Amendments to the *Migration Act* 1958 (Cth) (the Act) may place immigration law practitioners in an invidious position as acting in the best interest of the client could well involve disciplinary measures against the practitioner.

BY MURRAY GERKENS, RODGER FERNANDEZ, DOMINIC YAU AND MELAINE TONG

# Passport to an ethical dilemma

The *Migration Legislation Amendment (Migration Agents Integrity Measures) Act* 2004 (the Amendments) began operating from 1 July 2004.

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 the Migration Agents Registration Authority (MARA) for disciplinary proceedings if the practitioner has a high visa application refusal rate from the Department of Immigration or review application refusal rate from a merits review authority in relation to a particular class of visa: s306AC.

There is some discretion vested in MARA not to take disciplinary action on a first referral from the Minister (s306AC(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, she or he may refer the practitioner a second time (s306ACAA) in which case MARA has no choice. It must impose a disciplinary sanction: s306ACAC.

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 Act and the *Migration Regulations* 1994 (Cth) (the Regulations) 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 she or he has lodged 10 or more valid visa applications (including review applications) of a particular visa class within a prescribed six months period and 75 per cent of the applications (90 per cent 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;



ILLUSTRATION BY GREGORY BALDWIN

- applications for ministerial discretion are not included;
- applications lodged by practitioners in a prescribed capacity (e.g. under the Immigration Advice and Assistance Scheme) 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 so as 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 fewer than 10 applications in a prescribed six-month period for a particular class of visa are not subject to the new disciplinary procedure.

## 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: ss306AC and 306ACAC. On the first ministerial referral, a decision not to discipline if special circumstances exist is available: s306AC(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 Administrative Appeals Tribunal (AAT): s306AJ.

The AAT may issue a stay order to enable the practitioner to continue practice pending the result of the appeal (s306AK) but the publication of disciplinary details are not prevented by the stay order: s306AL.

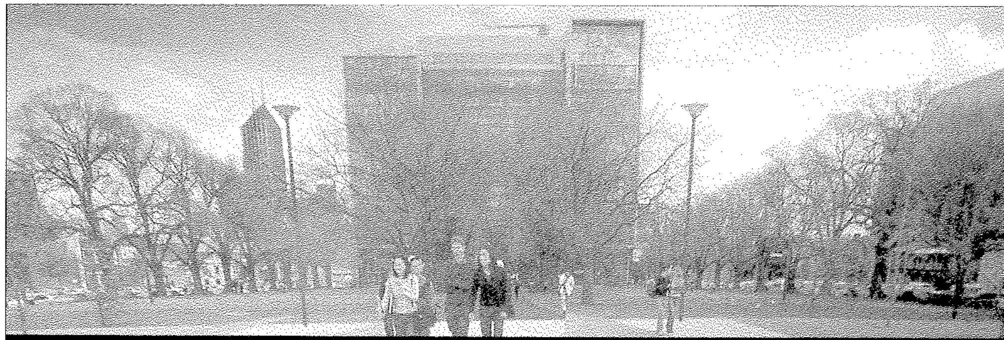
It is submitted that this is inappropriate and that it should be left to the independent arbitrator, the AAT, to determine whether disciplinary decisions against a practitioner, which are awaiting merits review, should be published before the review is concluded.

## Serious issues of principle

The "high visa refusal rates" legislation clearly 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.

- A client seeks advice in relation to a Refugee Review Tribunal (RRT) review application and the practitioner forms the view that while a valid application may be made, 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 RRT to make a decision whether or not the application is

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unfounded, 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 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.

- 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. At the time she held no substantive visa. 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 obtaining a permanent residence visa by way of Ministerial intervention under s417 of the Act on public interest grounds. However, under s417, Ministerial intervention is only available where the RRT has made a merits review decision on an application which has been validly made. Again, the practitioner will fall foul of the "high visa refusal rates" disciplinary process.

## Conflict of interest between the lawyer and the client

The new reforms aimed at reducing applications with a high probability of failure are particularly problematic for lawyers who have a fiduciary duty to act on behalf of a client in accordance with the client's instructions. The primary concern is that practitioners may be dissuaded from giving advice to visa applicants for fear of developing a high visa refusal rate.

Lawyers are ultimately presented with an inescapable predicament. Disciplinary liability will be incurred to MARA if they accept instructions. Their clients' best interests will often be frustrated if they do not.

The implications of this are:

1. clients, many of whom are from non-English speaking backgrounds with limited experience of the Australian legal system, may be denied their right to obtain representation despite having genuine and complex cases; and
2. the conflict may temper the zeal with which the lawyer is permitted to act on behalf of the client and compromise the standard and comprehensiveness of advice the lawyer is able to provide.

## Conclusion

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.

It is time for the profession to exercise increased vigilance and activism to guard against the escalating erosion of what have been generally regarded in the past as rights. ●

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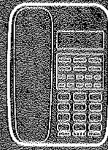

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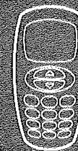

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