

MIGRATION LEGISLATION CONUNDRUMS: A NEED FOR LEGISLATIVE REFORM¹

The Migration Act 1958 (Cth) (the ‘Act’) is an extremely complicated piece of legislation which may confront the unwary lawyer, accountant and migration agent with serious regulatory problems. The LIJ Article *Passport to an Ethical Dilemma* (2004) 78(11) LIJ, p62 outlined some of these problems. This article enumerates some even more serious issues.

Unregistered persons giving Immigration Assistance

Part 3 of the Act deals with the migration advice industry and regulates the activities of migration agents including the manner of providing immigration assistance. Essentially, in order to provide “Immigration Assistance”,² a person is required to be a registered migration agent.³ Persons specifically exempted from the requirement are:

1. Parliamentarians.⁴
2. Lawyers providing immigration legal assistance in the context of s.277 of the Act (i.e., lawyers engaged in judicial review of migration decisions in the Federal Circuit Court of Australia, the Federal Court and the High Court, but not the merits review tribunal, namely (the Administrative Appeals Tribunal).⁵
3. Close family members, nominators or sponsors giving immigration assistance to the person.⁶
4. Officials giving immigration assistance in the course of their duties as officials.⁷

The overall effect of Part 3 of the Act is that lawyers, unless they are also registered migration agents, cannot give migration advice or assistance of any kind except for the purposes of judicial review in the courts.

There is also a deeming provision under the Act which provides that a person does not give immigration assistance if he or she merely:

- “(a) does clerical work to prepare (or help prepare) an application or other document; or

¹ Updated by the Migration Team at FCG Legal Pty Ltd.

² *Migration Act 1958 (Cth)* s.276.

³ s.280.

⁴ s.280(2).

⁵ s.277, s. 280(3).

⁶ s.280(5A), s.280(5B), s.280(5C).

⁷ s.280(4).

- (b) provides translation or interpretation services to help prepare an application or other document; or
- (c) advises another person that the other person must apply for a visa; or
- (d) passes on to another person information produced by a third person, without giving substantial comment on or explanation of the information.”

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If a person is not a registered migration agent and provides immigration assistance as defined in s 276, the Act provides a number of offences carrying severe penalties; e.g., 60 penalty units where the person is not a registered agent and gives immigration assistance.⁹ Sub-section 280(1A) makes the latter a *strict liability* offence. As a result, a lawyer or accountant, who does not normally practise in this area and who is unaware of the Part 3 regime, could unwittingly incur criminal liability and potential disbarment merely by giving casual advice to a client.

Unregistered persons deriving income from giving “immigration assistance”

Of even more concern is the fact that a breach of s 281 (which provides that unregistered persons must not ask for or receive a fee or other reward for giving immigration assistance) seems to expose certain professionals such as lawyers, accountants and education agents to liability for an indictable offence carrying a penalty of up to 10 years imprisonment.

Medium and large legal and accounting firms/proprietary companies often have a sector devoted to business migration; the sector being staffed by registered migration agents. Again, some partnerships and companies operating migration assistance businesses have registered migration agents operating the businesses but non-registered persons as partners or shareholders.

It is clear that the Act does not permit registration of partnerships, companies or derivative entities. Registration as a migration agent is individual and personal¹⁰ and is restricted, among other requirements, to persons 18 years or over.¹¹ The effect of s 281 in these circumstances is to expose non-registered partners and/or shareholders to criminal liability under s 281 where the partnership or company derives remuneration from migration advice and assistance activities and they, in turn, share that remuneration; e.g. in the form of dividends or partnership distributions.

Unregistered persons deriving income from making “immigration representations”

⁸ s.276(3).

⁹ s.280(1).

¹⁰ s.286.

¹¹ s.293.

A similar concern is also raised in s 282, which provides that unregistered persons must not ask for or receive a fee or other reward for giving immigration representations or for the making of immigration representations by another person who is not registered. The Act defines immigration representations as making representations, to or otherwise communicating with, the Minister, the Minister's staff, or the Department on behalf of a visa applicant, a review applicant, a sponsor or a nominator. .¹²

Communicating with Departmental officials is a key part of migration practice, and as such, it is highly likely that partners in a firm offering migration services will derive income referable to these activities.

As was detailed in the potential effect of s 281, should a non-registered partner or shareholder of a firm receive remuneration derived from immigration representation activity, they may be exposed to criminal liability. This is also an indictable offence carrying a penalty of up to 10 years imprisonment.

Summary

In summary, lawyers who do not practise in the migration area must be careful to avoid giving casual advice which amounts to "immigration assistance" under s 276. Even more importantly, legal and accounting practitioners who are not registered migration agents need to exercise extreme care in relation to their obligations under s 281 of the Act.

Although the writers have concentrated on s 280 to s 282, there are a number of other provisions in Part 3 which also require careful consideration.

The *Migration Act* 1958 (Cth), like the various taxing statutes, is subject to regular amendment designed to close perceived "loopholes" which occur from time to time. The effect of such regular and piecemeal change can be a loss of overall perspective; leading to unintended and unnecessarily restrictive results. It is doubtful, for example, that the legislature intended to criminalise non-registered partners and shareholders in the example offered above when the actual immigration advice and assistance or immigration representations are being provided by competent registered agents. In these circumstances, a review of Part 3 of the Act may be required.

¹² s.282(4).