

PROFESSIONAL INDEMNITY FOR MIGRATION AGENTS: RECENT DEVELOPMENTS AND INSIGHTS

10 MAY 2019 | PROFESSIONAL INDEMNITY & FINANCIAL LINES

This article discusses the impact of recent developments in the migration agent industry, including:

1. the recent report of the Parliamentary Inquiry into the regulation of Australian migration agents;
2. the abolition last year of the 457 visa and its replacement with the Temporary Skills Shortage (TSS) visa; and
3. changes impacting the size and make up of the industry.

The article goes on to discuss how these developments have affected claims against agents and how best to manage complaints made against agents to the Office of the Migration Agents Registration Authority (OMARA).

PARLIAMENTARY INQUIRY INTO MIGRATION AGENTS

In March 2018, following reports of exploitation, fraud and rorting of visa processes, the Parliament of Australia's Joint Standing Committee on Migration was asked to inquire into and report on the efficacy of current regulation of Australian migration agents.

The Committee tabled its report in February 2019. Among its recommendations were:

1. establishing an Immigration Assistance Complaints Commissioner (IACC) with greater investigatory and sanctioning powers than the OMARA currently has, including new powers to impose fines and award compensation;
2. publication of agents' performance data and pricing arrangements; and
3. increased training and qualification requirements for new migration agents, including a period of supervised practice.

By no means is this to suggest widespread malpractice. 74% of agents have never had a complaint made against them, and a large number of complaints against the remaining 26% are dismissed.¹ In fact, the main reason given for the IACC was due to the OMARA's inability to investigate individuals operating illegally as unregistered migration agents.

457 ABOLITION: TIGHTENED VISA SYSTEM CAUSING CHALLENGES

Until its abolition last year, the 457 visa was the most common visa for employers to sponsor foreign workers in Australia. Many of these workers then used this as a step in transitioning to other visas which provided permanent residency.

The 457 visa was scrapped partly to remove this pathway to permanent residency and the opportunity for exploitation that accompanied this, and partly to ensure Australians are given priority in the Australian job market.

Changes to the 457 visa in its replacement, the TSS visa, include:

- no pathway to permanent residence for most applicants;
- the removal of 200 occupations from the list of eligible skilled occupations;
- tighter regulations, including increased work experience requirements, mandatory labour market testing (the sponsoring employer must demonstrate lack of success in finding a local worker to do the job), proof that the salary is at the market level for the role and higher English language level requirements; and
- increased costs to employers, in the form of contribution to a fund for training Australians in apprenticeship and trainee programs.

The replacement of the long standing 457 system with the new TSS visa has not been a straightforward adjustment for agents, as the author is aware of claims against agents resulting from:

- difficulty in complying with and correctly advising clients on these new requirements, particularly getting the specifics of labour market testing right;
- dealing with the fallout of clients' occupations being removed from the skilled occupations list and trying to fit new applicants into one of the limited occupations;
- transitional issues for existing 457 holders to which grandfathered pathways to permanent residency apply;
- seeking workarounds to obtain permanent residency by applying for alternative temporary visas for which clients do not meet all criteria; and
- an unrelated change to Departmental policy of refusing visa applications for missing documents, when the Department would previously notify agents and allow further time for missing documents to be provided.

GROWTH AND CHANGE IN THE INDUSTRY

Over the last three years there has been significant growth in the migration advice profession. The total number of migration agents in June 2018 was 7,402, up from 5,706 in June 2015.² The registered migration agent industry now has an estimated value of approximately \$877 million.³

This is despite Australia's permanent immigration intake falling to below 163,000 last year, the lowest since 2007-08. In addition, the Government has announced that the permanent immigration target will be cut to 160,000 from next year, down from the previous target of 190,000.

But these reductions are largely of rhetorical import only, for two reasons; first, the vast majority of migrants to Australia are temporary (around 600,000 last year). The cap to the permanent intake does not affect this. Secondly, as Australia's intake of permanent last year was already at around the new target level of 160,000, the announcement of the new target does not change matters.

What will have a significant impact on the size of the industry is the passage of the *Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2018*, as a result of which lawyers will no longer be regulated by the OMARA. 30% of all migration agents have a legal practising certificate, and as such it is anticipated that around 4,800 lawyers will be removed from the OMARA's regulation.⁴

The Bill, which has already passed the House of Representatives, 'will enable legal practitioners to be regulated by their requisite law society without unnecessary dual regulation by the OMARA', according to the Department of Home Affairs.

Underwriters of both lawyers and migration agents will need to consider the impact of this to their books.

DEALING WITH OMARA COMPLAINTS

Along with the increased number of agents and tightening of the system, there has been a corollary increase in the number of complaints to the OMARA. The last two years saw 1,475 complaints against migration agents, compared to just over 400 in 2013/4.

It is clear from a reading of recent OMARA decisions that the overriding aims of the Migration Agents Code of Conduct, including ensuring that agents are persons of integrity and good character, are the principal matters leading to decisions to sanction agents. In fact, in one recent decision, the reason for barring an agent from practice was the provision of incorrect information to the OMARA in the complaints process itself.

The OMARA now has access to big data, being one of the dozens of agencies, including intelligence agencies, now under the remit of the Department of Home Affairs. Additionally, the OMARA takes a dim view of the omission of material provided to them in an agent's file in investigating a complaint, as the OMARA will infer a failure by the agent to keep proper records.

Professionals can make mistakes. It is important not to make them worse by doubling down on them. Rather, the author's approach to defending OMARA complaints is as follows:

1. correct any inaccuracies in the complainant's version of events;
2. acknowledge errors and, if relevant, their gravity and impact on others;
3. provide any mitigating circumstances for any errors. These may include the complainant's conduct; and
4. commit to improvements and compliance with the Code of Conduct, including by outlining specific steps that will be taken or have already been taken to ensure mistakes will not be repeated. This can include training, establishing different systems or creating new precedents.

The author has acted for numerous migration agents in both litigated claims and OMARA complaints. Of note, of the 104 OMARA complaints resulting in findings of breaches of the Code in 2018, only 35 of these agents escaped sanction (or only 34%). In the same period, the author acted for four agents against whom numerous breaches of the Code were found and all

of whom escaped sanction (a 100% success rate).

[1] OMARA Migration Agent Activity Report 1 July to 31 December 2018

[2] Migration Agent Activity Report 1 January to 30 June 2018

[3] Joint Standing Committee on Migration report on the efficacy of current regulation of Australian migration agents

[4] Joint Standing Committee on Migration report on the efficacy of current regulation of Australian migration agents

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