31 January 2020

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Members

A submission regarding the *Migration Amendment (Regulation of Migration Agents) Bill 2019* (the "Bill") follows this cover letter. No submission regarding the *Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019* is made.

The writer's background

- I am a supervised solicitor working on immigration matters with Potts Lawyers, a Queensland-based law firm. I've been a registered migration agent since 2011.
- I was a Convenor in the Australian National University Graduate Certificate in Australian Migration Law (when it was in existence). I am now a Lecturer in the Faculty of Law at the University of Technology Sydney. I am a Practitioner Lecturer in the Graduate Diploma of Australian Migration Law.
- I deliver Continuous Professional Development workshops for the Migration Institute of Australia when opportunity presents.
- I am a Member of the Law Council of Australia and an Associate Fellow of the Migration Institute of Australia; and value the many friendships I've made with my learned colleagues.

The opinions and proposals expressed in the submission are my own and may or may not reflect the views of any of the organisations in which I am associated. Proposals address inadequacies and unanticipated side-effects of the Bill and achieve the goals of deregulation.

Proposal

Amendments to the Bill can create a regulatory framework not entirely dissimilar to our existing regime but with considerable advantages. The occupation Registered Migration Agent ("RMA") will be split into two: **Australian Immigration Attorney** and **Australian Immigration Consultant**. An Immigration Attorney must hold a legal practising certificate and cannot be an Immigration Consultant. There will be no time limit imposed upon a restricted legal practitioner to become unrestricted. Practitioners will keep their current MARN. RMA will become Immigration Consultants and upskill to become an Immigration Attorney if they take further steps (such as completing an Australian Law degree) and become admitted to the legal profession. Unrestricted legal practitioners will not have to become Immigration Attorneys but may choose to do so. The system that currently applies to RMA will be similar to the new system. An Immigration Attorney would be able to own and operate registered migration agency or be employed by one. A difference will be that Immigration Attorneys will be regulated only by the relevant State or Territory body. By creating a two-tiered system and the incentive for a practitioner to become legal practitioners, we can leapfrog similar jurisdictions such as New Zealand, Canada, and the UK in the regulation of our profession.

I believe the proposals can advantage many; disadvantage few or none; and advance our profession.

Tom Foran (MARN 1172414)

THE MIGRATION AMENDMENT (REGULATION OF MIGRATION AGENTS) BILL 2019

Introduction

[1] Thank you for the opportunity to provide my opinions and proposal to the Committee.

[2] I write as a stakeholder that will be negatively impacted by the *Migration Amendment (Regulation of Migration Agents) Bill 2019* ("the Bill") should it not be amended.

[3] My concerns extend to my RMA colleagues and to future migration advice practitioners that will join our profession in the future.

[4] I make no comment regarding the *Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019*.

[5] I propose that problematic aspects of the Bill in its current form are replaced with provisions that will better achieve the goals of deregulation and mitigate undesirable consequences.

[6] This submission is provided in three parts. The first part presents opinion about certain aspects of the Bill. Problems are identified and explained.

[7] In the second part, amendments to the Bill are proposed.

[8] In the third part, the reasons for the proposed amendments to the Bill are explained.

Part One: Problems with the current Bill

The advantages of complete deregulation are not achieved

[9] An aim of the Bill is to reduce red tape and remove the costs and problems of dual regulation. A clean and clear break, a complete debarkation between legal practitioners and RMA would maximise deregulation gains.

[10] Complete deregulation cannot occur because restricted legal practitioners would become highly disadvantaged, for reasons explained below.

[11] There are many restricted legal practitioners that are RMA so many would be impacted without the concession offered by the proposed section 278A.

[12] The concession enables dual regulation for a limited time period, which helps reduce the negative consequences that would otherwise be imposed upon them.

[13] A clear and clean break (complete deregulation) will never be achieved if there are some legal practitioners that may be RMA while other legal practitioners may not. Under the provisions of the current Bill, waters will forever be muddy.

[14] The below proposals will enable complete deregulation and achieve the associated advantages. Waters will be clean.

Restricted legal practitioners will face an unnecessary ticking time bomb

[15] The Bill creates section 278A as a concession to eligible restricted legal practitioners. The provision enables eligible restricted legal practitioners to also be an RMA.

[16] The concession is temporal. An eligible restricted legal practitioner may hold registration as a migration agent for two years after admission (the "eligible period") pursuant to subsection 278(3). An additional two years may be sought (subsection 278(4)) but this extension may only be relied upon once: (subsection 278(5)).

[17] This "loophole" will enable a person that gains admission to the legal profession to join the community of legal practising certificate holders (lawyers) yet keep their registration as a migration agent. The window of opportunity to gain an unrestricted legal practising certificate ends after a maximum of four years.

[18] If a restricted legal practitioner becomes an unrestricted legal practitioner during that four-year period, they would be removed from the register of migration agents and enjoy the benefits of deregulation. They would become regulated only by the relevant State or Territory legal body and save the costs of MARA registration. The provisions of the Bill will operate as envisioned.

[19] Despite the potential advantages of enabling dual regulation during the transition period, the imposition of a time limit is unnecessary and problematic.

[20] Current and future restricted legal practitioners should not be required to obtain an unrestricted legal practising certificate at all, let alone do so within a particular time frame.

[21] A person that becomes a restricted legal practitioner is not required to become an unrestricted legal practitioner. A person may achieve the goal of admission to the legal profession yet never become an unrestricted legal practitioner. There are no time limits imposed for restricted legal practitioner to become unrestricted in any area of Australian law. Why should a time-limit be imposed upon one that practises in migration law?

A disincentive will be created for RMA to further their study and improve

[22] The provisions of the current Bill create a disincentive for an RMA to invest in further knowledge and skills. An RMA would be dissuaded from improving. Should an RMA decide to study and complete an Australian law degree, they would become subject to a ticking time bomb described above in which they must complete supervised practise.

[23] A currently registered migration agent that decides to do a law degree and gain admission would need to find a supervisor. There would be only a four-year time frame to become unrestricted. Positions as a supervised solicitor in an Immigration Law firm (or in a firm with an Immigration Law section) are not so plentiful. The registered migration agent might be grateful to find a position in ANY area of law so that eventually the restriction can be removed. For 24 months, the RMA could be working on personal injury matters for example, an area completely unrelated to immigration law.

[24] Failure to become unrestricted in the eligible period would mean that the money, time, and effort set out to achieve their goal could come to naught. The RMA would be required to give up on becoming unrestricted legal practitioner; forfeit their legal practising certificate; lose the prestige of being a lawyer; and suffer the emotional harm and distress that could result. Few would take the risk achieving a huge gain that could easily be lost.

[25] A restricted legal practitioner may be able to find a supervised position, but the reality is that most graduate lawyer positions are in areas that are not related to immigration law.

[26] The RMA could stop dealing in migration matters to work as a supervised solicitor until they become unrestricted and again become able to work as a migration advisor. That could take so long that they lose the expertise they've developed in immigration law.

[27] The amendments proposed will reverse the disincentive. RMA will become able to reap all the benefits of completing an Australian law degree and not face any particular time frame to become unrestricted.

Unrestricted legal practitioners will lose their MARN

[28] Unrestricted legal practitioners have expressed concern to the writer that the Bill will prohibit them from being an RMA, and so they will lose the considerable value of their Migration Agent Registration Number ("MARN").

[29] The first two digits of a MARN are the year the agent became registered.

[30] The writer was first registered in 2011 so the first two MARN digits "11". Practitioners registered in 2005 have MARN that begin "05". Those registered in 1998 begin with "98".

[31] A MARN continues to build value over time. Those with years of experience in our profession will lose that intangible but valuable asset. The Bill will overnight completely eliminate the value of this asset. Many practitioners will be negatively impacted.

The opportunity to update occupational nomenclature and create a system will built-in incentives for practitioner advancement will be lost

[32] The occupational name *Registered Migration Agent* may have been appropriate in the 1950s when the provisions of the *Migration Act 1958* were drafted. For reasons explained below, more suitable occupational nomenclature exists.

[33] By creating two occupations, Immigration Attorney and Immigration Consultant, a system will exist that inherently creates an incentive for Immigration Consultants to upskill.

[34] There would be no requirement for an Immigration Consultant to become an Immigration Attorney, but a practitioner that chooses to invest in time, effort, and money to do so will realise intangible gains.

[35] Similar legal jurisdictions such as Canada, New Zealand, and the United Kingdom face similar challenges in the efficient regulation of their respective migration advice professions. Those jurisdictions do not have a system that has a built-in incentive for practitioners to improve.

[36] The proposed amendments would enable Australia to overtake those countries because the goal of deregulation will be achieved; restricted legal practitioners will not be disadvantaged; and migration advice professionals will have an incentive to study further.

Part 2: Proposed amendments to the Bill

Insert the occupations **Australian Immigration Attorney** *("Immigration Attorney") and* **Australian Immigration Consultant** *("Immigration Consultant") into s 275 of the Migration Act 1958.*

[37] The updated occupational names will replace the archaic occupational name *Registered Migration Agent*.

[38] Only a person that holds a current legal practising certificate issued by an Australian State or Territory may be licensed as an Immigration Attorney.

[39] Both restricted legal practitioners and unrestricted legal practitioners may be licensed as an Immigration Attorney.

[40] Neither restricted legal practitioners nor unrestricted legal practitioners will be permitted to be an Immigration Consultant.

[41] Current RMA without a legal practising certificate will become registered as Immigration Consultants, as would new entrants to the profession that do not hold a legal practising certificate.

[42] Registered Migration Agencies will become Immigration Consultancies. The current rules regarding ownership and operation of a Registered Migration Agency will be carried across to Immigration Consultancies. Both Immigration Attorneys and Immigration Consultants can own and operate an Immigration Consultancy. Both Immigration Attorneys and Immigration Consultants can be employed in an Immigration Consultancy.

Immigration Attorneys to be regulated only by the relevant State or Territory legal profession; and Immigration Consultants regulated only by an independent regulator

[43] Immigration Attorneys will be regulated (only) by the State or Territory that has issued their legal practising certificate.

[44] Immigration Consultants will be regulated (only) by an independent, MARA-like Authority (or alternatively by the relevant State/Territory legal profession).

[45] An Immigration Attorney employed by an Immigration Consultancy will be only regulated by the relevant State or Territory. An Immigration Consultant working in the same Immigration Consultancy will be subject only to the independent regulator.

Time limit for a restricted legal practitioner to become an unrestricted legal practitioner to be removed

[46] There would be no time-limit imposed upon a restricted legal practitioner to become an unrestricted legal practitioner.

Opt-in or opt-out licencing for unrestricted legal practitioners but compulsory licencing for restricted legal practitioners that undertake migration matters

[47] An unrestricted legal practitioner may choose to become licensed as an Immigration Attorney if they wish. They may opt-in but may freely choose to opt-out of the registration process.

[48] A person that is (or that becomes) a restricted legal practitioner must become an Immigration Attorney if they wish to undertake immigration assistance. This parallels the current system where a restricted legal practitioner must become an RMA if they wish to assist migrants with their cases.

Australian Immigration Attorneys to be allocated a MARN-like number

[49] Immigration Attorneys and Immigration Consultants will be allocated a number in the format currently used by an RMA.

[50] Practitioners that currently hold a MARN will be allocated an Australian Immigration Attorney Number (AIAN) that is the same number as their current MARN. RMA that become Australian Immigration Consultants will be allocated an Australian Immigration Consultant Number (AICN), enabling them to keep their current MARN.

[51] An Immigration Consultant that becomes an Immigration Attorney will keep their registration number. The AICN will become an AIAN but the number will not change.

Licensing as an Australian Immigration Attorneys to be inexpensive

[52] Unlike registration as an Immigration Consultant, which would involve the full range of functions that are currently afforded to the OMARA, licensing would involve no investigations, client complaint handling, disciplinary proceedings and the like.

[53] Licensing as an Immigration Attorney would be an inexpensive, annual process. The Authority need only confirm the applicant holds a valid legal practising certificate issued by a State or Territory Authority and maintain a database of Immigration Attorneys and their numbers.

[54] Australian Immigration Consultants will be issued their number by their regulator, as is currently done.

Part 3: Rationale for the proposed amendments

Create the occupations Australian Immigration Attorney and Australian Immigration Consultant

[55] By amending the Bill, we can create a new category of migration advice practitioner called *Australian Immigration Attorney*; and replace the archaic occupational name *Registered Migration Agent* with the more appropriate term *Australian Immigration Consultant*.

[56] The term “Australian” distinguishes a practitioner that practises in our legal jurisdiction.

[57] The term “Immigration” refers to inbound migration, reflecting the type of work that Australian migration advice professionals undertake. We do not engage in “emigration”. The word “migration” is ambiguous and is not used in other similar legal jurisdictions.

[58] The word “Registered” can be removed as it may be inferred by the name of the occupation.

[59] The term “Attorney” is used in Australia to describe the occupation of intellectual property specialists such as Trademarks Attorney and Patent Attorney.

[60] An Australian Trademark Attorney or an Australian Patent Attorney may be an unrestricted legal practitioner, a restricted legal practitioner, or not a legal practitioner at all. There is a precedent in Australia to use the word “Attorney” in the context of a profession.

[61] The term “Immigration Attorney” is commonly used to denote immigration lawyers in the United States.

[62] In Canada, migration advice professionals are called “Canadian Regulated Immigration Consultants”.

[63] New Zealand licenses practitioners and uses the term “New Zealand Immigration Adviser”.

[64] The United Kingdom registers practitioners and uses the term “Immigration Adviser”.

[65] Australia could replace *Registered Migration Agent* with the moniker Australian Immigration Agent; Australian Immigration Adviser; or Australian Immigration Consultant (as examples).

[66] Immigration Consultant is preferred as it is less similar to the term Australian Immigration Attorney, and less likely to be confounded by migration advice consumers.

Immigration Attorneys to be regulated only by the relevant State or Territory legal profession; and Immigration Consultants regulated only by an independent regulator

[67] Immigration Attorneys must hold a legal practising certificate. They are already subject to stringent oversight by the State or Territory Authority. The advantages of deregulation can be achieved if all legal practitioners are only regulated the legal profession.

[68] Immigration Consultants would be regulated in a manner not so different from the current regulatory regime. The functions of the OMARA would be performed by a similar body, renamed appropriately (for example, the Immigration Consultant’s Regulatory Authority).

[69] The writer’s view is that Immigration Consultants undertake legal work and that therefore they too should be regulated by State and Territory legal bodies and not an independent body. Legal bodies are experienced and well-equipped to regulate both lawyers and Immigration Consultants. Immigration Consultants would pay fees to the State or Territory body and be subject to their registration, disciplinary, and other processes.

The provision of “immigration assistance” and “immigration legal assistance”

[70] Both an Immigration Attorney and an unrestricted legal practitioner that is not an Immigration Attorney would be able to undertake what we currently define as “immigration assistance” and “immigration legal assistance”. Licensing distinguishes a specialised legal practitioner from a general legal practitioner.

[71] Restricted legal practitioners licensed as an Immigration Attorney will be authorised to undertake only the same tasks as RMA are currently able to do (immigration assistance).

[72] A restricted legal practitioner licensed as an Immigration Attorney could also undertake immigration legal assistance if they are supervised and working in a law firm.

Remove the time limit for a restricted legal practitioner to become an unrestricted legal practitioner

[73] The imposition of a time-limit does not advantage our profession and unnecessarily disadvantages restricted legal practitioners.

[74] Restricted legal practitioners that fail to gain an unrestricted legal practising certificate within the eligible period will face an unpleasant and unnecessary dilemma. They could maintain their registration as a migration agent and forfeit their restricted legal practising certificate; or they could forfeit their registration as a migration agent until they can become unrestricted.

[75] There are many registered migration agents that became so because they could not find supervision or employment in a law firm.

[76] Many migration agents became registered on the basis of holding a valid (restricted) legal practising certificate and not through academic qualifications such as the former Graduate Certificate or current Graduate Diploma in Australian Migration Law.

[77] Queensland and other States require a restricted legal practitioner to be supervised for 24 months to become an unrestricted legal practitioner.

[78] Only those restricted legal practitioners that already are employed by a law firm (and have a supervisor arranged from day one of admission) would be able to become unrestricted during the eligible period as the Bill is currently drafted.

[79] There are many circumstances in which a restricted legal practitioner would not be able to complete supervision requirements within 4 years, even if they were able to find a supervisor. Sometimes those reasons could be beyond their practicable control.

- Many newly admitted legal practitioners do not already work in a law firm nor have a supervisor, so they will require more than two years to become unrestricted.
- It is a well-known reality that many law graduates are not able to secure supervised employment. Sometimes a law graduate is not offered a supervised solicitor position for months, or years, or ever.
- A restricted legal practitioner for family or other reasons, might be only able to work 2 days per week, permanent part time. It would take that practitioner five years to cover the 24-month supervision period. They would not be come unregistered within the “eligible period”.
- A person could become a restricted legal practitioner and fall pregnant. It is sensible and desirable for a mother to attend first to the needs of a child and postpone a legal career until the timing best suits the family.
- A restricted legal practitioner could suddenly fall ill or be injured in an accident, unable to complete the last month or two of supervision, and through no fault of their own, fall just short of the target.
- A person might gain admission to an Australian legal jurisdiction, and soon afterwards travel overseas with their partner, to enable the partner to take up a fantastic job opportunity.
- Some restricted legal practitioners have already built businesses and have employees and obligations to clients. It could be hard for them to find suitable supervision because of their commitments to their business.

[80] An ideal legal framework would create an incentive for a practitioner to upskill. A system that rewards those who invest their time, effort, and money to study law and become a legal practitioner is a system that would benefit the individual and the migration advice profession as a whole.

[81] The Bill in its current form creates risk and disincentive. Removing the time limit and clearly identifying a pathway to career enhancement will create an inherent incentive to improve.

Opt-in or opt-out licencing for unrestricted legal practitioners but compulsory licencing for restricted legal practitioners that undertake migration matters

[82] Legal practitioners that choose to be licensed as an Immigration Attorney will gain the advantages of a licensing number – the value of an existing MARN will not be lost as it will roll over to the new system.

[83] Licencing will enable a legal practitioner to distinguish the type of law in which they practise and market their specialisation accordingly.

[84] The current or updated RMA Code of Conduct will not apply to Immigration Attorneys.

[85] Immigration Attorneys will be permitted to undertake MARA-approved CPD in the same way that Registered Migration Agents currently can.

[86] Both Immigration Attorneys and Immigration Consultants can remain membership with professional associations such as the Migration Institute of Australia.

[87] Trans-Tasman Agreement provisions will not change – a lawyer in New Zealand would need to become admitted to an Australian State or Territory Law Society to be an Australian Immigration Attorney. New Zealand Immigration Advisers that wish to become Registered Migration Agents would instead become Australian Immigration Consultants.

[88] A restricted legal practitioner that becomes a licensed Immigration Attorney will be able to be employed in an Immigration Consultancy and undertake immigration assistance. This parallels the current regime.

[89] A restricted legal practitioner licensed as an Immigration Attorney will be able to operate an Immigration Consultancy in the same way that a restricted legal practitioner currently can operate a Registered Migration Agency.

[90] The current insurance provisions available to a Registered Migration Agency would remain available to an Immigration Consultancy.

[91] Some registered migration agents are unrestricted legal practitioners. They operate registered migration agencies. The Bill if enacted would require the lawyer to choose between their legal practising certificate and their MARA registration. If they choose to retain their legal practising certificate, then they would need to spend money to convert their business from an agency to a legal practise and have far higher operating costs.

Australian Immigration Attorneys to be allocated a MARN-like number

[92] The year of migration agent registration has relevance because the year forms part of the number of a practitioner's Migration Agent Registration Number ("MARN").

[93] Clients and colleagues understand an agent's MARN to be a proxy for their experience.

[94] The value of a MARN increases over time as the first two digits of the number *decrease*. Value increases as then first two numbers (currently no higher than 20) decrease to 00, with the count-down continuing backwards for those registered in 1999 heading backwards.

[95] Lawyers with considerable experience will lose their ability to market their experience as an active participant in our profession because they can no longer be registered as a migration agent.

[96] By allowing all legal practitioners to be registered as Australian Immigration Attorneys and assigned the same number as their current MARN, this loss to practitioners can be completely avoided.

Licensing as an Australian Immigration Attorneys to be inexpensive

[97] As explained above, mere licensing will not be expensive as the functions required to license an Immigration Attorney will be far less than the full range of functions imposed upon a regulator such as the OMARA.

[98] Licencing will be simple and inexpensive (in the order of $100 per year) and involve a simple, annual application process.

A migration advice profession with an in-built incentive system that promotes self-development, skills and educational advancement, benefiting both the individual and profession as a whole

[99] By creating two occupations, one “above” the other, a clear pathway to professional and career enhancement can be made.

[100] An Immigration Consultant would have an incentive to study Australian law, complete a Law degree, and become admitted to the legal profession. They would be under no obligation or requirement to gain an unrestricted legal practising certificate. If they chose to do so, no time limit to achieve that goal will be imposed.

[101] Admission to the legal profession in Australia requires a highly English language proficiency threshold than does current entry to the migration advice profession.

[102] Minimum English language proficiency requirements for admission to the legal profession in NSW can be met (for example) by providing an IELTS (Academic) test score with Listening 7.0; Reading 7.0; Writing 8.0; Speaking 7.5

[103] The minimum threshold for registration as a migration agent requires (for example) IELTS (Academic) minimum overall test score 7.0 and a minimum of 6.5 in each subtest.

[104] An Immigration Consultant that does not have the English language proficiency to be admitted to the legal profession will be given a strong incentive to improve their English skills.

[105] An Immigration Consultant that becomes an Immigration Attorney will enjoy the prestige and recognition of that occupation. As there will be no time limit to become unrestricted, the risk of wasting time, effort, and money to upskill will be mitigated.

Conclusion

[106] Thank you for the opportunity to provide my opinion and recommendations to the Committee. If am able to assist the Committee, please ask me.