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No. 48 2003–04

Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003

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Integrity Measures) Bill 2003

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8 October 2003

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Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003

Date Introduced: 17 September 2003

House: House of Representatives

Portfolio: Citizenship and Multicultural Affairs

Commencement: On Royal Assent for the preliminary provisions and by Proclamation for the amendments made by Schedule 1.

Purpose

The purpose of the Bill is to implement two key recommendations contained in the report to Government, *2001–2002 Review of Statutory Self-Regulation of the Migration Advice Industry*. The two key recommendations concern, (a) sound knowledge requirements for registration as a migration agent, and (b) sanctions for large numbers of vexatious visa applications (i.e. applications of little merit).

Background

Migration Agents

The migration advice industry has been the subject of three reviews since 1996. The 1996–97 review led to the move away from government regulation and the commencement of statutory self-regulation. On 21 March 1998, the regulation of migration agents passed from the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) to the Migration Agents Registration Authority (MARA).¹ MARA's key powers are:

- the registration and monitoring of migration agents in Australia
- investigation of complaints and disciplinary action
- mediation and other ADR procedures for resolving complaints, and

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- monitoring the adequacy of the Code of Conduct.

A review in 1999 further examined statutory self-regulation in the industry.

The third review, the *2001–2002 Review of Statutory Self-Regulation of the Migration Advice Industry* (Spicer Report), was presented to Government in July 2002.² The Spicer Report made 27 recommendations to strengthen the professionalism of the migration advice industry and to improve consumer protection. The Spicer Report expressed the view that there remains a level of concern that the industry is not yet ready to move to full voluntary self-regulation and that it should achieve a number of key milestones before that occurs. One of the milestones is a significant decrease in the number of complaints and an increase in consumer satisfaction.³

Broadly speaking, statutory self-regulation is a step in the progressive move towards voluntary self-regulation. Under statutory self-regulation, an industry has some statutory obligations to observe but, in the main, the industry is moving towards a stage where there is an absence of specific government involvement in how the industry conducts its affairs.

On 25 September 2002, the Minister for Citizenship and Multicultural Affairs, the Hon Gary Hardgrave MP, issued a media release which stated that the Government would be acting on all recommendations in the Spicer Report.⁴

On 24 February 2003, the *Migration Act 1958* was amended by the *Migration Legislation Amendment (Migration Advice Industry) Act 2003*, to remove a sunset clause which would otherwise have seen the current statutory self-regulation of the migration advice industry lapse on 21 March 2003. This legislative amendment means that consumers of migration advice will continue to be protected by the retention of some statutory measures rather than the industry move to full voluntary self-regulation. This legislative response by the Government implemented Recommendation 1 of the Spicer Report.

This Bill addresses other recommendations of the Spicer Report. Specifically, the Bill addresses Recommendation 3 and Recommendation 16 of the Spicer report. Recommendation 3 is concerned with improving the competence of migration agents by making the educational course and examination for entry-level knowledge for registration more comprehensive. The MARA is to be empowered to refuse registration to a person unless they have sound knowledge of migration procedure or other relevant qualifications (e.g. legal practitioner). In short, sound knowledge or relevant qualifications will be mandatory for registration. Recommendation 16 deals with proposed sanctions for vexatious, unfounded or incomplete applications. 'Vexatious activity' will be assessed by applying a prescribed threshold that identifies a high refusal rate for applications lodged by a migration agent.

The Senate Estimates Committee (Legal and Constitutional) of Thursday, 29 May 2003 heard evidence from the MARA that there is a growth of between 13% and 20% each year

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in the number of migration agents. Last year, the number of new agents was 700 but this was offset by some others leaving the industry.⁵

The current number of registered agents is estimated at 3, 800 with about 10% of service providers from the not-for-profit (i.e. non-commercial) category of agents and advocates.

The Government's Policy Commitment

As noted above, on 25 September 2002, the Minister for Citizenship and Multicultural Affairs, the Hon Gary Hardgrave MP said that the Government would be acting on all recommendations in the Spicer Report. The Second Reading speech to the Bill sets out the key recommendations of the Spicer Report that have been addressed.⁶ Viewed overall, the policy is aimed at strengthening the powers of the MARA to deal with complaints about rogue migration agents and to implement a sanction scheme to counter the lodgement of large numbers of dubious applications, including the organised entry of women into Australia to be employed as sex workers.

The Government's introduction of this Bill follows on from an announcement by the Minister on 24 July 2003 that DIMIA had setup a Migration Agents Taskforce to specifically deal with unscrupulous operators and to target unethical behaviour.⁷

Interest Groups and Press Commentary

There are a number of organisations involved in providing advocacy, assistance and support for immigration and refugee matters. These include the Immigration Advice and Rights Centre and the Refugee Council of Australia. The Refugee Council of Australia provides the following comments on its web site about giving migration advice:

Giving Immigration Advice:

A very important thing for anyone working with asylum seekers or TPV holders to know is that it is illegal to give immigration advice if you are not a registered migration agent.

Lawyers and solicitors must also be registered as migration agents to give immigration assistance. The Migration Act details various fines and penalties for those offering migration advice without being registered.⁸

The Immigration Advice and Rights Centre web site contains comments that inform users that complaints can be made to the MARA about former registered migration agents if the complaint is made within 12 months of the person ceasing to be registered.⁹

The Law Society of New South Wales in commenting on immigration matters has queried the voluntary nature of professional indemnity insurance for migration agents. The Society has made a submission to Government commenting that it would be best practice

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for the MARA to make professional indemnity compulsory for all (*nb*: solicitors who are also migration agents are required to have professional indemnity insurance).¹⁰

Sophie Morris in the *Australian* on 18 September 2003 in an article 'Rogue migrant agents targeted', commented on both the introduction of the legislation and on the recent political debate concerning the granting of visas.

Rebecca DiGirolamo in the *Australian* on 30 September 2003 in an article 'Judges question visa case "abuse" ' commented on the growing concern of members of the judiciary about the merit of a flood of migration cases that have been submitted to the courts for judicial review.

The TV news program *PM* ran a segment on Thursday, 11 September 2003, on the doubling of complaints against migration agents in the past 12 months and foreshadowed the introduction of this Bill by the Government.

Australian Labor Party's Position

Even before the introduction of the Bill, the Australian Labor party maintained a position that voluntary self-regulation of the migration advice industry is not appropriate and that there was a need to target unscrupulous migration agents. On 16 May 2003, the Shadow Minister for Citizenship and Multicultural Affairs, Mr Laurie Ferguson MP, issued a Media Statement that included:

Labor has long recognised that unscrupulous migration agents pose both a threat to the integrity of our migration system and to vulnerable clients who are open to exploitation. That is why we first introduced registration of suitable agents and why we have consistently opposed the industry being totally self-regulating, as advocated in the past by Minister Ruddock.¹¹

Comments by the Australian Democrats

In a debate on previous MARA-related legislation on 20 June 2002, Senator Bartlett, Leader of the Australian Democrats, said in the Senate:

It is worth emphasising the very large number of people who rely on migration agents and the enormous consequences for them if those agents do not act appropriately when they are meant to be helping them.

...

Often people do not have much money and may have spent some of what little they have seeking advice. It is crucial that there be as strong a confidence as possible in the ability and integrity of registered migration agents, and the Migration Agents Registration Authority has been tasked by the parliament with that job. It is positive,

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as I said, that its powers will be expanded under this legislation and that there will be greater chances of catching some of the small number of crooks who are out there.¹²

Senate Select Committee on Ministerial Discretion in Migration Matters

There is currently a Senate Select Committee inquiring into ministerial discretion in migration matters. The Committee had its first meeting on 26 June 2003. The Committee's terms of reference direct the Committee to examine the use of Ministerial discretion under the *Migration Act 1958*.

Main Provisions

Schedule 1—Amendments

Migration Act 1958

The *Migration Act 1958* (MA) regulates the coming into, and presence in, Australia of non-citizens. The Act provides for visas permitting non-citizens to enter or remain in Australia and for the removal or deportation of non-citizens whose presence in Australia is not permitted by the MA.

Part 3 of the MA contains the provisions that deal with migration agents and immigration assistance.

Item 1 inserts a reference to a definition of 'high visa refusal rate' into Part 3 of the MA. The actual procedure of how to work out if a migration agent has a high visa refusal rate is found in **proposed new section 306AC** which is inserted by **Item 75**, below. A high visa refusal rate renders the migration agent liable for classification as being engaged in 'vexatious activity'. The Minister is empowered under **proposed new section 306A** to refer a migration agent for disciplinary action by the MARA if the agent has a high visa refusal rate.

Items 2 and 3 revises the definition of 'registered agent' to 'registered migration agent'. In addition, the Bill makes multiple revisions to change the references to 'migration agent' to 'registered migration agent' throughout the MA (see the summary of Items listed at pages 50–51 of the *Explanatory Memorandum*).

Item 6 expands the definition of 'immigration assistance' to expressly cover situations where a person provides assistance in making applications to the Minister to intervene under the MA.

Item 8 addresses the issue of distinguishing between 'immigration assistance' and 'immigration legal assistance'. Section 280 of the MA restricts who may give 'immigration

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assistance' but it provides exemptions for persons such as parliamentarians and lawyers. The general rule under section 280 is that a person who is not a registered migration agent must not give immigration assistance. The amendment in **Item 8** amends an earlier definitional section that defines 'immigration legal assistance' (section 277 of the MA) to now limit the range of matters covered by the term 'immigration legal assistance' (i.e. applications to the Minister to intervene are no longer to be classified as 'immigration legal assistance' and thus not free of restriction under section 280).

Item 17 amends the general rule under section 280 (see above) to allow a further limited class of exemptions from the restrictions concerning giving immigration assistance. These include assistance from a close family member or a person who nominates or sponsors a visa applicant. An exempt person bears an eventual burden in establishing that they are within the limited exempt category otherwise they breach the MA. **Item 19** provides for the making of Regulations under the MA to define the meaning of 'close family member'.

Under section 282 of the MA, a person who is not a registered migration agent must not charge a fee or seek reward for immigration representations. The penalty for a breach of section 282 is imprisonment for 10 years. **Item 25** expands the matters covered by section 282 to cover seeking Ministerial intervention in a visa matter.

Item 39 requires the MARA to remove details from the register of migration agents concerning a suspension or caution when the period specified in Regulations made under the MA have expired.

Item 40 is a significant revision of the existing section 288 of the MA. Currently, section 288 covers application for registration as a migration agent and the obligation for new applicants to publish a notice so that anyone may have the option of lodging an objection with the MARA about registering the applicant. The replacement provisions are **new sections 288, 288A and 288B**. The overall aim of the revisions is to enhance the replaced section 288 with more detail and to place the power for approving the form of applications with the MARA instead of the Minister (see **proposed new subsection 288(3)**). The **proposed new section 288B** mirrors an existing section 308 in the MA which empowers the MARA to require the lodgement of sworn statements when investigating a matter. The purpose of the new section 288B is to allow the MARA to also obtain sworn statements to support information lodged in the initial registration process.

Item 47 inserts a **proposed new section 289A** in the MA. This provision stipulates that an applicant must not be registered as a migration agent unless they have completed a prescribed course of study and passed a prescribed examination, or hold prescribed qualifications. New applicants and those re-applying more than 12 months after the end of a previous registration must satisfy these mandatory sound knowledge requirements.

Section 304 of the MA allows conditions to be applied to the lifting of a suspension of a migration agent's registration. **Item 71** inserts a **proposed new section 304A** which will allow conditions to also be applied to the lifting of a caution.

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Items 72 to 73 revise and enhance existing sections 305 and 305A concerning the notice that must be given by the MARA to a migration agent (including a statement of reasons) when disciplinary action is taken, and the publishing of details about the disciplinary action to the public and to clients of the migration agent. Sections 305 and 305A are replaced with **proposed new sections 305, 305A, 305B and 305C**.

Item 75 is a key provision in the Bill. It inserts a **proposed new Division 3AA—Disciplining registered migration agents for engaging in vexatious activity**. Under this new Division of the MA, the Minister has the power to refer a migration agent who has a high visa refusal rate to the MARA for disciplinary action. The Minister's decision to refer the migration agent is reviewable by the Administrative Appeals Tribunal (AAT). The Minister also has a role in determining the threshold numbers for calculating a high visa refusal rate for the various categories of visas. The Minister's determination on thresholds is a disallowable instrument (**proposed new subsection 306AD(4)**). Before referral, the Minister must invite the migration agent to make a submission on the matter.

A **proposed new section 306AG** specifies that if the Minister refers a registered migration agent to the MARA for disciplinary action, the MARA **must** (*emphasis added*) suspend the migration agent's registration for 12 months (for a first offence) or cancel the registration where there is a later referral. Under a **proposed new section 306AH**, the Minister may direct the MARA to revoke a mandatory decision taken in relation to a migration agent if the Minister thinks it is appropriate (e.g. if a mistake in calculating the high visa refusal rate has been made). **Proposed new sections 306AL and 306AM** authorise the MARA to make public (and to the migration agent's clients) details of mandatory discipline action taken in relation to the migration agent that has been referred by the Minister.

The **proposed new Division 3AA** is aimed at applying sanctions to counter vexatious activity by unscrupulous migration agents. The objective appears clear but the methods proposed in the Bill appear a little harsh and may have unintended consequences. The method chosen is to add to a list of matters for Ministerial discretion. The Minister's decision to refer a matter to the MARA for disciplinary action is reviewable by the AAT but once referred the MARA's disciplinary role is merely procedural and mandatory (i.e. to suspend and possibly deregister but not 'consider'). Furthermore, it is not clear whether the application of a formula-based approach to determining a high visa refusal rate will take into account a situation where a particular migration agent is acting for a number of applicants whose claims are borderline and the migration agent considers that the right course of action, after careful consideration, is to at least lodge the applications. In other words, it places the migration agent in the position of deciding the overall merits of the application—a function more directly the responsibility of the relevant authority. There may be a tendency for some cautious migration agents to turn away borderline but deserving applicants for fear that the agent may end up with a high visa refusal rate.

Items 76 to 98 are minor reference amendments.

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Item 99 revises section 306C of the MA to expand the meaning of 'client' to include circumstances when a migration agent seeks Ministerial intervention and to extend the meaning of 'client' as remaining a 'client' even when a migration agent has been deregistered, is inactive or is deceased. The aim of this provision is to allow the MARA to have access to originals or copies of the migration agent's documentation (including a client's passport held by the migration agent) which may have a bearing on the outcome of a visa application.

Items 100 to 126 include minor consequential amendments but note should be taken of the significant amendment made by **Item 116** which reverses the legislative effect of existing section 306J (an individual is excused from producing a document that would tend to incriminate). **Item 116** is aimed at unscrupulous agents who may rely on the existing right to withhold a document or information. That right is now removed and the document or information must be produced even it tends to incriminate the migration agent. The document or information is not available for use as evidence in a subsequent prosecution unless it is shown to comprise false or misleading information (i.e. sections 137.1 and 137.2 of the *Criminal Code* apply).

Items 117 to 134 are minor consequential amendments.

Items 134 to 142 revise the existing Division 4A (which deals with disciplining by the MARA of former registered migrations agents) to expand the Division to be consistent with the overall changes made by the Bill, such as having engaged in vexatious activity. Again, the Minister is given power to refer a former agent to the MARA for disciplinary action (see **proposed new section 311L**) and the MARA must impose a *bar* to re-registration for a period of up to 5 years (depending on the circumstances that occurred when the migration agent was previously operating as a registered agent). The Minister's decision to refer a former agent for disciplinary action is reviewable by the AAT.

Division 5 of the MA deals with the obligations on registered migration agents to notify the MARA of changes to business circumstances (e.g. bankruptcy), procedures for charging fees and the obligation to comply with the prescribed Code of Conduct. **Proposed new sections 312A and 312B** impose new obligations on migrations agents to notify DIMIA or the relevant review authority (i.e. the Migration Review Tribunal or the Refugee Review Tribunal) when they give migration assistance. The data is then used to calculate the migration agent's visa refusal rate.

The Migration Institute of Australia Limited (MIA) was appointed by the then Minister for Immigration and Multicultural Affairs, the Hon Philip Ruddock MP, on 20 March 1998 to undertake the role of the Migration Agents Registration Authority (the MARA). The Authority replaced the Migration Agents Registration Board. **Item 165** inserts the power of delegation into the MA to enable the MARA to delegate to individual officers or committees of MARA who may then make routine decisions and also make recommendation to the board concerning more complex matters. The existing power of delegation is confined to the Minister (see section 320 of the MA).

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Item 170 inserts new provisions to empower the MARA to remove disciplinary action details from the register after a prescribed period of time (see **proposed new sections 332C and 332D**). As assumption is made that, with the enhance sanctions, a balance must be given to ensure that the register contains details that are current and that constitute a fair description of individual's status within the industry. **Proposed new section 332E** provides protection from civil proceedings for a person, official or the Minister who lodges a complaint about a registered migration agent or former agent, in good faith.

Item 171 inserts a proposed **new paragraph 504(1)(ja)** into the MA to enable the Regulations to provide for an administrative penalty of 12 penalty units (a unit is currently set at \$110) for a minor breach of subsection 280(1). Subsection 280(1) of the MA proscribes the giving of migration assistance unless the person is a registered migration agent or in an exempt category. The usually penalty for a serious breach of subsection 280(1) is 60 penalty units (as amended by this Bill from the current 50 penalty units—see **Item 12**).

Part 2 of Schedule 1 of the Bill mainly sets out transitional amendments. **Item 173** allows an administrative penalty (inserted by **Item 171**, above) to be imposed on an alleged minor offence against subsection 280(1) before new paragraph 504(1)(ja) actually commences under this legislation—but where no penalty has already been imposed before commencement. Although technically retrospective in effect, it would allow minor matters to be immediately dealt with by administrative means. Several other items in Part 2 of Schedule 1 (e.g. (a) removal of 'old' disciplinary details from the register and, (b) whether *any* previous disciplinary action has been taken against an applicant for registration as a migration agent (i.e. **Item 179**)) have a retrospective effect.

Concluding Comments

There appears to be a general recognition of serious problems caused by some unscrupulous migration agents in the migration advice industry. This legislation, however, indicates a heavy approach to imposing new sanctions on the industry. The role of the Minister in the sanctions process is enhanced along with that of the MARA. This approach, on one view, exhibits a tightening of Ministerial control over activities in the industry rather than that role being largely performed by a regulatory agency. Active Ministerial involvement in disciplining the industry is commendable but it appears to be a long way from the original policy intention of an industry that would move to voluntary self-regulation.

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Endnotes

- 1 The Mara website is at: <http://www.themara.com.au/Online/default.asp>.
- 2 *Review of Statutory Self-Regulation of the Migration Advice Industry*, Department of Immigration and Multicultural and Indigenous Affairs, July 2002 at: http://www.dima.gov.au/general/agents_review2002.htm
- 3 *ibid.*, p. 25.
- 4 The Hon Gary Hardgrave MP, Minister for Citizenship and Multicultural Affairs, 'Regulation of Migration Advice Industry', *Media Release H93/2002*, 25 September 2002.
- 5 Senate Estimates, Legal and Constitutional Legislation Committee, Senate, *Hansard*, 29 May 2003: p. 596.
- 6 The Hon Dr S. N. Stone MP, Parliamentary Secretary to the Minister for the Environment and Heritage, Second Reading speech, Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003, House of Representatives, *Debates*, 17 September 2003: pp. 19508–19509. See also the summary contained in the Minister Hardgrave's *Media Release* No. H131/2003, 'Unscrupulous Migration Agents to be Removed', at: <http://www.minister.immi.gov.au/cam/media/media03/h03131.htm>.
- 7 The Hon Gary Hardgrave MP, Minister for Citizenship and Multicultural Affairs, 'Migration Agents Deregistered', *Media Release H93/2003*, 24 July 2003.
- 8 Refugee Council of Australia at: <http://www.refugeecouncil.org.au/html/resources/advocateskit.html>.
- 9 Immigration Advice and Rights Centre at: <http://www.iarc.asn.au/new/story01/story.html>.
- 10 Submission by The Law Society of New South Wales, 'The Migration Advice Industry', September 2003: para 4 at: http://www.lawsociety.com.au/uploads/files/1062986066500_0.5900159991361913.pdf.
- 11 Mr Laurie Ferguson MP, Shadow Minister for Citizenship and Multicultural Affairs, 'Unscrupulous Migration Agents Must be Weeded Out', *Media Statement*, 16 May 2003 at: <http://www.alp.org.au/media/0503/20004520.html>.
- 12 Senator Andrew Bartlett, Leader of the Australian Democrats, Second Reading speech, Migration Agents Registration Application Charge Amendment Bill 2002 and the Migration Legislation Amendment (Migration Agents) Bill 2002, Senate, *Debates*, 20 June 2002: p. 2294.

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