Dear all,

Memorandum

As promised, I finally managed to obtain the attached memorandum from renowned legal counsel, whose strong credentials are found at the end of this email, about the unconstitutionality of the Bill.

Let me extract some important passages from it. After an analysis where counsel formed the view that the Bill presented constitutional issues, they closed as follows:

14. Lastly, we note the recommendation in the LCA submission to the effect that, in order to address concerns about the consequences of the elimination of dual regulation for some migration agents, here should be a two-year transitional period during which current registered migration agents who are also Australian legal practitioners with a restricted practising certificate might retain their registration. In our view, this would not dispel the constitutional issues considered above. As the LCA's recommendation is only envisaged to apply to those registered migration agents who hold a restricted practising certificate at the date of enactment (which we presume is intended to mean the date of commencement of the amendments), the problems would remain for any registered migration agent who becomes an Australian legal practitioner by obtaining a restricted practising certificate after the commencement of the amendments (i.e. during the transitional period). More generally, after the transitional period has ended, the same issues will arise in respect of any registered migration agent who subsequently becomes an Australian legal practitioner, and who would then be required to cease giving unsupervised immigration assistance for so long as they hold a restricted practising certificate.

Conclusion
15. We consider that there is at least an appreciable risk that the Bill, if enacted, may be constitutionally invalid as infringing the implied freedom. We consider that the Bill would be less susceptible of challenge if it permitted Australian legal practitioners (or at least those who hold a restricted practising certificate) the option of continuing to be registered as migration agents.

To give an option of being dually registered (or a transitional period) that does not apply to agents who are yet to become lawyers, as counsel stated, 'would not dispel the constitutional issues considered above'. Not to mention that a 2-year transitional period is highly problematic for the other reasons raised by counsel at [14] and by other submissions, including mine.

The solution to the constitutional and policy issues is very simple in my humble opinion: each agent, whether the holder of a legal practising certificate before or after at the enactment or commencement of the Bill, should have the option of being dually registered if they so choose. That is a win/win solution.

Counsel's credentials*

Chris Horan QC

"Chris has a particular interest in constitutional and administrative law, and also has a developing practice in commercial law and equity and trusts.

Before coming to the Bar, Chris worked for the Commonwealth Attorney-General's Department, in the office of General Counsel and later as Counsel Assisting the Solicitor-General. As Counsel assisting the Commonwealth Attorney-General's Department Chris prepared legal opinions and written submissions in significant litigation involving the Commonwealth. As General Counsel Chris gave legal advice in the areas of constitutional law and statutory construction in such areas as native title, taxation, grants and appropriations, superannuation, judicial power and acquisitions of property.

Prior to these roles Chris was an Associate in the High Court of Australia to Justice Brennan".

Alex Solomon-Bridge

"Alex has a broad range of experience across all types of commercial disputes, including in contractual, trade practices, corporations, and equity matters. He also has particular expertise in administrative and constitutional law, and appellate litigation.

Before coming to the Bar, Alex was the Researcher to the Solicitor-General for Victoria, Stephen McLeish SC (now Justice McLeish of the Victorian Court of Appeal). He was previously Associate to Justice Tate of the Victorian Court of Appeal. Before coming to Melbourne, Alex was a solicitor in the Crown Solicitor's Office in South Australia.

Alex is a reporter for the Commonwealth Law Reports, and editor of the freedom of information chapter of the Victorian Administrative Law looseleaf service. He is also Assistant Secretary of the Public Law Section of the Commercial Bar Association".
*
https://www.listgbarristers.com.au/barristers/christopher-horan-qc
https://www.listgbarristers.com.au/barristers/alexander-solomon-bridge

Regards,

Sergio Zanotti Stagliorio, Registered Migration Agent
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IN THE MATTER OF THE MIGRATION AMENDMENT (REGULATION OF MIGRATION AGENTS) BILL 2017

JOINT MEMORANDUM OF ADVICE

Introduction

1. We are briefed to advise on whether the Migration Amendment (Regulation of Migration Agents) Bill 2017 (Cth) (the **Bill**) would, if enacted, be invalid on the ground that it infringes the implied constitutional freedom of political communication on governmental and political matters (the **implied freedom**).

2. The background to and objects of the Bill are set out in the accompanying Explanatory Memorandum and we do not repeat them here. We note the following salient matters.

   2.1 The principal object of the Bill is to "remove lawyers from the regulatory scheme that governs migration agents such that lawyers cannot register as migration agents and are entirely regulated by their own professional bodies" (see p 2 of the Explanatory Memorandum).

   2.2 Accordingly, while the amendments will permit an Australian legal practitioner (defined as a lawyer who holds a restricted or unrestricted practising certificate) to give immigration assistance in connection with legal practice, they also prevent an Australian legal practitioner from registering as a migration agent under Div 3 of Pt 3 of the *Migration Act 1958* (Cth). The registration of a registered migration agent who is or becomes an Australian legal practitioner will be cancelled: see proposed ss 289B, 302A and 333B (items 13, 15, 30 of Sch 1 to the Bill).

   2.3 Subject to limited exceptions, it will remain a criminal offence under s 280 of the *Migration Act* for a person who is not a registered migration agent to give immigration assistance. "Immigration assistance" is defined in s 276 of the *Migration Act* and extends to a great many activities, including assisting another person in preparing a request for Ministerial intervention under ss 351, 417 or 501J of the *Migration Act*.

   2.4 An Australian legal practitioner will now only be able to give immigration assistance "in connection with legal practice" (see items 6 to 11 of Sch 1 to the Bill).

2.5 However, Australian legal practitioners are usually required to undergo a period (typically two years) of supervised legal practice once they are granted their first practising certificate. The holder of such a restricted practising certificate must practise under the supervision of an authorised principal of a law practice, and therefore cannot practise as a sole practitioner.

3. An obvious consequence of the Bill is that a registered migration agent who becomes an Australian legal practitioner, and who initially holds a restricted practising certificate, will be unable to continue giving immigration assistance as a migration agent, and will only be able to give immigration assistance in connection with the legal practice in which he or she is employed. This will have an impact on some existing migration agency businesses. Upon becoming an Australian legal practitioner holding a restricted practising certificate, the former agent will no longer be able to provide unsupervised immigration assistance. Further, whether or not the former agent can provide ongoing immigration assistance to his or her clients may depend on the principal of the relevant law practice. At best, the former agent will be required to transfer his or her clients (and any future new clients) to the law practice in question. If this is not possible, the clients would need to engage a new migration agent or a different legal practice.

4. This consequence of the amendments is acknowledged in the Explanatory Memorandum (at para 50), which states:

> *There will be some instances where an Australian legal practitioner, who operates a migration agency and also works separately in a law firm, may need to adjust the way in which they provide such services. The most obvious case in point will be where a practitioner has a restricted practising certificate. Such a practitioner can currently provide immigration assistance directly to clients if he or she is also registered as a migration agent. Following the commencement of the legislation, such a practitioner will cease to be a registered migration agent if they continue to hold their practising certificate, or will need to drop their practising certificate and maintain their status as a registered migration agent.*

5. As acknowledged in the Law Council of Australia's submission to the Legal and Constitutional Affairs Legislation Committee dated 5 September 2017 (the **LCA submission**), migration agents who hold a restricted practising certificate will be required –

> *to make a decision to either remain as a registered migration agent providing immigration assistance services (and to cease holding a restricted practising certificate) or regularising their legal profession*

practising entitlements by undertaking the steps necessary to obtain an unrestricted practising certificate." (p 13)

The implied freedom

6. The nature of the implied freedom has been examined on a number of occasions in the High Court. In *McCloy v New South Wales* (2015) 257 CLR 178, a majority of the High Court set out the relevant analytical framework as follows:

   6.1 Does the law effectively burden the freedom in its terms, operation or effect?

   6.2 If "yes", are the purpose of the law and the means adopted to achieve it legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?

   6.3 If "yes", is the law justified as:

      (a) suitable (*i.e.* as having a rational connection to the purpose of the provision);

      (b) necessary (*i.e.* that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom); and

      (c) adequate in its balance (*i.e.* as between the importance of the purpose served and the extent of the restriction it imposes on the freedom).

Consideration

Burden (Stage 1)

7. While not completely free from doubt, we are of the view that the Bill effectively burdens communication on governmental or political matters.

8. In *Cunliffe v The Commonwealth* (1994) 182 CLR 272, a majority of the High Court found that the statutory provisions regulating the giving of immigration assistance burdened communication on governmental or political matters within the scope of the implied freedom. The identification of a binding ratio from the decision in *Cunliffe* is not straightforward – the provisions were ultimately upheld as constitutionally valid, with differing reasons being given for reaching

that conclusion. Nevertheless, we consider that the judgments of Mason CJ, Deane, Toohey and Gaudron JJ in *Cunliffe* provide support for the proposition that the provision of advice and information by lawyers and other migration agents in relation to matters and issues arising under the *Migration Act* involves communications that are protected by the implied freedom. We note in this regard that applications or requests for Ministerial intervention are communications which would appear to be ineluctably bound up in political and governmental matters.

Compatibility testing (Stage 2)

9. The purpose of the law is, in our view, legitimate. The apparent objects of the Bill are two-fold: (1) to enable Australian legal practitioners to be able to give immigration assistance without being required to register as migration agents (**Object 1**); and (2) to provide a single regulator responsible for any particular person giving immigration assistance (*i.e.* the Migration Agents Registration Authority for registered migration agents, and the relevant legal disciplinary authority in the case of Australian legal practitioners) (**Object 2**). Those objects are compatible with the system of representative government provided for by the *Constitution*.

10. However, a question arises as to the means being used to achieve the identified objects and whether those means adversely impinge on the functioning of the system of representative government and are therefore incompatible in the relevant sense.

11. The means being used is deregistration of migration agents who become Australian legal practitioners. The effect of the chosen means is to restrict a class of communications (including communications made to the Minister) by those previously registered migration agents, who can no longer provide unsupervised immigration assistance outside the legal practice in which they are employed. Previous clients may also be left without advice and assistance from their former agent in this regard. This might raise questions as to whether the functionality of the system of representative government is unduly impinged by such restrictions.

12. Thus, even if Object 1 and Object 2 pursue ends which are *prima facie* legitimate, the means adopted to achieve those ends may give rise to a risk of incompatibility with the system of representative government that is protected by the implied freedom. As the High Court made clear in *McCloy*, if the Bill fails the compatibility test, it will be invalid without a need to undertake any further "proportionality testing".

Proportionality testing (Stage 3)

13. In our view, the Bill may face difficulties in passing the proportionality stage of the analysis.

13.1 *Suitable*: Plainly, Object 1 (allowing Australian legal practitioners to give immigration assistance) is not rationally furthered by cancelling the registration of those migration agents who become Australian legal practitioners, in circumstances where those agents will lose the ability to provide unsupervised immigration assistance for so long as they hold a restricted practising certificate. On the other hand, Object 2 (allocating a single regulator) is arguably furthered by the amendments effected by the Bill. We note, however, that a lawyer who has been admitted to practise but who does not hold a practising certificate may become or remain registered as a migration agent and be regulated by the Office of the Migration Agents Registration Authority, and yet remain subject to disciplinary action by his or her legal disciplinary authority for matters which tend to show he or she is not a fit and proper person (see *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279 at 289).

13.2 *Necessary*: The obvious and compelling alternative to achieve Object 1 would be to permit an Australian legal practitioner (or alternatively an Australian legal practitioner who holds a restricted practising certificate) to continue to be registered as a migration agent and to give immigration assistance in that capacity independently of legal practice, while also permitting them to give immigration assistance in connection with legal practice. On the other hand, it may be more difficult to identify an obvious and compelling alternative to achieve Object 2 – in so far as allowing dual regulation would inevitably involve some individuals being subject to two regulators.

13.3 *Adequate in its balance*: Object 1 having failed the "suitable" and "necessary" tests, it is convenient to focus upon Object 2. Whether there is an adequate balance demands attention be paid to the public importance of the purpose which is sought to be achieved, and involves a comparison of the positive effect of the legitimate purpose with the negative effect of the limit on the implied freedom. Overall, we are of the view that the impact of the restrictions on registered migration agents who become Australian legal practitioners with a restricted practising certificate may not be justified by the apparent importance of the object being pursued. While there may be some

efficiencies in removing the overlap in regulatory regimes, the public interest in that purpose may not ultimately outweigh the substantial impingement on the implied freedom. In so far as the statutory regime is directed at the protection of vulnerable persons in obtaining immigration advice and assistance, it is not clear that the interests of such persons would necessarily be advanced by completely removing the possibility of dual regulation.

14. Lastly, we note the recommendation in the LCA submission to the effect that, in order to address concerns about the consequences of the elimination of dual regulation for some migration agents, there should be a two-year transitional period during which current registered migration agents who are also Australian legal practitioners with a restricted practising certificate might retain their registration. In our view, this would not dispel the constitutional issues considered above. As the LCA's recommendation is only envisaged to apply to those registered migration agents who hold a restricted practising certificate at the date of enactment (which we presume is intended to mean the date of commencement of the amendments), the problems would remain for any registered migration agent who becomes an Australian legal practitioner by obtaining a restricted practising certificate after the commencement of the amendments (*i.e.* during the transitional period). More generally, after the transitional period has ended, the same issues will arise in respect of any registered migration agent who subsequently becomes an Australian legal practitioner, and who would then be required to cease giving unsupervised immigration assistance for so long as they hold a restricted practising certificate.

Conclusion

15. We consider that there is at least an appreciable risk that the Bill, if enacted, may be constitutionally invalid as infringing the implied freedom. We consider that the Bill would be less susceptible of challenge if it permitted Australian legal practitioners (or at least those who hold a restricted practising certificate) the option of continuing to be registered as migration agents.

3 October 2017

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* Liability limited by a scheme approved under Professional Standards Legislation.