

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE
ATTORNEY-GENERAL'S DEPARTMENT

Native Title Amendment (Reform) Bill 2011

Senator Humphries asked the following questions at the hearing on 16 September 2011:

- a) What would the enactment of the Bill as currently drafted have on the question of interpretation that was raised in *Western Australia v Ward*? In particular, in that case HREOC and Justice Callinan expressed different views about interpreting legislation. HREOC, as an intervener in the case, made submissions concerning the interpretation of the *Native Title Act* and the relevance of international law. HREOC suggested that the Court should strain to read the Native Title Act in a way consistent with Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights (the UNDRIP not then having been adopted by the UN General Assembly), and that the presumption that courts construe domestic statutes to accord with international obligations should not be limited to cases of ambiguity. Justice Callinan rejected this view and said that it is better for the Court not to do this unless the legislation is genuinely ambiguous. If the Bill is enacted, would it effectively require the approach endorsed by HREOC?
- b) If the Bill is enacted, what influence would the High Court's decision in *Teoh* have on Australian domestic law, particularly the Native Title Act?

The answers to the honourable senator's questions are as follows:

- a) The Attorney-General's Department (the Department) is unable to provide legal advice to the Committee.

In *Western Australia v Ward* [2002] HCA 28, Callinan J stated as follows:

HREOC contended that the presumption that the courts construe domestic statutes to accord with international obligations should not be limited to cases of ambiguity, and that the courts, wherever possible, should read statutes consistently with international law. On this basis, partial extinguishment ought to be rejected and native title should be recognised as something akin to an estate in land of a kind familiar to the common law.

I would reject these submissions. The task of this Court and other courts in Australia is to give effect to the will of Australian Parliaments as manifested in legislation. Courts may not flout the will of Australia's democratic representatives simply because they believe that, all things considered, the legislation would "be better" if it were read to cohere with the mass of (often ambiguous) international obligations and instruments. Consistency with, and subscription to, our international obligations are matters for Parliament and the Executive, who are in a better position to answer to the international community than tenured judges. Where legislation is not genuinely ambiguous, there is no warrant for adopting an artificial presumption as the basis for, in effect, rewriting it.

The Department notes that the United Nations Declaration on the Rights of Indigenous Peoples is a resolution of the United Nations General Assembly. It is not a treaty. It is not legally binding, and does not give rise to obligations under international law.

b) In *Minister for Immigration and Ethnic Affairs v Teoh* (1994) 183 CLR 273 (*Teoh*) the High Court held that the ratification by the Executive Government of an international treaty gave rise to a legitimate expectation that a decision maker would act in conformity with the treaty requirements.

A legitimate expectation in administrative law is an interest protected by procedural fairness (*Kioa v West* (1985) 159 CLR 550). The High Court held in *Teoh* that where a ratified international treaty is relevant to the exercise of a decision making power, and the decision maker decides not to act in conformity with the treaty requirements, the decision maker must inform the person affected that the treaty requirements will not be considered and give him or her an opportunity to argue that the decision maker should comply with the treaty.

The decision in *Teoh* only considers legitimate expectations and international treaties ratified by the executive government. The decision in *Teoh* did not consider non-binding resolutions of the United Nations General Assembly such as the Declaration on the Rights of Indigenous Peoples.

The High Court in *Teoh* did not comment on objects clauses in legislation in relation to legitimate expectations and procedural fairness.