Adjudication—Migration Decisions

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I represent an aspect of the tribunal-to-be which will stand in a very special position because the relevant legislation, described as the portfolio legislation—the amendments made to the *Migration Act 1958* in the consequential and transitional bill—provides that Parts 4 to 10 inclusive of the ART Bill, the primary bill, will not be applicable to the Immigration Review Dvision ('the IRD'). To put it another way, it means that only Part 1 (Preliminaries), Part 2 (Establishment, Structure and Membership of the Tribunal), and Part 3 (Administration of the Tribunal), will apply to the IRD. I should of course mention that Part 11 deals with the Administrative Review Council.

All other matters—therefore, the manner in which the Immigration Review Division operates—will continue to be governed as they are now by the provisions of the *Migration Act 1958* as amended and by substantial amendments made in the consequential and transitional bill.

In addition, of course, the Administrative Review Tribunal will constitute a merger between two existing independent tribunals—that is, the Migration Review Tribunal ('MRT') and the Refugee Review Tribunal ('RRT'). Although they are presently dealt with under separate parts of the Migration Act, they have a number of provisions in common. They also differ quite sharply, partly because they have grown up separately—and one obviously develops an independent culture if one lives separate and apart—and partly because the provisions that apply to them are quite different. The MRT holds public hearings and the RRT holds private hearings. The position of dealing with, say, the general migration issues and dealing with protection visa issues will remain the same. Whoever holds the position of executive member of the ART will have an interesting function in trying to meld, if he or she were to try it at all, those two different streams into a single body. That is going to be quite a challenge.

The fact that the Migration Act procedure will continue to apply will mean that the migration divisions will continue to be essentially of an inquisitorial nature. By that I mean something more than what is described in the ART Bill as non-adversarial. It means that there will be a system whereby the primary responsibility for collecting the evidence and conducting the hearing will continue to rest with the member rather than with the representative of one or other of the parties—and, indeed, one interested party, namely the department, is hardly ever there. That will continue to be the case. The exclusion of virtually the bulk of the legislation means that the procedural core provisions will not be applicable to the ART. Those core provisions in relation to procedure are covered in sections 90, 91 and 92. Section 90, which provides that the tribunal must afford procedural fairness, has no corresponding provision in the migration legislation. Section 91, which relates to rules of evidence, and which says that the tribunal is not bound by the rules of evidence, et cetera, has its counterpart in the migration legislation. Section 92, which says that the tribunal must act with little formality, also has its counterpart in the migration legislation. A number of provisions dealing with procedure have been adopted, as it were, from the primary bill. As Sandra Power explained, the idea is that the Migration Act will provide a self-contained code so that one does not have to flip from one piece of legislation to another and put it all together. Hence, some aspects of the primary bill have been incorporated into the portfolio legislation.

Another provision that has been translated is the provision for making decisions on the papers. At the moment under the Migration Act, the Refugee Review Tribunal may make a

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decision on the papers only if it is favourable to the applicant. The provisions in the bill will widen this and will allow a decision to be made on the papers which is either adverse or favourable to the applicant. However, in the case of an adverse decision, as in the primary bill, certain safeguards are inserted and, indeed, the applicant must be called upon to show why the Division should not proceed in the absence of further evidence.

My hunch is that, because of this, and also of course the sensitivities, since these decisions will be judicially reviewable, members are unlikely, except in the very clearest of cases, to proceed to make an adverse decision on the papers. First, it may be simpler to invite the applicant to a hearing rather than first invite the applicant to show cause why a hearing should not be held. There is in fact already provision under our system whereby we ask applicants whether they want a hearing, and sometimes they say no, in which case life is a lot easier.

The other provision, however, which will be very useful, and that is taken over from the primary bill, is the provision to end reviews early if the applicant does not turn up for the hearing or if there is a breach of any direction. Leaving the breach of direction aside, in the Refugee Review Tribunal last year 47 per cent of applicants did not attend for a hearing. Most of these applicants, I hasten to say, come from countries which do not on the face of it raise refugee issues, in the sense that they are countries which do not have a record of internal disturbance and violence, and several of those countries in fact have democratically elected governments. When we are dealing with some of the countries that are well known from the newspaper records then the rate of attendance approaches 100 per cent. At the moment, a written decision in respect of an applicant who does not attend still has to be given. It happens from time to time, I notice from the records, that such an applicant, not having attended the hearing and having had his or her decision affirmed, then proceeds to appeal to the Federal Court and there also frequently does not turn up and then has his or her application for judicial review dismissed.

The option therefore of saying, 'Well, provided you have received adequate notice, you have chosen not to turn up, even though it was not possible to make a decision in your favour on the papers,' and then to simply say, 'Because you did not turn up we end the review, and the original decision continues to stand,' should save both members and the Federal Court some unnecessary time and effort. Of course, there is also included, again copied from the primary bill, provision for reinstatement. In other words, in such a case where for any reason the applicant was sick, forgot the date or whatever, there is provision to seek reinstatement on conditions very similar to the defendant who comes into the District Court after a default judgment and says, 'Please set it aside. I want to come in and defend.' This is a very positive provision.

Much of the business of the tribunal will again depend on the directions that are given. At the moment the principal member gives practice directions both to members and to applicants. The portfolio legislation contains s.353A, which, like s.161 of the primary bill, provides for directions to be given by the minister, the President or the executive member. The provisions in s.353A are considerably wider than those in s.161 of the primary bill.

Therefore, it may pay to do some study on the implications. Directions are undoubtedly necessary. It is obvious that any tribunal must be able to fine-tune the way in which cases are to proceed. I also accept that, in certain situations, it is legitimate for the Minister to give certain directions as to whether or not priority should be given by the Tribunal to particular categories— for instance, we have a policy to give priority in allocating hearings to persons who are in detention. It is obviously legitimate for the Minister to give such a direction and to make it government policy; the difficulty is to draw a line as to where the legitimate interests of the Minister stops and where the legitimate interests of those who are in day-to-day charge of the Tribunal should prevail.