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No. 81 2001–02

Migration Legislation Amendment (Migration
Agents) Bill 2002

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No. 81 2001–02

Migration Legislation Amendment (Migration Agents) Bill
2002

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Contents

Purpose	1
Background	1
Regulation of the Migration Advice Industry	2
The Existing Regulatory Scheme	3
Existing Regulatory Scheme to Continue	3
Powers of the MARA over Migration Agents	3
Procedures Following Suspension or Cancellation of Registration	4
MARA statistics	4
The rationale for the proposed amendments	5
Main Provisions	5
Immigration Assistance	5
Immigration representations	6
Barring period	6
Automatic continuation of registration	7
Disciplining former registered migration agents	7
Functions of MARA	8
Endnotes	9

Migration Legislation Amendment (Migration Agents) Bill 2002

Date Introduced: 14 February 2002

House: House of Representatives

Portfolio: Immigration and Multicultural and Indigenous Affairs

Commencement: The amendments outlined in this Digest commence on a day to be fixed by Proclamation. However, where those amendments are not proclaimed within six months of the Bill receiving the Royal Assent, they will be taken to have commenced on the first day immediately after that period.

Purpose

The major amendments proposed by the Bill:

- prevent an applicant for registration as a registered migration agent from being registered where the Migration Agents Registration Authority (MARA) has made a decision to bar him or her for a particular period and that period has not ended
- provide the MARA with the power to bar a former registered agent from being a registered migration agent for a maximum period of 5 years if, after investigating a complaint in relation to his or her provision of immigration assistance as a registered agent, it is satisfied the subject matter of the complaint is made out, and
- provide the MARA with the power to investigate, or complete an investigation of a complaint about a person at a time when he or she is no longer a registered agent.

Background

This Bill is substantially the same as the Migration Legislation Amendment (Migration Agents) Bill 2000 which was introduced into the House of Representatives by the then Minister for Immigration and Multicultural Affairs on 29 November 2000. The second reading debate was adjourned on 29 November 2000. The Senate Scrutiny of Bills Committee considered the Bill in its Report No. 2/01 that was tabled and adopted on 28 February 2001. It did not recommend that the Bill be referred to a Committee for closer scrutiny. Apart from some redrafting, the principal differences between this Bill and the

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previous one relate to the proposed Administrative Review Tribunal. The Bill to establish the Administrative Review Tribunal lapsed when Parliament was prorogued on 8 October 2001.

Regulation of the Migration Advice Industry

Regulation of the migration advice industry is not new. A regulatory scheme for migration agents was first introduced by the *Immigration Act 1948*, which amended the predecessor to the *Migration Act 1958* (Migration Act). Since then the scheme has undergone a number of changes and revisions, some of which have been substantial. Acts passed in 1958, 1988, 1989, 1992, 1997 and 1999 have all touched upon the regulation of the migration advice industry.

In May 1995, the Joint Standing Committee on Migration produced a report on the then existing scheme for regulation of the migration advice industry (MARS)¹, entitled *Protecting the Vulnerable?* In 1996-97, as part of the Commonwealth Legislative Review Program and in response to the Committee's report, the Government conducted a further review of MARS. As a result of both of these review processes, the Government decided that the migration advice industry should move to voluntary self-regulation through a period of statutory self-regulation.²

Voluntary self-regulation is generally understood to mean that there is no legislative framework for the industry, apart from consumer protection mechanisms such as small claims tribunals and the potential for clients to take legal action against agents under the *Trade Practices Act 1974* and/or civil action for damages. In 1999 complete self-regulation was opposed by the Government and by interested parties, including consumers, the Migration Institute of Australia (the MIA) and various community organisations, on the following grounds:

- there is considerable potential for abuse by agents and a history in the industry of exploitative conduct, affecting both:
 - consumers, who are often in a vulnerable position because they do not speak English and because the nature of the market is such that it is not easy to discern good service providers from unscrupulous ones, and
 - the national interest, since unethical conduct on the part of agents affects the integrity of the migration and humanitarian programs.
- only 25 percent of registered agents were members of the industry association (the MIA) in 1999,³ so complete self-regulation could potentially threaten the existence of the MIA, as well as lead to a decline in compliance with industry standards, and
- the migration industry is not homogeneous, in that it comprises lawyers, non-lawyers and community sector workers. Some form of structured regulation is necessary to ensure uniformity in industry standards and practices.

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In view of these considerations, the Government has determined that it is necessary to retain some control of the regulatory scheme, which it does through a statutory framework.⁴

The Existing Regulatory Scheme

The existing statutory self-regulatory scheme was introduced by the *Migration Legislation Amendment (Migration Agents) Act 1997*. The amendments effected by that Act (contained in Part 3 of the Migration Act) allowed the then Minister for Immigration and Multicultural Affairs to appoint the MIA as the Migration Agents Registration Authority (MARA).

The functions of the MARA are listed in section 316 of the Migration Act, and include:

- maintaining a register of migration agents
- investigating complaints against agents and disciplining them, and
- overseeing agents' professional development.

The MIA is the main industry body, so a scheme in which the MIA (as the MARA) carries out regulatory functions under Part 3 of the Migration Act is a statutory self-regulatory one.

The scheme became operational on 23 March 1998 when the Minister formally appointed the MIA as the MARA.

Existing Regulatory Scheme to Continue

On 27 August 1999, the then Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs announced that the existing arrangements for the migration advice industry would be extended until March 2003.⁵

The decision to extend the existing arrangements was made after a review of their operation, carried out by DIMA under direction from an independent reference group.

Powers of the MARA over Migration Agents

The powers of the MARA over migration agents are contained in Divisions 3 and 4 of Part 3 of the Migration Act. At the outset, it is important to recognise that currently the MARA only has jurisdiction over *registered* migration agents.

The main - indeed in the majority of cases, the only - disciplinary sanction that the MARA has against a registered migration agent is to cancel or suspend their registration. Once an agent is deregistered, he or she is no longer within the jurisdiction of the MARA.

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The MARA does have power to refer the conduct of a registered agent who is also a lawyer to a body responsible for disciplining lawyers.⁶

Procedures Following Suspension or Cancellation of Registration

Section 305 of the Migration Act requires the MARA, when cancelling or suspending the registration of an agent, to publish a statement that advises of the cancellation or suspension, explains the reasons for it, and sets out the MARA's findings on material questions of fact and other evidence. Under regulation 7 of the Migration Agents Regulations 1998, the notice is to be published in:

- the Saturday edition of a gazetted national weekly newspaper, and
- a weekday edition of a gazetted paper, or a gazetted ethnic press publication for an ethnic group that was a substantial part of the agent's practice, that circulates in the state or territory where the agent practised.

MARA statistics

Any person who makes immigration representations for a fee or who provides immigration assistance as defined in section 276 of the Migration Act must be registered as a migration agent with the MARA unless exempted by section 280 of the Act.

At 30 June 2001 there were 2 429 registered migration agents.⁷ Thirty five per cent of registered agents are female and sixty five per cent are male. The average age is 42. There are 827 (34 per cent of all registered agents) who possess legal qualifications. Only 411 or 17 per cent of agents have Practising Certificates as lawyers.

In 2000-2001 the MARA received 600 new applications for registration and 1865 repeat registration applications.⁸ According to statistics collected by the MARA, fewer than 150 agents have more than eight years' experience as registered agents. The average number of years' experience is only 3.3 years.⁹

During 2000-2001, 369 agents were deregistered. According to the MARA's annual report, the reasons behind deregistration vary but they relate primarily to lapsed registrations, or a decision not to continue as a registered agent.¹⁰

In its Annual Report for 2000-2001, the MARA indicates that it refused initial registration to two applicants. One was refused on the basis that the applicant was not fit and proper having given advice whilst unregistered, and the other applicant was refused because the applicant had a previous criminal conviction. Twelve applicants were refused repeat registration. By far the greatest reason for refusal of repeat registration was non-compliance with the continuing professional development requirement. Three applicants were refused because they did not respond to the MARA's request for further information,

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one was refused because of insufficiently sound knowledge of migration procedure, and one for failure to notify the MARA of being a bankrupt.¹¹

During the 2000-2001 reporting year, the MARA received 164 complaints, down from 177 in 1999-2000. Complaints were made against 4.9 per cent of registered agents (119 agents), with 11 agents attracting multiple complaints. Sixty three per cent of complaints were made against registered agents with no legal qualifications and 37 percent against registered agents with legal qualifications.¹² The MARA finalised 149 complaints in 2000-2001, cautioned five agents, suspended five agents who were involved in six complaints, and cancelled the registration of four agents who were involved in nine complaints.¹³ 95.1 per cent of all registered agents did not attract a complaint.¹⁴

The rationale for the proposed amendments

The major amendment proposed by this Bill will allow the MARA to start or complete investigations of complaints against migration agents even where they are no longer registered and to subsequently prevent them being a registered agent for a maximum of five years where a complaint is made out.

In the Second Reading Speech to the Bill the rationale given for the proposed amendments is:

Under the Act as it stands the MARA is forced to abandon this kind of disciplinary action when a person who is the subject of a complaint deregisters.

The consequence of this is that migration agents who have acted improperly can leave the industry with an apparently untarnished reputation.¹⁵

Main Provisions

Immigration Assistance

It is a condition of registration as a registered migration agent that a person gives immigration assistance. The term 'immigration assistance' is defined in section 276 of the *Migration Act 1958* (Migration Act) to include:

- preparing, or helping to prepare, the visa application or cancellation review application; or
- advising the visa applicant or cancellation review applicant about the visa application or cancellation review application; or

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- representing the visa applicant or cancellation review applicant in proceedings before a court or review authority in relation to the visa application or cancellation review application.

Subsection 276(3) sets out certain specific circumstances when a person will not be taken to give immigration assistance, including if he or she merely:

- does clerical work to prepare (or help prepare) an application or other document
- advises another person that the other person must apply for a visa, or
- passes on to another person information produced by a third person, without giving substantial comment on or explanation of the information.

A **new subsection 276(4)** is inserted in the Migration Act by **item 1 of Schedule 1** of the Bill that provides that a person will not be taken to give immigration assistance in circumstances prescribed by regulation.

Immigration representations

Section 282 of the Migration Act makes it an offence punishable by a maximum term of imprisonment of 10 years for a person who is not a registered agent to ask for or receive a fee or other reward for making immigration representations.

The term 'makes immigration representations' is defined by subsection 282(4) to mean where a person makes representations to, or otherwise communicates with, the Minister, a member of the Minister's staff or the Department:

- on behalf of a visa applicant about the application for the visa
- on behalf of a cancellation review applicant about the cancellation review application
- on behalf of a person nominating (or seeking to nominate) a visa applicant for the purposes of the regulations, about the nomination, or
- on behalf of a person sponsoring (or seeking to sponsor) a visa applicant for the purposes of the regulations, about the sponsorship.

A **new subsection 282(5)** is inserted in the Migration Act by **item 2 of Schedule 1** of the Bill that provides that a person will not be taken to make immigration representations in circumstances prescribed by regulation.

Barring period

A **new section 292A** is inserted in the Migration Act by **item 5 of Schedule 1** of the Bill which prevents an applicant for registration as a registered migration agent from being

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registered if the MARA has made a decision to bar him or her for a particular period and that period has not ended.

Automatic continuation of registration

Item 7 of Schedule 1 of the Bill inserts a **new section 300** in the Migration Act providing for a registered migration agent's registration to continue after its expiry date where there is a pending and paid for registration application at the time of the expiry of the existing registration. Under the proposed section, the existing registration will be taken to have continued until the MARA decides on the new application and will date from the expiry day.

Where the MARA has not decided a registration application within 10 months of the expiry date of a registration, the application will be taken to have been granted at the end of that period.

Disciplining former registered migration agents

New sections 311A-311F, dealing with disciplining former registered agents, are inserted in the Migration Act by **item 9 of Schedule 1** of the Bill. **Proposed section 311A** provides the MARA with the power to bar a former registered agent from being a registered migration agent for a maximum period of 5 years if, after investigating a complaint in relation to their provision of immigration assistance as a registered agent, it is satisfied the subject matter of the complaint is made out.

Proposed subsection 311B(1) deals with notice of a decision to bar a former registered migration agent. Basically, where the MARA decides to bar a former registered migration agent, it must give that person written notice of the decision specifying the reasons for the decision and the period in respect of which the bar operates.

The MARA will also be required under **proposed subsection 311B(2)** to publish, in a prescribed way, a statement about the decision (including the reasons for the decision). The statement must be published as soon as possible after the end of 28 days after the former registered migration agent is given notice of the barring or, if the decision is subject to review, after the end of the process (**proposed subsection 311B(3) and (4)**).

Proposed section 311C allows the MARA, where it bars a former registered migration agent from being a registered agent for a period under proposed section 311A, to prepare a statement about the decision and make that statement available to any or all of the following:

- the public
- one or more sections of the public
- one or more groups of persons, or

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- one or more persons.

The statement may include any of the following:

- the contents of a statement under proposed subsection 311B(2)
- an extract from such a statement
- MARA's reasons for the decision
- MARA's findings on any material questions of fact, or
- the evidence or any other material on which the findings of fact are based.

The statement may be made available by being published in a newsletter, newspaper, periodical, on the internet, or in any other way (**proposed subsection 311C(4)**).

Under **proposed section 311D** the MARA must give a former registered migration agent written notice that it proposed to make a decision to bar them from registration for a period and invite them to make a submission on the matter within 28 of the notice being given. Where a submission is made, the MARA must consider it. Additionally, where a submission is made, the MARA may decide the matter or give the former registered migration agent the opportunity to appear before it and then decide the matter.

Proposed section 311F provides former registered migration agents who are bared from registration under **proposed section 311A** with a right of review of the decision to the Administrative Appeals Tribunal.

Functions of MARA

Section 316 of the Migration Act sets out the functions of the MARA, which include to deal with registration applications, to investigate complaints about registered migration agents and to take appropriate disciplinary action against registered agents. **Item 12 of Schedule 1** of the Bill inserts a **new subsection 316(1A)** in the Migration Act which provides:

- that the MARA may start, or complete an investigation of a complaint about a person at a time when they are no longer a registered agent.

A **new subsection 316(1B)** is also inserted in the Migration Act by **item 12 of Schedule 1** which provides that the MARA can investigate a complaint about a former registered migration agent only if the complaint is received within 12 months of them ceasing to be a registered migration agent.

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Endnotes

- 1 Migration Agents Registration Scheme.
- 2 Sen the Hon Ian Campbell, Parliamentary Secretary to the Minister for Communication, Information, Technology and the Arts, 'Second Reading Speech', Migration Legislation Amendment (Migration Agents) Bill 1999, Senate, *Hansard*, 23 September 1999, p. 8751.
- 3 This figure is now 37 per cent or 899 registered agents are members of the MIA (Migration Agents Registration Authority, *2001 Annual Report*, p. 5).
- 4 *ibid.*, p. 8752.
- 5 *ibid.*, p. 8752.
- 6 Section 319 of the *Migration Act 1958*.
- 7 Migration Agents Registration Authority, *2001 Annual Report*, p. 15.
- 8 *ibid.*, p. 15.
- 9 *ibid.*, p. 16.
- 10 *ibid.*, p. 21.
- 11 *ibid.*, p. 21.
- 12 *ibid.*, p. 24.
- 13 *ibid.*, p. 23.
- 14 *ibid.*, p. 23.
- 15 Hon Gary Hardgrave MP, Minister for Citizenship and Multicultural Affairs, 'Second Reading Speech', Migration Legislation Amendment (Migration Agents) Bill 2002, House of Representatives, *Hansard*, 14 February 2002, p. 132.

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