

## **[335] An Ethical Dilemma: High Visa Refusal Rates and the Duty to Act in the Best Interest of the Client**

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### **The new amending legislation**

Recent amendments to the MA vide the Migration Legislation Amendment (Migration Agents Integrity Measures) Act 2004 (the Amendments) operate from 1 July 2004<sup>1</sup> and have significant implications for immigration law practitioners. In part, the purpose of the amendments is to discipline those migration agents (including legal practitioners practising in immigration law) who lodge large numbers of visa or merits review applications which have little or no chance of success; commonly termed “unfounded applications”.

### **Ministerial power to refer practitioners to MARA for discipline**

Under the Amendments, the minister may refer a registered migration agent (practitioner) to MARA for disciplinary proceedings if the practitioner has a high visa application refusal rate from DIMIA or review application refusal rate from a merits review authority in relation to a particular class of visa: s 306AC.

There is some discretion vested in MARA not to take disciplinary action upon a first referral from the minister (s 306AG(1)(d)) if it is satisfied there are special circumstances to justify it not doing so. However, in such a case, MARA must notify the minister of its decision and the reasons. Should the minister decide not to accept the decision, he or she may refer the practitioner a second time (s 306AGAA), in which case MARA has no choice. It must impose a disciplinary sanction: s 306AGAC.

It is clear that the Amendments apply to a particular class of visa and not to all visa applications submitted by a practitioner. Further, there is no provision for examining the number of visa applications submitted by a law firm or a migration practice as a group. Attention is focused on particular practitioners.

The MA and the MR are dynamic and complex pieces of legislation. They are the subject of myriad judicial authority and are daily fare in the three merits review tribunals exercising migration jurisdiction. It will be seen, therefore, that immigration practice is already fraught with difficulty. The degree of that difficulty has been significantly increased by the Amendments.

### **High visa refusal rates**

Section 306AC defines how a practitioner’s visa refusal rate is to be determined. Briefly, a practitioner has a high refusal rate if he or she has lodged ten or more valid visa applications (including review applications) of a particular visa class within a prescribed six-month period and 75% of the applications (90% for protection visa applications) are refused.

Note, however, that:

- if a practitioner represents a client at both the primary and review stages of the same application, there is only one visa application;
- applications for ministerial discretion are not included;
- applications lodged by practitioners in a prescribed capacity (eg under the Immigration Advice and Assistance Scheme (IAAAS)) are not subject to the Amendments; and
- a refusal on a particular visa application attributed to a practitioner (or practitioners, if the applicant was represented by more than one practitioner) will be discounted if that visa application was subsequently successful at the review stage, even if the applicant was represented by another practitioner at review.

The method of calculating a high visa refusal rate may have unexpected and curious results, such as “quota” shopping. For example, practitioners in an immigration law firm might arrange their affairs in order to ensure that visa applications of a particular class are evenly distributed between the firm’s immigration lawyers. This may enable them to avoid the consequences of high visa refusal rates because practitioners who submit less than ten applications in a prescribed six-month period for a particular class of visa are not subject to the new disciplinary procedure.

### **The disciplinary sanctions provided**

The disciplinary sanctions available to MARA in respect of “high visa refusal rates” are caution, suspension of registration, or cancellation of registration: ss 306AG and 306AGAC. Upon the first ministerial referral, a decision not to discipline if special circumstances exist is available: s 306AG(d).

### **Publication of details**

Under the Amendments, if MARA takes disciplinary action against a practitioner, it must make a publicly available statement detailing the sanction imposed and may also inform the agent’s clients of the action taken. A register of agents who have been sanctioned can also be inspected on the MARA website. Provision is made for removal of details after a prescribed period.

### **Right of merits review**

Practitioners who are aggrieved by decisions of MARA may seek to have the decisions reviewed by the AAT; see s 306AJ. The AAT may issue a stay order to enable the practitioner to continue practising, pending the result of the appeal (s 306AK), but the publication of disciplinary details is not prevented by the stay order; see s 306AL. It is submitted that this is inappropriate and that it should be left to the independent arbitrator, the AAT, to determine whether disciplinary decisions against a practitioner, which are awaiting merits review, should be published before the review is concluded.

### **Serious issues of principle**

The “high visa refusal rates” legislation raises serious issues of principle for lawyers and for people wishing to exercise rights and test those rights in the merits review and judicial systems. Unfortunately, the Amendments only reinforce existing statutory provisions designed to restrict those rights.

Two examples will serve to develop the discussion of the issues:

(1) A client seeks advice in relation to a RRT review application and the practitioner forms the view that there is no chance of success. The practitioner advises the client to this effect but the client insists on exercising the right to lodge a valid application and says that it is for the tribunal to make a decision whether or not the application is unfounded and not the practitioner. The client is less than adequate in the English language and begs the practitioner to provide professional assistance. The practitioner makes sure that the client understands the advice and then assists the client to make the application after arranging for the client to acknowledge in writing that he or she has received and understood the advice but still wishes to proceed.

This practitioner has complied with cl 2.17 of the Migration Agents’ *Code of Conduct* but will, nevertheless, find him or herself on the path to MARA “high visa refusal rates” discipline.

(2) Adding a further layer to the above example, the client found herself pregnant to her Australian citizen partner after her protection visa decision was refused by the primary delegate and immediately married him. It is the practitioner’s view that, although she has no chance of succeeding on her RRT review application, she has an excellent chance of ministerial intervention under s 417 of the MA on public interest grounds. However, under s 417, ministerial intervention is only available where the RRT has made a merits review decision.

Again, the practitioner will fall foul of the “high visa refusal rates” disciplinary process.

It is submitted that the ever-encroaching legislative trend in the immigration area to confine the rights of access to government and to judicial and quasi-judicial bodies has reached a watershed, and that the time has come for the profession to exercise increased vigilance and activism to guard against the erosion of what have been generally regarded in the past as rights.

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<sup>1</sup> Proclaimed by Gaz GN 23 of 9 June 2004.