Dispute Resolution Pty Ltd

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31st January 2020

Committee Chairman
Senate Legal and Constitutional Affairs Committee
Mailto: legcon.sen@aph.gov.au

Dear Chairman

Migration Amendment (Regulation of Migration Agents) Bill 2019 [Provisions] and Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019 [Provisions]

Thank you for the opportunity to make a submission on the abovenamed Bill relating to the regulation of migration agents. This Bill has been drawn up to exclude lawyers from the need to register as migration agents.

I have attached a copy of my previous submission to the Joint Standing Committee on Migration dated 24th May 2018 which clearly sets out my views on the regulation of migration agents and the reasons why lawyers *must* continue to be required to be registered through the Office of the Migration Agents Registration Authority (OMARA). Unfortunately, up to date figures and data relating to the registration of lawyers through OMARA are no longer available since the OMARA was subsumed into the Department of Home Affairs and is no longer required to produce its own Annual Report.

I am writing this subsequent submission on the basis of my experience as an inaugural member of the first Migration Agents' Registration Board from 1992-1997 and the former NSW/ACT and National President of the Migration Institute of Australia. I have been practising in the migration area since 1988.

I understand that there will be lawyers who continue to maintain the argument that there is no need to require lawyers to be registered under a separate registration system independent of their state legal disciplinary bodies. This is done on the basis that lawyers are subject to strict scrutiny by their relevant law associations and have stringent requirements for trust accounting.

However, this argument is circuitous and ignores the real problem of allowing lawyers to be outside the current registration system. A client who has been ill advised and incurred substantial losses, whether it be financial or psychological, will receive no satisfaction or benefit that relevant law societies can audit a lawyer's trust account as in many cases, monetary compensation is not the issue.

I have been contacted by people who have been given wrong advice by lawyers (who are currently registered) but who have not been required to undertake or maintain any migration law studies to demonstrate their sound knowledge of migration. The OMARA recognises that legal practitioners must undertake compulsory CPDs in order for them to renew their legal practising certificates. However, there is no requirement that any of the CPDs that lawyers undertake during the 12 month period are migration related.

It never ceases to amaze me how some lawyers who hang out their shingle to provide migration advice understand little or nothing about Section 48, Schedule 3 or Schedules 1 and 2 of the Migration Act. Without this knowledge, advice provided to clients can be highly detrimental as clients may lose their opportunity to lodge a valid application which may have consequences for themselves and other family members. It may also result in a significant financial loss to the client and/or sponsor.

Lawyers must be kept within the registration system of migration agents through OMARA plus they must also be required to demonstrate that they have sound knowledge of migration practice and procedure. Being able to google a visa or check the department's website it not sufficient but is often the length and breadth of some lawyer's knowledge.

Questions need to be asked of both the OMARA and the relevant law societies in each state/territory as to how many past and current complaints have been received and resolved which involved lawyers as these figures are no longer available since the OMARA no longer produces its own Annual Report.

Consultations should also be carried out with ethnic communities throughout Australia to survey their experiences in using registered migration agents and lawyers as there is anecdotal evidence that negative experiences may not come to the attention of this inquiry. This is particularly important as the descriptor for this Bill on the Senate website does not make any mention to the removal of lawyers from the registration system but is coded by using the words that the Bill "……*would make a number of amendments to the Migration Act 1958, which are aimed at streamlining and simplifying regulation of the migration advice industry..*" which in layman's language does not properly inform the public of what the Bill is actually about.

The role of consumer protection in ensuring that there is only one registration system for people who provide migration advice (whether registered agents or lawyers) is compelling as it ensures that the general public can feel confident that there is an expectation that either registered agents or lawyers have demonstrated to the OMARA that they have sound knowledge. There is one high professional standard. This is a cogent reason why lawyers must be required to demonstrate their sound knowledge of migration practice and procedure by undertaking annual CPD studies in this specialist area.

If, however, this legislation proceeds, then an alternative option would be to ensure that there is a sunset clause of 3 years included in the legislation. This would allow time for the new régime to be tested and for the law societies to demonstrate that they are able to effectively handle complaints against their members and ensure consumer protection for the public.

I have provided a copy below of my previous submission to the Joint Standing Committee on Migration on the Efficacy of Current Regulation on Australian Migration Agents.

I would be happy to address the Committee on this matter.

Yours faithfully

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SUBMISSION TO
JOINT STANDING COMMITTEE ON MIGRATION
EFFICACY OF CURRENT REGULATION ON AUSTRALIAN MIGRATION AGENTS

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24th May 2018

Committee Chairman
Joint Standing Committee on Migration

Dear Chairman

I am writing this submission on the basis that I have been involved in providing migration advice since 1988 and have witnessed the development of the migration industry over the past 30 years.

BACKGROUND TO REGISTRATION:

The system of registration of migration agents was introduced in 1992 when the Migration Agent's Registration Board (MARB) was established. The writer was appointed by the then Minister for Justice, the Hon. Senator Michael Tate as one of the five national Board members for a period of five years. The role of the MARB was to establish a system of registration for migration agents which included *inter alia*, establishing a Code of Conduct, criteria for sound knowledge; reviewing academic courses; developing case precedents in determining professional misconduct and integrity issues, etc. During its five year term, the MARB registered the first 3,000 agents.

The MARB was replaced in 1998 by the Migration Agent's Registration Authority (MARA) which was subsequently replaced by the current Office of the Migration Agent's Authority (OMARA) in 2009.

There have been two major reviews of the migration industry the first in 2007, with the Hodges Report and subsequently, the Kendall Report in 2014. The Joint Standing Committee on Migration has undertaken this current review before all the recommendations of the Kendall Report have been fully implemented.

A snapshot of the migration industry on 30 June 2017[1] shows:

- 7006 people were registered in Australia as migration agents;
- 2292 (33 per cent) of the total number registered have a legal practising certificate;
- 39 per cent report operating in a business as a sole trader and
- 75 per cent have never had a complaint made against them
- Disciplinary decisions were made against 16 agents during 2016-2017

TERMS OF REFERENCE

[1] DIBP Annual Report 2016-2017, OMARA, Appendix E pp276-277

The terms of reference include addressing the following matters:

1. UNREGISTERED PRACTICE

The problem of unregistered practice in Australia continues with little being done to stamp out this insidious practice. It seems that it is only when there are complaints which gain notoriety through media publicity that investigations and prosecutions occur.

There are three main areas of concern about unregistered practice:

(a) Unregistered education, travel agents and companies providing migration advice on visa applications

In Australia there are a number of people and agencies who perform as unregistered migration agents. For example, there are some education and travel agents who secure clients by offering a one stop shop for their education or travel requirements bundled in together with the provision of the requisite visa made on behalf of their client, e.g. student or partner. Education agents often keep their clients for a number of years by offering visa services for further temporary or permanent visa.

These unregistered agents do not have the sound knowledge or standards of conduct which are required by registered migration agents to provide professional services.

Many companies also provide migration advice to visa applicants who may be seeking sponsorship by the company which is in contravention of the Migration Act 1958 relating to Migration Agents.

Unregistered practice has always been a problem in Australia as there is confusion about who is exempt from being registered to provide migration advice.

(b) Lawyers who will no longer be required to be registered

The problem of poor quality of advice and service will become more apparent when the proposed **Migration Amendment (Regulation of Migration Agents) Bill 2018** is passed. This Bill will allow lawyers to provide migration advice even though they are no longer required to be registered and/or have undertaken migration related studies as either part of their law degree or their continuing education programme.

The Law Council of Australia would argue that their lawyers undertake specialist migration studies and have superior skills to provide migration advice to the community above those agents who may have been registered for a number of years, undertaken extensive migration law studies and have a high reputation of providing substantial and sound migration advice to clients.

However, nothing could be further from the truth as not all lawyers have obtained specialist accreditation with their relevant law societies. According to information obtained from the relevant Law Societies and Council, as at June 2018 there were only 86 accredited migration specialists nationally. Only the Law Societies/Council based in NSW, Queensland and Victoria offer accredited migration specialist studies.

NSW	VICTORIA	QUEENSLAND
36	47	3

This does not bode well for the migration advice profession when considering the tens of thousands of lawyers who will be allowed to practice migration law without having studied any migration components as either part of their law degrees or continuing professional development. Once the Bill is passed, lawyers can provide migration advice without the need for registration.

As there are only 86 accredited migration specialists nationally, statements made by the Law Council of Australia that “Only lawyers are trained in core and elective fields of law”[2] cannot be sustained.

The posturing by the Law Council of Australia that only lawyers should be allowed to provide migration advice is anti-competitive and will be received with the cynicism that it deserves. There is no evidence to support such statements nor evidence to prove that lawyers are the only people competent to provide migration advice.

(c) Overseas Agents

The registration of overseas agents has proven to be problematic as the Australian government does not have jurisdiction over people who operate overseas even if they are Australian citizens. This is a problem particularly where there are labour hire firms involved with the principals located offshore. The Australian migration agent may only operate off shore to provide workers for local Australian companies thus escaping the requirements for registration. It is often in the cases of labour hire firms that high profile cases have gained notoriety through the press.

There needs to be tighter monitoring of workers who are brought in through labour hire firms to ensure that they are not exploited with their wages, accommodation, afforded proper OH&S and do not have their human rights abused through exploitative practices of avaricious employers.

2. TRAINING OF AGENTS and LAWYERS IN MIGRATION LAW

There are various levels of training that have been accepted by the registration authorities since 1992. These range from demonstrating work experience in the area to now requiring people to obtain a graduate diploma in migration. As migration law becomes more complex, it is necessary that new entrants and lawyers who have not studied any migration law, be required to undertake regular continuing education

[2] Submission by the Law Council of Australia on the *Efficacy of Current Regulation of Migration Agents*, p8

in migration law to bring them up to the same level as those agents who are required to do so under the current Migration Act 1958 and Code of Conduct.

The graduate diploma in migration is quite an extensive and expensive course. It is envisaged that by the time students finish this course that they would be able to provide sound migration advice. It should also be recognised that anyone undergoing this and other courses offered in migration law would have a substantial advantage over any lawyer who had not undertaken specific migration law studies. Simply studying a law degree should not automatically qualify a person to operate in the migration area because of the complexity and fluidity of migration law.

Over the years, I have experienced lawyers contacting me on matters which one would assume to be basic knowledge for a person who is providing migration advice such as:

- When does this person’s visa expire (when they have the visa in front of them)
- How can I obtain a paper application for my client? This is despite the fact that many applications have been on-line for most migration applications for over five years.
- Ignorance of the operation of the need to lodge applications before clients become unlawful.
- Ignorance of the operation of s48
- Ignorance of the operation of Schedules 1 and 2
- No access to Legendcom or its equivalent which is essential to anyone providing migration advice as it contains all migration legislative requirements and policy information.

3. SUPERVISED PRACTICE

There is a need for 12 months supervised practice for any person who wants to practice in the migration area after they have either completed their Graduate Diploma in Migration Law and/or their law degree. This should be encouraged so that a new graduate or lawyer can feel confident in providing migration advice and the practice and procedures which are involved in representing clients effectively and successfully. This would also provide consumer protection to those who are most vulnerable seeking migration advice.

4. TIERS OF MIGRATION AGENTS:

Migration agents can be recognised through the number of years that they have been working in the area and through their success record in lodging migration applications. This would be in a similar way that a business may become an accredited business sponsor where they have had no workplace and immigration issues and have a non-approval rate of less than 3% over the past 2 years.

5. AAT REVIEW AND THE ROLE OF MIGRATION AGENTS

It is imperative that registered migration agents continue to carry out the work required at the Migration and Refugee Division (MRD) of the AAT. The MRD is a statutory body with administrative powers to review migration decisions.

It is misleading for people to suggest that only lawyers should be allowed to represent clients at the MRD as this demonstrates a distinct lack of understanding of how the MRD works. As an administrative body, the Department of Immigration is not represented at the hearings and although the appellant may nominate the services of a representative, they do not have the automatic right to make representations before the MRD without first seeking permission of the Member hearing the matter.

The Migration Review Process sheet provided by the MRD clearly states that:

> *"…We may invite a representative to comment on matters at a hearing, but a representative cannot make an oral presentation other than in **exceptional circumstances**."*[3]

To only allow lawyers to represent clients at the MRD would be contrary to the spirit of the establishment of the MRD as an administrative non-adversarial body. It can only lead to longer delays at hearings and increased costs for clients.

6. OMARA and REGISTRATION

It is important that there be one regulatory authority for the registration of migration agents, including lawyers, despite the introduction of the proposed Bill. The system of registration has been simplified for agents seeking re-registration. However, apart from providing registration services, agents receive little benefit from OMARA after paying their substantial registration fees annually, which currently stands at $1595 for commercial agents. There is often no communication between the OMARA and the agent during the entire period of registration.

7. PROFESSIONAL STANDING AND OBLIGATIONS:

Migration agents are bound by a Code of Conduct which is extensive and covers, *inter alia* areas such as:

- migration practice
- ethics
- sound knowledge
- fees
- accounting
- file management
- advertising
- marketing

There are sanctions that may be imposed on agents who breach the Code of Conduct. During 2016-2017, the OMARA received 746 complaints and finalised 584. Merit and jurisdiction were established for 235 complaints and 107 were

[3] Form M10 February 2018 p 3

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finalised with a finding that the agent had breached the code of conduct for registered migration agents.[4]

Further, the OMARA report shows that disciplinary decisions were made in regard to 16 registered migration agents in 2016–17, in relation to 40 of the 107 complaints where breaches were found. These decisions resulted in seven agents having their registration suspended, eight having their registration cancelled and one agent being barred from registering again as a migration agent for a period of five years.[5]

It is clear that agents who are in breach of the Code of Conduct will be disciplined by OMARA who has the power to impose heavy penalties on offending agents.

8. FEES:

Currently the fees charged by migration agents are within a wide range. However, problems arise when either registered agents, lawyers or unregistered people seek substantial sums of money for a migration outcome.

There should be a community education campaign to ensure people who believe paying a huge sum of money, which would appear to be outside the realms of what may be considered a reasonable fee to be paid, that they will have no advantage over those who have paid substantially less for migration advice.

9. PRIVATISATION OF THE VISA SYSTEM

Although not within the current terms of reference it is important to acknowledge that the Department of Home Affairs is currently piloting programmes where all migration visa applications and processing will be done through large private companies.

This will decimate the current migration profession for both agents and lawyers as only the very big firms will be able to operate in the new environment. This step should not be embarked upon lightly and until it can be demonstrated that it will be in the best interest of consumers who are often the most vulnerable in the community.

[4] DIBP Annual Report 2016-2017, Appendix E p278
[5] Ibid

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CONCLUSION:

The migration profession is highly regulated for the protection and benefit of the community as a whole. The current registration system is robust but will lose its prominence once lawyers are no longer required to be registered.

Yours Faithfully

[redacted]

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