (1985) 195 CLR 70

The case concerned whether an Indigenous man, Mr Brown who was not of the Pitjantjatjara people, was racially discriminated against when denied access to Pitjantjatjara land in South Australia.

The High Court decided that non-Pitjantjatjara people could be lawfully excluded from the Pitjantjatjara lands as the legislation in question met the conditions of a '**special measure**' under the RDA. See page 9 to find out about special measures.

This is an example of racial discrimination that can occur within the same broad ethnic group.

AL GRASSBY, THE FIRST COMMISSIONER FOR COMMUNITY RELATIONS, WITH GOUGH WHITLAM AT THE PROCLAMATION OF THE RACIAL DISCRIMINATION ACT 1975



National Archives of Australia, 'Al Grassby, the first Commissioner for Community Relations, with Gough Whitlam at the proclamation of the Racial Discrimination Act 1975' Australian Government <http://primeministers.naa.gov.au/Images/A6180_25-2-77-23_tcm13-21488.jpg>

WHAT IS RACE?

According to **CERD** race includes colour, descent and national or ethnic origin.

According to **most people** race is skin colour. For example: White, African, Asian.

According to the ***Anti-Discrimination Act 1991 (Qld)*** race includes— colour; and descent or ancestry; and ethnicity or ethnic origin; and nationality or national origin.

According to **science** race is a term people use to explain variations in physical features in human populations that relate to geographic regions.

WHAT BEHAVIOUR CAN BE CONSIDERED RACIAL DISCRIMINATION?

The following anecdotes will give you an indication of different situations involving discrimination on the basis of race and whether they fall under the definition of racial discrimination in the RDA.

1. An employer who refuses to pay equal wages because he says people of a certain race 'are not good workers'.

This is a clear example of racial discrimination since an employer is openly discriminating and placing people of a particular race at a disadvantage.

2. An Indigenous Australian receives more financial assistance from the government to attend university, than a non-Indigenous Australian.

This is an example of affirmative action or 'positive discrimination'. It is recognised that in certain areas some groups require additional assistance to access their rights because of historical discrimination against them.

3. A television advertising campaign portrays people of a particular race as less intelligent.

This is an example of offensive behaviour in public on the basis of race, also known as racial vilification, which is unlawful under the RDA.

4. A person who hates a particular racial/cultural group and often talks privately to their friends about their hatred.

This is not an example of racial discrimination. It is not unlawful under the RDA to express opinions in private.

ROAD MAP: INTERNATIONAL TO DOMESTIC

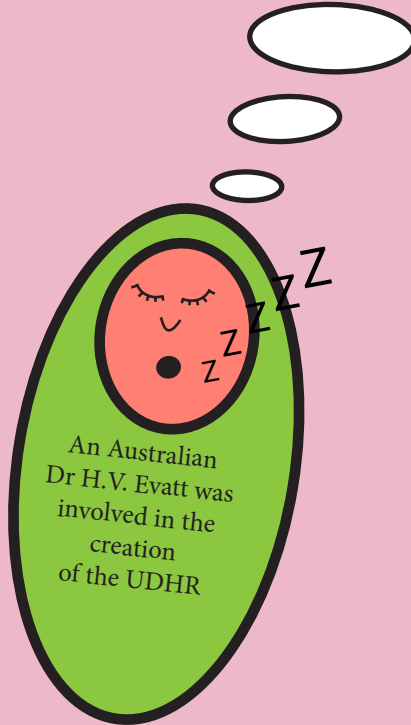
1 The Universal Declaration of Human Rights (1948) - UDHR

SOFT LAW

Laws which are not legally binding but promote protection of human rights.

*Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the **rule of law**...*

- Preamble to the UDHR (1948)



The UDHR was written in 1948 as a response to the horrors of the Second World War.

Australia signed the UDHR in 1948 to promote the importance of human rights.

While it is a soft law, it is widely recognised as a cornerstone of human rights law.

2 HARD LAW

Laws which are legally binding on sovereign states and aim to enforce protection of rights.

How do international agreements become law in Australia?

When an international agreement is ratified by Australia, it does not immediately become law. Australia has a **dualist system** which means the Parliament of Australia must write agreements into statutes before it has effect in Australian law. CERD was used as the basis of the *Racial Discrimination Act 1975 (Cth)* (RDA) and that statute applies throughout Australia.

How is the CERD legally binding on Australia?

Australia must report to the Committee for the Elimination of Racial Discrimination every two years on how the rights in the CERD are being implemented under Australian law. The AHRC writes the report with input from NGOs.

International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") 1969

Signed by Australia in 1969, ratified in 1975



LAW & RACIAL DISCRIMINATION

3 Human Rights and Australian Statute Law

Racial Discrimination Act 1975 (Cth)

The Racial Discrimination Act 1975 (Cth) s10(1) defines the right to racial equality before the law.

- the *RDA* states that it will enforce the right of people to enjoy the same access to a legal right as all other persons no matter what race, colour, or national or ethnic origin under either State or Commonwealth law.
- Section 8 of the *RDA* references CERD and provides exceptions to section 10. These exceptions are called “special measures” and are actions taken to assist a specific racial or ethnic group for a particular purpose and are not considered racial discrimination.

Human Rights & Anti-Discrimination Laws

Anti-discrimination laws provide a legal process for seeking compensation if an individual feels they have been treated unfairly because of their sex, race, age or disability.

Definitions of what constitutes discrimination are narrow. This limits the situations in which they can be used. Discrimination laws concerned with racial vilification have come into conflict with the right to ‘free speech’.

Enforcement and protection of a right occurs when a person brings a complaint.

4 Australian Human Rights Commission (AHRC)



Australian Human Rights Commission

everyone, everywhere, everyday

The first step of making a discrimination complaint is to go to the AHRC which must investigate it and try to conciliate it.

Laws found to be Racial Discrimination

A law of a Commonwealth or a State/Territory can be challenged as being racially discriminatory.

This means that a person can appeal to a court in their state and territory to have a law declared ‘invalid’. This kind of challenge may reach the High Court of Australia. If the High Court finds that a law is racially discriminatory it will be struck down as being **inconsistent** with the *RDA*.

Although the AHRC does not represent people in court, but when asked makes submissions on specific cases.

COMPLAINT MADE TO AHRC

CONCILIATION

Conciliation is a confidential process where all parties involved in the complaint come to a resolution with the help of a conciliator.

NOT RESOLVED

FEDERAL COURTS

RESOLVED

Examples of the ways that complaints can be resolved include payment of compensation and making an apology.

CASE: RACIAL DISCRIMINATION AND ALCOHOL RESTRICTIONS IN QUEENSLAND

Joan Monica Maloney v The Queen [2013] HCA 28

The Appellant

The Respondent

Year decision was handed down and the court

BACKGROUND

In *Maloney v the Queen [2013] HCA 28* an Indigenous woman living on Palm Island appealed against a law restricting possession of alcohol. Her argument was that the law discriminated against her because of her Indigenous background.

In 2008, Ms Maloney was convicted and fined in the Magistrates Court of Queensland for possessing more than the allowed quantity of alcohol in a **restricted area** (see **glossary**). The whole of Palm Island is a **restricted zone** under a regulation of the *Liquor Act 1992 (Qld)*

The **regulation** states that on Palm Island people may only have up to 30 cans of light to mid strength beer in their possession. The penalty for disobeying the **regulation** is a fine of \$120. Ms Maloney appealed to the District Court of Queensland which dismissed her appeal, then later appealed to the Queensland Court of Appeal which also refused her appeal. Finally, she applied for special leave to appeal to the High Court to argue her case.

The High Court granted Ms Maloney a hearing and had to decide whether a regulation made under the *Liquor Act 1992 (Qld)* in Queensland was in conflict with the *Racial Discrimination Act 1975 (Cth)*. If the **regulation** was found to be in conflict with the RDA then it would be struck down and the charges against Ms Maloney would be dropped. If the court found the **regulation** did not conflict with the RDA then Ms Maloney's conviction and fine would stand.



GLOSSARY

RDA - *Racial Discrimination Act 1975 (Cth)*

Leave to appeal - some courts require people to demonstrate that a legal issue is particularly important before they agree to hear it.

Alcohol restrictions - a ban or limit on the use, quantity and type of alcohol a person can possess in a defined area such as Palm Island.

Liquor Regulation - the Liquor Regulation made under the Liquor Act provides a list of **restricted areas** in Queensland where the use, type, quantity or possession of alcohol can be restricted or prohibited by law.

Restricted Area - a geographical area defined in the Liquor Regulation where restrictions on the use, quantity or possession of alcohol are in place. Disobeying the restriction is a criminal offence with a penalty of \$120.

WHAT DID THE HIGH COURT DECIDE?

Ms Maloney's appeal was **dismissed unanimously** by the Full Bench of the High Court, but discussed the issue of racial discrimination in great detail:

1. *Is restricting access to alcohol on Palm Island racial discrimination?*

Yes, a majority of High Court justices found that the regulation restricting alcohol in a community where 97% of people are Indigenous is racially discriminatory. However, they unanimously found the regulation was a '**special measure**' under the RDA taken to ensure the protection of other rights.

2. *Are the alcohol restrictions on Palm island a 'special measure'?*

Yes, the RDA allows for **special measures** which discriminate to be put in place if the goal is to allow for the equal enjoyment of human rights and fundamental freedoms. It found that the alcohol restrictions were intended to protect the residents from violence and social problems associated with alcohol abuse. The restrictions were found by the court to be an acceptable **special measure** under s8 of the RDA.

3. *Is there a fundamental freedom to possess alcohol?*

No. Kiefel J wrote in paragraph 157 of the full judgment that the possession and consumption of alcohol has been restricted and controlled throughout Australia and globally for hundreds of years and in some countries it is prohibited altogether.

Effect of the Decision

700 of the residents of Palm Island have been charged with offences relating to the possession and consumption of alcohol in **restricted areas**. If the Regulation had been found to conflict with the RDA then these charges would have been dropped.

The Queensland government is currently reviewing laws related to the restrictions and is encouraging Indigenous communities to be involved in decision making about alcohol restrictions.

Unanimously - when the decision of a court is unanimous it means that all the judges who heard the case were in agreement. If a decision is not unanimous, the majority view will be the decision of the High Court. Cases heard by the Full Bench of the High Court involve seven justices. When a justice disagrees with the majority view they are referred to as being 'in dissent'.

CERD- *International Convention on the Elimination of All Forms of Racial Discrimination* ("CERD") 1969

AHRC - The Australian Human Rights Commission

Liquor/Grog - alcoholic beverages

Majority decision - a decision where the majority of judges agree.

Special Measures - an action taken only to assist or protect the adequate advancement, equal enjoyment, human rights and fundamental freedoms of a racial or ethnic group

IN DEPTH: ISSUES DISCUSSED BY THE HIGH COURT

The summary of the case on the previous page is an overview and does not provide an explanation of all of the issues considered by the High Court. While the judgment was unanimous, each Justice provided different reasons for coming to their decision.

QUOTES FROM THE JUDGMENT

EXPLANATION*

'Difficulties can follow from the incorporation into a domestic law of criteria designed for an international instrument when those criteria have to be applied to the determination of rights and liabilities in a matter arising under that law in a municipal court'
French CJ (after Gummow J) *Maloney v the Queen* [2013] HCA 28 [15].

Sometimes it is difficult to make a domestic law fit with an international agreement because the unique needs of a state and its legal system will not always fit into the broad criteria of international agreements that are designed for all sovereign states.

"The sole purpose of the impugned provisions [the Liquor Act 1992 (Q) regulations] is the adequate development or advancement of the community of Palm Island, and the individuals within it, and their protection from ... 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, those provisions are a special measure within Art1(4) of the Convention [ICERD]."

The reason for the liquor restrictions on Palm Island is to protect the community from violence so that they can advance through their lives safely and this means that the restrictions are special measures as defined by ICERD.

Crennan J, *Ibid* [139].

"For the reasons that follow, I consider that the Court of Appeal [Queensland] was right to find that the liquor restrictions are racially discriminatory...[However]I consider that the liquor restrictions are special measures."

Although the liquor restrictions discriminate against the mainly Indigenous people of Palm Island they are legally valid.

Bell J, *Ibid* [197].

*These explanations are not a substitute for reading the full judgment of the court and are supplied to assist in understanding the terminology and concepts in the judgment.

NON-LEGAL PERSPECTIVES ON ALCOHOL RESTRICTIONS

Communities which are the subject of alcohol restrictions throughout Australia are split in their opinion about this issue. Alcohol restrictions in other Indigenous communities in Queensland, the Northern Territory and Western Australia have been adopted and if the case had been successful then states other than Queensland would have had to alter their legislation and regulations.

Some members of Indigenous Communities consider the restrictions a positive measure to ensure the safety of their communities, while others see the restrictions as limiting their rights and imposed by government without sufficient community consultation.



http://recordsearch.naa.gov.au/scripts/PhotoSearchItemDetail.asp?AM=08B=11695921&SF=1

While the decision of the High Court is final, the perspectives of those for and against alcohol restrictions, as outlined in the table below, are important for Federal, State and Territory Governments in considering whether they will reform their laws to ensure the right balance between restrictions and rights and freedoms.

FOR ALCOHOL RESTRICTIONS*		AGAINST ALCOHOL RESTRICTIONS*	
Jenny Macklin-Indigenous Affairs Minister ¹ Commonwealth of Australia	“...Aboriginal people have made it clear to me that alcohol abuse and the violence that comes with it is destroying their families”	Glen Elmes Minister for Aboriginal and Torres Strait Islander Affairs ⁵ Queensland	Wants to include community consultation. Restrictions should not be imposed on communities, they should be able to choose it or not. Does not want to continue the ‘paternalism of the past’.
Professor Marcia Langton University of Melbourne ²	Reduces hospitalisation for alcohol related assaults. Does not believe that alcohol restrictions are a violation of human rights.	Alf Lacey Mayor Palm Island ⁶	Paternalistic policy that can be compared to the excuses used to remove indigenous children from their families. That alcohol management ‘kills’ self-determination and economic prosperity. Indigenous people needed to determine their own future.
Warren Mundine Generation One ³	Freely available grog is a nightmare for remote indigenous communities.	Campbell Newman State Premier Queensland ⁷	“I simply say the policy of discrimination against Aboriginal people is not appropriate.”
Derek Waipo Mayor Aurukan (remote Indigenous community) ⁴	Alcohol ban is essential and links the need for alcohol management plans (AMPs) to the need for employment. If more people work then the community will no longer have a need for AMPs	Ethel Robertson Coordinator of the Palm Island Women’s Shelter ⁸	Alcohol restrictions discriminates against the rights of the people of Palm Island

*See page 13 for footnotes

ACTIVITIES

Questions

1. Identify one international agreement which protects human rights.

2. Outline the role of special measures.

3. Evaluate the effectiveness of legal and non legal responses to the restriction of alcohol possession and consumption on Palm Island.

4. Who are the stake holders in the debate about alcohol restrictions in Indigenous communities?

5. **Describe** how the High Court protected human rights and fundamental freedoms of the people of Palm Island in *Joan Monica Maloney v The Queen [2013] HCA28*?

CASES, LEGISLATION AND REFERENCES

Statute Law

Racial Discrimination Act 1975 (Cth)

Liquor Act 1992 (Qld)

Liquor Regulation 2002 (Q) ss37A,37B,Sched 1R

Case Law

Joan Monica Maloney v the Queen [2013] HCA28

International Law

International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") 1969

REFERENCES FOR TABLE ON PAGE 11

1. Richard Margetson, 'Alcohol management plans; Stronger Futures', *ABC Radio Darwin* 26 February 2013, <<http://jennymacklin.fahcsia.gov.au/node/2252>>
2. Jamie Walker and Patricia Karvelas, 'Relaxed grog bans 'to revive violence', Aboriginal leaders warn', *The Australian*, 4 October 2012, <<http://www.theaustralian.com.au/national-affairs/indigenous/relaxed-grog-bans-to-revive-violence-aboriginal-leaders-warn/story-fn9hm1pm-1226487743699>>
3. *ibid*
4. *ibid*
5. *ibid*.
6. Michael McKenna, 'High Court upholds alcohol restrictions in indigenous communities', *The Australian*, 20 June 2013, <<http://www.theaustralian.com.au/national-affairs/state-politics/high-court-upholds-alcohol-restrictions-in-indigenous-communities/story-e6frgczx-1226666549392>>
7. AAP, 'War brewing over indigenous alcohol ban', *The Australian*, 6 February 2013 <<http://www.theaustralian.com.au/news/breaking-news/alcohol-bans-discriminatory-newman/story-fn3dxiwe-1226571585291>>
8. Peter Mcallister, 'Fight for the right to drink on Palm Island', *The Australian*, 4 March 2013, <<http://www.theaustralian.com.au/national-affairs/indigenous/fight-for-the-right-to-drink-on-palm-island/story-fn9hm1pm-1226589532727>>

Still have a question?

Ask us on Facebook

<http://www.facebook.com/RoLAustralia>

or on Twitter

<http://www.twitter.com/RoLAustralia>



www.ruleoflaw.org.au

RoLIA

www.ruleoflaw.org.au