To the Senate Legal & Constitutional Legislation Committee
legcon.sen@aph.gov.au

MIGRATION LEGISLATION AMENDMENT
(MIGRATION AGENTS INTEGRITY MEASURES) BILL 2003

1. PRELIMINARY

a. The many media reports about migration agents have painted a very sorrowful picture of the migration advice profession. As the public and the politicians generally obtained their information of the profession from the media reports and the Minister's media releases, they have understandably formed a negative view of the profession and decided that tough measures are necessary to deal with the perceived problems.

b. The truth is, as in all professions, true "rogue agents" only form a very tiny proportion of the profession. The former Minister has so acknowledged many times. This tiny group of agents can be easily identified and under present law, be investigated and disciplined.

c. The question is whether the draconian and capricious measures proposed in the Bill are fair to the large body of honest and competent migration agents.

d. The Bill (new Division 3AA and 312(A) and 312(B) of Division 5) purports to achieve two primary objectives: (1) facilitate the task of identifying agents who indulge in vexatious activities and (2) removing them from the profession altogether, if an initial 12-month suspension failed to get them in line.

e. While it is debatable whether the first objective is achievable against the real "rogue agents", the method adopted will unintentionally capture agents who are otherwise honest and competent.

2. SWORD OF DAMOCLES

The proposed new Division 3AA is (a) arbitrary and oppressive (b) open to abuse and loss of public confidence, (c) unreasonable and unnecessary interference with or restraint of trade, (d) unfair curtailment of clients' entitlement to professional representation, (e) fails to distinguish between the client's conduct and the agent's conduct and (f) operate as the sword of Damocles.

a. Arbitrary, oppressive and capricious

i. Division 3AA equates a vexatious activity with a high visa refusal rate. Members of the Committee well know that the commonly held view of a vexatious application is an application that is bound to fail on its merits. It encompasses applications that are frivolous, misconceived or lacking in merits. The courts have traditionally used such test with success. It is clear evidence it is fair, sufficient and effective to identify the vexatious applicant.

ii. The commonly held view necessarily implies that a vexatious application is bound to fail. But what it does not do is to identify and measure a vexatious application by its result. How can it be that an application with a 50/50 chance of success becomes a vexatious application merely because it failed? It could equally well succeed. An application can and do fail because of an adverse view taken (rightly or wrongly) by the Minister or a review authority on the evidence presented such as whether the couple had a genuine ongoing marital relationship or whether an asylum seeker satisfies

the Refugee Convention. An application can also fail if the Minister "suspects" that a document is bogus. Migration agents are not trained detectives. Provided their views of the evidence are honestly and reasonably held and there is no evidence to suggest that the documents to be used to support the application are bogus, they are entitled to submit the client's application without fear of being personally penalised.

iii. Failure is but only one of the several criteria of vexatiousness. Singling out failure alone as the sole criterion is arbitrary, oppressive and capricious.

b. **Abuse of discretionary power. Loss of public confidence.**

i. Suspension and cancellation are the severest forms of disciplinary actions that can be meted out on a member of any profession. They are normally reserved for serious misconducts that generally indicate a failure to meet the standards expected of a reasonably competent migration agent. A migration agent who scores a high visa refusal rate does not per se necessarily fall into that category. A reasonably competent agent is entitled to assume that a favourable view is just as likely on the strength of the evidence presented to support the failed application.

ii. The vexatious activity test proposed in the Bill does not take that into account the reasons for the failed application but leaves whatever explanation that is offered after the event to the mercy of the Minister. It can be used to terrorise agents. This is a recipe for abuse

iii. The controversy surrounding the Ministerial interventions is well published. It has raised issues of public confidence in the integrity of the system. The discretionary power to refer or not refer an affected agent for mandatory action falls within the same category. It will generate the same controversy. It will lead to a loss of confidence in the system.

iv. The two thresholds (the number of applications under the scheme and visa refusal rate) are subject to the Minister's directions. This is open to abuse and controversy.

c. **Unreasonable interference with or restraint of trade**
Clients rights to professional representation severe curtailed

The profession will be forced to adopt the first line of defence: self interest first and client second. This is contrary to the rule that the client's interest should come first. The agent, particularly one who has a prior referral (and therefore the mandatory 12-month suspension), will be forced to turn away clients whose prospective applications do not meet the implied test of certainty of success. That must be taken to mean close to 100% chance of success. The results of this enforced attitude are two-fold: (1) the otherwise honest and competent agent will lose business and (2) prospective clients will have their right of representation severely and unfairly curtailed.

d. **No distinction between client's conduct and agent's conduct**

The Bill does not make the important distinction between the client who insists on proceeding with an application in spite of the agent's advice and the agent who instigates the client to put in a vexatious application. The two are lumped together with the result that the client's risk of failure becomes a risk to the agent personally. This is contrary to the general law.

e. **Sword of Damocles**

The high visa refusal rate test is the same as the sword of Damocles that dangles over the heads of honest and competent agents with all the attendant ills without a single compensating benefit.

3. **NOTIFICATION (REPORTING) PROVISION**

a. If the reporting requirement is limited to the name, the MARA registration number and contact details of the agent representing the visa or review applicant, then it is already covered under the current visa application form and form 956. Any further reporting is superfluous.

b. If the reporting requirement goes further and will result in breach of the agent's confidentiality obligation to the client, then it is contrary to the Code of Conduct and the general law that insist on strict confidentiality between the professional and the client.

c. Notwithstanding the redundancy of the information, if the new sections 312A (1) and 312B (1) are to be proceeded with, they should be amended to expressly limit the reporting requirement to just the name, MARA registration number and contact details of the agent.

4. **THE MARA DILEMMA**

There is also the role of the MIA performing the functions of the MARA. The Minister's reserved powers to make referral decisions as he or she thinks fit violates (and therefore breaches) the Deed of Agreement between the MIA and the Commonwealth under which the MIA agreed to perform the functions of the MARA. The MIA will be released of its obligation to perform. Whether the MIA should terminate the Deed of Agreement effective the day the Bill as it presently stands becomes law is a matter for the members of the MIA to decide. Although not necessarily a matter that concerns the Senate, it is a matter worth deserving of consideration.

20 October 2003
Seng-chaye Yap
Solicitor NSW
Registered Migration Agent No 9684320
Tel: (02) 9837 3393
Fax (02) 9837 3396
Mob: 0414 989 418
Email: chaye@chayeski.com
PO Box 7027 Baulkham Hills Business Centre
Baulkham Hill NSW 2153