Immigration Matters

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I want to cover some of the reasons behind why the Department of Immigration and Multicultural Affairs has such a comprehensive and self-contained code and also to put in context a few of the things that are challenges for us. I will start by saying that, at the time of the government's making its in-principle decision to establish the ART, it also made some decisions to make comprehensive changes to merits review in the Immigration portfolio. Those changes were enacted in late 1998 and came into effect in about June 1999. The desire in relation to the ART was that those reforms not be lost.

By and large, those reforms were consistent with the government's view of the procedures it would like to see for the ART.

What we have attempted to do is to make the comprehensive code self-contained in the Migration Act for ease of reference for all those who have to use it. It is also important to put in context that 97 per cent of the Immigration and Multicultural Affairs portfolio's merits review caseload is dealt with by the MRT and the RRT at the moment, with three per cent being dealt with by the AAT. Of that three per cent, two-thirds relate to character decisions and criminal deportation. Now that we have taken the opportunity with the ART to do some consolidation, the Immigration and Refugee Division of the ART will review all visa related decisions under the Migration Act, and the General Division of the ART will review citizenship decisions and decisions on registration of migration agents.

One of the challenges is the type of review processes that will in fact be used for character decisions. These are currently done, and have been done in the past, through an adversarial process. It is possible that ministerial directions may well be made to retain those sorts of processes within the ART and also in relation to how the tribunal is to be constituted, such as level of membership, whether it is multimember panels and so forth, and the procedures.

Moving on to some of the procedures, one of the important things that we have retained is the non-adversarial approach. In 97 per cent of our cases, the department does not appear before the tribunal, does not regard itself as a participant or a party. I think that it is important to recognise that the tribunal is undertaking an administrative decision making process. The objective that the department has is similar to that of the tribunal, and that is to arrive at the correct and preferable decision. It is not to actually be perceived as standing up to uphold a decision that may be inappropriate.

There are also resource implications. In fact, when people start talking about the financial costs of tribunals one thing often overlooked is the cost borne by agencies in the adversarial processes, such as having advocates and the filing of documents. Our processes for providing documents to both our tribunals at the moment is basically that the department file is handed over to the tribunal—warts and all. This in fact imposes some discipline on our record keeping to ensure that all our processes are well documented and retained. It also removes some of the issues of what we may or may not regard as relevant and a potential for dispute. We would envisage in the ART that review processes along those lines, without having the formal T documents of an AAT type process, would continue so that we can in fact contain our costs. Certainly, the government is not providing funds for additional departmental costs coming out of the reforms.

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Another important aspect is that, while the tribunal will have discretionary hearings, the Migration Act contains a comprehensive code of procedure to ensure that applicants have the opportunity to present all the material that they wish and the opportunity to respond to any material that is relevant that the tribunal may take into account in reaching its decision. Another important aspect is that the restrictions or rules in relation to representation relate specifically to appearances before the tribunal. There are no restrictions on having assistance and representation in the making of written submissions and preparation of documents. I think that at times when people talk about representation or lack of representation they seem to focus primarily on the hearing literally being solely the review. It is one mechanism or one avenue open to the tribunal for acquiring evidence for its decision.

The other important aspect of our process is that we also retain the specialised judicial review regime that is contained in Part 8 of the Migration Act; hence the removal of Part 10 of the ART Act from judicial review of immigration division decisions.

Essentially, the review rights and the review processes that currently exist with our two immigration portfolio tribunals will be retained. The only significant difference is the method of handing down decisions and the discretion to proceed to decision without a hearing.