# SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

## INQUIRY INTO THE

## MIGRATION LEGISLATION AMENDMENT (MIGRATION AGENTS INTEGRITY MEASURES) BILL 2003

## MIGRATION AGENTS REGISTRATION APPLICATION CHARGE AMENDMENT BILL 2003

| | |
|---|---|
| SUBMISSION NO: | 8 |
| DATE RECEIVED: | 20 OCTOBER 2003 |
| ORGANISATION: | CHRISTOPHER LEVINGSTON & ASSOCIATES |
| SUBMITTOR: | MR CHRISTOPHER LEVINGSTON<br>PRINCIPAL SOLICITOR |
| ADDRESS: | GPO BOX 2502<br>SYDNEY NSW 2001 |
| TELEPHONE:<br>FAX: | 02 9290 2633<br>02 9290 2191 |
| EMAIL: | |
| NO. OF PAGES: | 6 |

# CHRISTOPHER LEVINGSTON & ASSOCIATES

C.H.Levingston
Principal Solicitor

D.J.Prince
Associate

20 October 2003

The Secretariat
Senate Legal and Constitutional Committee
Room S1.61
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Re: MIGRATION LEGISLATION AMMENDMENT
(MIGRATION AGENTS INTEGRITY MEASURES) BILL 2003
Our ref: Parliamentary Committees

We refer to the *Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003* ("the Bill") currently before the Senate Standing Committee on Legal and Constitutional matters and due to be returned to the Senate on 25 November 2003. We request that these submissions be placed before the Committee as part of their consideration of the Bill.

Disclosure Of Interest

I am an accredited specialist in migration law and I have been accredited by the Law Society of NSW since 1 September 1995. I run a law firm in Sydney employing a total of 5 Solicitors. My associate, Mr David Prince is also an accredited specialist.

The firm has and continues to maintain a high profile in this field of law.

Introduction

I have had the opportunity of reviewing the abovementioned legislation and there are a number of issues of concern arising from the foreshadowed amendments to the Act.

These submissions are intended to draw your attention to this complex and far reaching legislation so that when the matter comes before the Senate you are in a position to take a considered stance in relation to it.

By way of background, there is an overwhelming need for the relationship between Migration agents (including Solicitors) and their clients to be the subject of robust legislation which protects the vulnerable from exploitation.

The foreshadowed legislation sets out to achieve this purpose but in doing so creates a number of problems without, in my view, creating an effective means of achieving the stated aims of protecting consumers from unscrupulous migration agents.

In short, I am of the view that the legislation sets out to address a problem and in doing so creates practical as well as legal difficulties for the provision of independent immigration assistance, especially to those individuals most in need.

Further, the Bill has the potential to seriously affect the capacity of Australian and non-Australian people to obtain *immigration assistance* and *immigration legal assistance* as well as to make it less likely that qualified immigration practitioners will take on "difficult cases". These adverse consequences will exist in the context of the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister") being able to affectively remove the capacity for registered migration agents and solicitors at will and as such exposes a real potential for adverse competition and free trade issues.

The Problem of Condensing Executive, Law Making and Judicial Power in One Person

Broadly stated the legislation creates a regime for the discipline and mandatory cancellation of persons identified by the Minister who are found to be in breach of an expressed percentage said to be indicative of a high visa refusal rate.

By reference to the foreshadowed section 306AC the Minister has the discretion in subparagraph 1 to refer a registered Migration agent to the Migration Agents Registration Authority (MARA) if the Minister determines that the agent has a high visa refusal rate as calculated by reference to subparagraph 2. The calculation is based on a method statement which at step 2 does not identify precisely what numbers are "determined" by the Minister.

The first issue that concerns me is that where there is no statutory determination of the number of refusals as against the number of valid applications then the Minister is vested with an unfettered discretion, by regulation or other means to determine that a particular agent may have a high visa refusal rate and on that basis refer the agent under section 306AF to MARA who in turn must take disciplinary action by resort to the mechanism under section 306AG.

If you review subdivision B "Engaging in vexatious activity" the legislation links vexatious activity with the concept of a high user visa refusal rate. It appears that a former registered Migration Agent can be referred to MARA for disciplinary action which includes the additional sanction incorporated in section 311L(b). That sanction is a suspension of registration for a period of 5 years.

Considering the severe consequences of an agent being found to have a "high visa refusal rate" it is submitted that it is entirely inappropriate for the number of visa refusals and the time period within which these visa refusals make up a high refusal rate to be determined by regulation. These details have the capacity to alter the nature and practical effect of this legislation and, therefore, should be set out in the Bill that is considered by Parliament. It is inappropriate for such important matters to be delegated to a member of the Executive Government, particularly considering that the visa refusal that will be taken into account constitute decisions made by the Minister and her/his Department. It is important that administrative and law making functions are held separately by the Executive Government and Parliament respectively and this Bill undermines this important aspect of the separation of powers.

Furthermore, the foreshadowed system of determination under section 306AF creates what would in effect be mandatory penalties within the range contemplated by section 306AG(1)(a) or (b). The reason for this is that MARA must take disciplinary action against a Migration Agent if directed to do so by the Minister. The MARA has no residual discretion or capacity to undertake any separate investigation in relation to the referral from the Minister.

Under the scheme contemplated by the Bill the only person authorised to take into account an agent's circumstances is the Minister under section 306AE. If the Minister proceeds to direct MARA to take disciplinary action it is mandatory for MARA to discipline the agent and there is no capacity for merits review of the decision. It is inappropriate for such judicial decision-making power to be given to a Member of the Executive Government. This administrative action would override all other licensing and practicing regimes such as the Law Society and Bar Association of each Australian State as well as the existing registration scheme contained within Part 3 of the *Migration act 1958*.

Practical Adverse Consequences for Consumers

The lack of precision under section 306AD vests in the Minister a significant power which is capable of being abused and for which there are significant adverse consequences for both the agent and their subsisting clients.

For example, where a Migration Agent's registration has been suspended for 12 months (there being no lesser discretionary period) the clients of the Migration Agent will be without representation in their dealings with the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA) unless MARA has the capacity to run the cases themselves or in effect appoint a liquidator for the practise.

There does not appear to be any safety net for the clients of the de-registered or suspended Migration agent.

Given the punitive regime contemplated by section 306AG and the lack of precision in sections 306AC and AD it would be a very brave Migration Agent who would assume the carriage of any unresolved matter following upon the suspension or cancellation of a Migration Agents registration.

There is a further difficulty in section 306AC(3) where there is a lack of clarity as to whether the calculation of the high visa refusal rate is by reference to first instance applications (primary applications) only. In any event given that the very vast majority of applications for a protection visa are unsuccessful at first instance (98.5%) there does not appear to be any scope for any person providing immigration assistance to provide that assistance without in effect guaranteeing a high visa refusal rate. What this would mean is that no applicant for a protection visa would be able to obtain independent immigration assistance from any Migration Agent. That is, some of our most vulnerable visa applicants would be denied independent assistance in an extremely complex area of law.

What is unclear is whether by reference to section 306AC(3)(b) is whether subsequent immigration assistance on an appeal to the Refugee Review Tribunal, Migration Review Tribunal or the AAT could form part of the "method statement" at section 306AC(2).

Informed Consent

There is reference at section 306AC(4) to a "prescribed capacity" which does not appear to be defined within the body of the amendments.

Accordingly, there does appear to be some contemplation of conduct which may not count to the calculation of a high visa refusal rate but I can not identify those provisions.

There does not appear to be any statutory defence to a determination of the Minister under the combined operation of section 306AC, AD or AF of the foreshadowed amendments.

It is my view that there should be incorporated into the statutory scheme a statutory defence of "informed consent". It seems to me that the primary complaint with respect to the conduct of Migration Agents is that clients are being provided immigration assistance and fees charged where the client has no idea what services are to be supplied, what the likely outcome of the proceedings will be and what the consequences of an adverse decision will be. "Informed consent" is a key to overcoming this problem as it empowers consumers to make for themselves decision regarding their immigration affairs. It is my view that, accompanying the regulation of "informed consent" practices should be a greater emphasis on Migration Agent training so as to increase the "sound knowledge" requirement for Agent's not holding a law degree.

No Presumption of Innocence

The procedure contemplated by the legislation permits the communication of the fact of disciplinary action being on foot, whether the agent has applied for review and the status of any such review to be disseminated to the "public" in terms of section 305A and / or the agents' clients pursuant to section 305B.

My concern is that the dissemination of unresolved applications for disciplinary action based upon a referral by the Minister may have the effect of conveying to the Migration Agents' clients that the agent has been engaging in conduct capable of leading to either suspension of their right to practice or the cancellation of the registration. Such pre-emptive notification has the capacity to destroy a Migration Agent's reputation and ability to earn their livelihood without there being any corresponding duty upon MARA, in the event of there being no adverse determination, to notify the clients and the public generally of the agent not being the subject of any adverse finding. Further, the proposed section 305A(4) provides protection to persons who, in good faith, publish to the public or to the agents' clients. However, there appears to be no corresponding duty on that person to publish a fair statement, where the agent is successful, to in effect set the record straight. Thus, even where the agent defends his/her case on review, the damage to reputation may have already occurred.

This "problems" may simply be an artefact of the mandatory penalty regime.

Bona Fide Appeal Rights

The decision to refer a matter by the Minster with the consequential mandatory suspension or cancellation does have available to it appeal rights at the Administrative Appeals Tribunal (AAT) and from that body to the Federal Magistrates Court.

However if the penalty regime under section 306AG and 311L is mandatory then the scope of review available to the Migration agent by resort to proceedings in the AAT would necessarily be limited to the calculations made by the Minster under section 306AC, AD and AF.

It is of great concern that there would be in effect no merits review against the decision of the Minister to take disciplinary action against a Migration Agent.

This lack of bona fide merits review is also set against a backdrop where the ethical obligations of Solicitors (ie legal professional privilege) under the various State licensing arrangements will limit the capacity of Solicitors to respond to a notice from the Minister of their intention to refer the practitioner to MARA for suspension and/or cancellation without the specific permission of their clients.

Conclusion

I am very concerned that what the Minster seeks to do is to remove Migration Agents from the transaction between the client and his department. There is already no right to legal or other representation in proceedings at the Migration Review Tribunal and the Refugee Review Tribunal. Further, the fact of appearing for an Applicant before a merits review Tribunal or before the Courts necessarily involves the practitioner holding a position that the decision made by DIMIA or the Minister is in fact wrong and should be overturned. This fact, combined with the history of the previous Minister expressing adverse opinions about the involvement of migration agents and (especially) solicitors before merits review Tribunals and the Courts – including in relation to when we were successful in vindicating our clients' rights – mean that the Government's motives in relation to this Bill must be questioned.

If the Minster does not want Migration Agents including Solicitors to act for and represent clients in their dealings with DIMIA, the Tribunals or the Courts he/she should pass legislation which prohibits the provision of Immigration assistance, rather than creating a system in which Migration Agents are dependent upon the good favour of the Minister whom they should be acting independently of if they are to seek the best interests of their clients.

The Senate is currently investigating the importance of a Minister acting, and being seen to act, independently of Migration Agents and other representatives in the area of the exercise of Ministerial discretion under sections 351 and 417 of the Migration Act. It is submitted that it is in the interests of justice and crucial for maintaining the integrity of migration decision-making not only that the Minister act, and be seen to be acting, independently of Migration Agents, but also that Migration Agents are able to act, and be seen to act, independently of the Minister.

In short, it is my opinion that the Minister should not have any power to remove the registration of a migration agent, particularly when that power is effectively unreviewable.

I trust these submissions will be of assistance to you.

Yours faithfully
CHRISTOPHER LEVINGSTON & ASSOCIATES

(for) Christopher Levingston
**direct email: clevingston@migrationlawforum.com.au**