

CHAPTER 2

CERD AND THE CERD COMMITTEE

The History of the Convention and Australia's Signing and Ratification

2.1 The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted and opened for signature and ratification by United Nations General Assembly Resolution 2106 on 7 March 1966. The Convention came into force on 4 January 1969, in accordance with Article 19. Australia signed the Convention on 13 October 1966 and ratified it on 30 September 1975. Australia entered a reservation to Article 4(a) of the Convention, which places an obligation on State parties to prohibit incitement to racial violence.¹

Incorporation of the CERD Obligations into Domestic Law.

2.2 The *Racial Discrimination Act 1975* (RDA), which came into effect on 31 October 1975, was enacted to implement, in part, Australia's obligations under the Convention. The Preamble to the RDA states a particular purpose of giving effect to the provisions of the CERD and a copy of the Convention is scheduled to the Act. In this way, Australia's obligations under the CERD, to the extent that they have been given expression in the provisions of the RDA, now form part of the body of Australian domestic law.

2.3 In addition, even in the absence of legislation, international treaty obligations can be relevant in the domestic legal system. Several High Court decisions have indicated that the court is disposed to accord international instruments and international law some status in the domestic context. In *Mabo v Queensland (No 2)*, Brennan J stated that:

international law is a legitimate and important influence.²

2.4 Further, in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (Teoh's case), the majority held that the ratification of a treaty by Australia could create a legitimate expectation that administrative decisions would be made in accordance with the provisions of that agreement. In particular, Mason CJ and Deane J stated that:

ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act.³

1 This reservation is not relevant to the present inquiry.

2 (1992) 175 CLR 1 at 42.

3 *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 291.

2.5 The High Court has also accepted that international treaties can be used in interpreting ambiguous statutes, in the development of the common law and, since Teoh, that they may create legitimate expectations in relation to administrative decisions. While this does not suggest that a ratified treaty creates domestic legal obligations, it does give the treaty a level of significance that derives from the fact that it has been ratified. Successive governments have attempted to overcome the implications of Teoh with bills titled the Administrative Decisions (Effect of International Instruments) Bill,⁴ but no bill of this kind has yet been passed.

The Significance of the CERD for Australia

2.6 The international act of signing, ratification or accession does not result in the incorporation of treaties into domestic law until the Parliament enacts legislation to implement them. However, the executive act of entering into a treaty does create international obligations for Australia regardless of whether those treaty obligations have been incorporated into domestic law. This was recognised by a Senate Committee inquiring into the Commonwealth's power to make and implement treaties.⁵ Under international law a treaty is binding on any State which enters into it, and must be performed by it in good faith.⁶

Withdrawal from CERD

2.7 It is possible, in most cases, for parties to withdraw from a treaty. This is known as denunciation. The procedures for withdrawing from a treaty vary, depending on the actual instrument. In relation to the CERD, denunciation is possible by giving the Secretary-General of the United Nations 12 months written notice.⁷

The Committee on the Elimination of Racial Discrimination

Establishment and Membership

2.8 The Committee on the Elimination of Racial Discrimination (the CERD Committee) was established under Article 8 of the Convention. Article 8 states that the CERD Committee will consist of 18 members 'of high moral standing' elected by the State parties from their own nationals; although they sit on the Committee in their personal capacity.

2.9 The CERD Committee was the first of a number of bodies established by the United Nations under international human rights treaties to monitor and assist with the implementation of State parties' obligations under those treaties. Another example is

4 In 1995 and 1997.

5 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995.

6 See Article 26 of the Vienna Convention on the Law of Treaties.

7 Article 21.

the Human Rights Committee established under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

Functions, Powers and Obligations

2.10 Under Article 9 of the CERD, the parties to the Convention undertake to submit regular, or periodic, reports to the Committee detailing:

the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of the Convention.

A State party to the CERD must submit its initial report within a year of accepting the Convention, and subsequent reports each two years after that. The CERD Committee agreed in 1988 that after submission of a State party's initial, comprehensive report, the subsequent biennial report could be of an updating nature. Comprehensive reports are to be submitted every four years. The CERD Committee can also request supplementary reports at any stage.⁸

2.11 In practice, State parties are often late in submitting periodic reports. Overdue reports are noted in the annual report that the CERD Committee submits to the United Nations General Assembly. In addition, the CERD Committee has the power to consider the situation in States even when a periodic report has not been submitted.

2.12 The CERD Committee also has the power to request additional information from the relevant State party about any of the matters contained in Article 9. Under Article 9(2) the Committee must report annually to the Secretary General of the United Nations and may make suggestions and recommendations which are based on the examination of the reports of the parties to the Convention.

2.13 In the past, the CERD Committee has made recommendations and suggestions about individual States in relation to activities and compliance with the provisions of the Convention. In addition, the Committee has agreed a series of General Recommendations, which are intended to assist State parties to interpret, and comply with, their obligations under the CERD. Of particular relevance to this inquiry are General Recommendation XXIII on the rights of Indigenous peoples, and General Recommendation XX on the meaning of Article 5 of the Convention. While General Recommendations provide guidance in interpreting obligations under the CERD, they are not binding on State parties.

2.14 Since 1993, the CERD Committee has developed an 'early warning and urgent action' procedure. This enables it to examine situations of concern in relation to actual or potential circumstances within States that are parties to the Convention.

8 United Nations Centre for Human Rights, *The First Twenty Years: Progress Report of the Committee on the Elimination of Racial Discrimination*, New York, 1991, p 3.

An essential element of this procedure is that it does not depend on the relevant State party having submitted a report for consideration.⁹

2.15 The CERD Committee can activate these procedures and request that a report on the matters of concern be submitted to the Committee pursuant to Article 9(1) of the Convention. Matters under the early warning and urgent action procedure are dealt with on a case by case basis. The decisions of the CERD Committee in relation to Australia's native title legislation and other matters were considered by the CERD Committee under this procedure. The early warning and urgent action procedure also allowed the CERD Committee to keep these matters on its agenda for consideration at its 55th session in August 1999.

Individual Communications to the CERD Committee

2.16 Australia made a declaration on 28 January 1993 recognising the competence of the CERD Committee, under Article 14 of the Convention, to receive communications from individuals or groups from Australia who claim to be victims of a violation by Australia of its rights under the CERD. A State party that has made such a declaration can withdraw it at any stage, although this would not affect any communications that were already before the Committee.¹⁰ The CERD Committee has considered several individual communications in relation to Australia.

2.17 To date there has been no individual communication in relation to the effect of the amended *Native Title Act 1993*. Such an action would still be possible, providing that all domestic remedies were first exhausted.¹¹

9 Michael O'Flaherty, 'The Committee on the Elimination of Racial Discrimination: non-government input and the early warning and urgent procedure', in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, Leichhardt, 1998, p 159.

10 United Nations Centre for Human Rights, *The First Twenty Years: Progress Report of the Committee on the Elimination of Racial Discrimination*, New York, 1991, p 6.

11 Hon Elizabeth Evatt AC, Submission 7, p 2.