



RACS Guide 3:

The Regulation of Migration Agents

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Refugee Law Practice and Procedure Guide Series

This Guide is a practice oriented guide for Registered Migration Agents to providing advice and assistance regarding onshore Protection Visa applications. The information contained in this guide represents the law and procedures as they are at July 2006. While every effort has been made to ensure that the information in this guide is free from error and/or omissions, the law is complex and constantly changing. We advise readers to consult current legislation and seek further information when faced with specific problems. This guide should not be used as a substitute for legal advice.

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LAW AND JUSTICE
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OF NEW
SOUTH WALES

3.0 The Regulation of Migration Agents

Law

Migration Act 1958 Part 3

Migration Regulations 1994 Regulation 8, Schedule 2 Code of Conduct

Policy

MSI 400: Migration Agents and unregistered persons: dealing with conduct of concern
(Issued 1 Sept 2004)

Client Information:

MARA Information Sheet "Information on the regulation of the Migration Advice Professions"

3.1 Legal Regulation of Migration Agents

Migration Agents' responsibilities, liabilities and obligations are prescribed in the *Migration Act 1958* ('the Act'), in particular Part 3 of the Act. Migration Agents are also bound by the *Migration Agents Registration Authority (MARA) Code of Conduct*. A copy of the Code of Conduct has to be displayed in the agent's office. Check the MARA website www.themara.com.au to ensure your copy of the Code of Conduct is up to date.

Note the following provisions from the Code of Conduct which is also available at [<http://www.themara.com.au>].

A registered migration agent must always:

- act in accordance with the law and the legitimate interests of his or her client;¹
- deal with his or her client competently, diligently and fairly;²
- act in accordance with a duty of confidentiality to the client³ and must not disclose information without the written consent of the client, unless required by law;⁴
- hold a sound working knowledge of the Migration Act and Migration Regulations ('the Regulations'), and other legislation relating to migration procedure, and a capacity to provide accurate and timely advice;⁵
- act in a timely manner if the client has provided all the necessary information and documentation in time for statutory deadlines. For example, submit a visa application before a person's visa ceases to be in effect.⁶

¹ Code of Conduct Code 2.1(a)

² Code of Conduct Code 2.1(b)

³ Code of Conduct Code 3.1

⁴ Code of Conduct Code 3.2

⁵ Code of Conduct Code 2.3

⁶ Code of Conduct Code 2.18

In addition, to the extent that a registered migration agent must take account of objective criteria to make an application under the Act or Regulations, s/he must be frank and candid about the prospects of success.⁷ The agent must not make or encourage statements that s/he knows or believes to be misleading or inaccurate in support of an application under the Migration Act or Migration Regulations.⁸

If an application under the Act or the Regulations is vexatious or grossly unfounded (for example, an application that has no hope of success) a registered migration agent:

- (a) must not encourage the client to lodge the application; and
- (b) must advise the client that, in the agent's opinion, the application is vexatious or grossly unfounded; and (c) if the client still wishes to lodge the application - must obtain written acknowledgment from the client of the advice given under paragraph (b).⁹

3.2 Immigration Assistance and Registered Migration Agents, Lawyers and people without qualifications

3.2.1 Relevant Law

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| Law |
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| Migration Act 1958 Sections 276, 277, 280, 284, 314 |
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| Migration Agents Regulations 1994 Regulation 8, Schedule 2 Code of Conduct |
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A person cannot provide immigration assistance unless he or she is a Registered Migration Agent (RMA) (s280 of the Act). This is a strict liability offence (s280(2) of the Act) with a penalty of 60 penalty units. However lawyers can provide "immigration legal assistance" and people without qualifications as a lawyer or RMA are permitted to provide some types of assistance if this assistance is provided without fee or reward.

3.2.2 Lawyers who are not Registered Migration Agents:

Lawyers¹⁰ who are not RMAs can provide "immigration legal assistance"¹¹ ie lawyers can:

- act for a visa applicant, cancellation review application, sponsor, nominator in preparation for court proceedings in relation to that application; and

⁷ Code of Conduct Code 2.6

⁸ Code of Conduct Code 2.9

⁹ Code of Conduct Code 2.17

¹⁰ Migration Act Section 275 defines a lawyer to be a barrister, solicitor, a barrister and solicitor, or legal practitioner of the High Court or of the Supreme Court of a State or Territory.

¹¹ Migration Act 1958 s280(3)

- represent a visa applicant, cancellation review application, sponsor, nominator in court proceedings in relation to that application.

For example a lawyer is permitted to provide representation in the Federal Court for a matter arising from the refusal of a visa.

Lawyers cannot provide advice in matters not defined as “immigration legal assistance.”¹² A lawyer cannot advise on how to:

- Prepare or lodge a visa application or cancellation review application;
- Prepare or lodge an approved form for putting forward the name of a visa applicant, or an approved form undertaking sponsorship; nor on
- The review and proceedings before the MRT or RRT¹³ of a decision relating to the visa application, cancellation review application, sponsorship or nomination.

For example a lawyer is not permitted to provide advice in relation to how to apply for a bridging visa during Federal Court proceedings.

Some assistance can be provided by people who are not lawyers and not registered migration agents. For example people who are not registered migration agents can provide assistance in ministerial intervention requests. See below for details.

3.2.3 Non lawyers + Non Registered Migration Agents

A person who is not a registered Migration Agent must not give immigration assistance.¹⁴ However a person who is not a RMA can provide immigration assistance if this is:

- provided without fee or reward; and
- is of the following type of assistance:
 - help in preparing or helping prepare a request to the Minister to exercise his/her power under section [351](#), [391](#), [417](#), [454](#) or [501J](#)¹⁵ or [195A](#), [197AB](#) or [197AD](#);
 - advice to a person in relation to such a request;
 - where a person helps either the person who making the request (applicant/requestor) or someone else, provided it is in relation to those matters discussed above;¹⁶ or
- is other assistance such as:
 - clerical work to prepare an application or document,
 - translation or interpreting services,

¹² Migration Act 1958 s277 which defines “immigration legal assistance.”

¹³ Migration Act 1958 s275.

¹⁴ Migration Act 1958 ss280

¹⁵ Migration Act 1958 s276(2A)(a)

¹⁶ Migration Act 1958 s276(2A)

- advise that another person must apply for a visa
- hands over information produced by a third person, without giving substantial comment or explanation of that information.¹⁷

Note Sections 281, 282 set out restrictions on charging fees for immigration assistance. There are also various provisions in relation to officials, including consular and diplomatic officials in relation to providing immigration assistance in the course of their duties, as well as close family members, but these provisions will not be discussed in this handbook.

Division 2 of the Migration Act sets out the Penalties for the following offences:

- Section 280 Providing immigration assistance if a person is not a RMA. This is a strict liability offence. Penalty: 60 penalty units. If a person pays the fine within 28 days then the matter is dealt with by a court, and the person is not convicted of an offence.¹⁸
- Section 281 Asking for or receiving any fee or reward for immigration assistance provided by that person or another person who is not a RMA. Penalty: 10 year imprisonment.
- Section 282: Asking for or receiving any fee or reward for immigration representations by that person or another person who is not a RMA. Immigration representations include any communications with the Minister, DIMA or Ministerial staff on behalf of a visa applicant/ cancellation review applicant/ nominator/ sponsor/ person requesting Ministerial intervention in relation to that application or matter. Penalty: 10 year imprisonment.
- Section 283 Directly or indirectly falsely representing a person is a RMA. Penalty: 2 years imprisonment.
- Section 284 and 285 Advertising that a person gives immigration assistance where that person is not a RMA. Penalty: 2 years imprisonment.

3.3 Complaints Against Migration Agents

Law

Migration Act 1958 ss275 – 332B

Migration Agents Registration Application Charge Act 1997 (Cth)

Migration Agents Regulations 1998 (Cth), including Regulation 8 Schedule 2 Code of

Conduct

Migration Agents Registration Application Charge Regulations 1998 (Cth)

Policy

¹⁷ Migration Act 1958 s276(3)

¹⁸ Migration Act 1958 s504(1)(ja)

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Client Information
Code of Conduct should be in each office

Many asylum seekers have hired “bad” migration agents at some time which have varied and ongoing impacts on clients visa applications and migration options. Situations arising might include:

Example 1: A client was represented by a RMA in the preparation and lodgment of their protection visa application form. He advised the RMA when he changed address, and handed the agent a completed a change of address form which the agent failed to submit to DIMA. The client telephoned the RMA on many occasions over three months but the RMA did not return his call. The client telephoned DIMA to ask whether a decision had been made on his application and was informed the application had been refused over two months before. The client lost right to appeal for review of that decision at the Refugee Review Tribunal.

Example 2: A client arrived in Australia in 1995 and applied for protection with the services of a RMA. The client did not speak any English at the time, and handed over her passport explaining to the RMA that the name on the passport was false. She explained her story to the RMA. The RMA asked her to sign a blank form and told her that it would be best to stick with the name in her passport because in Australia documents are needed to prove your identity. The application was lodged in the false name, was refused at DIMA and at the Refugee Review Tribunal on the basis that given the applicant was able to leave the country on a valid passport in her own name there was no real chance she had been in the past sought by authorities and would not be sought in the future. Although the visa applicant is barred from applying again by s48A of the Act, the applicant now has a child and wants to apply for a protection visa for the child.

Two areas need to be addressed for client victims of wrong doing by RMAs

- Correcting any incorrect information provided to decision makers and advising decision makers of a RMAs wrong doing; and
- Complaints against RMAs or people holding themselves out to be RMAs.

3.3.1 Correcting any incorrect information

Checking the MARA Register of RMAs

If a client refers to wrong doing by a previous agent, you should go to the MARA website and check through the Register of Agents for the list of agents who have been

cautioned, cancelled, suspended or barred from practice as a RMA. Read the summary or the decision. Print out a copy of the decision for the clients.

A full statement of the clients correct claims

If incorrect information has been submitted to DIMA or the Refugee Review Tribunal due to the action or advice of a bad migration agent, advise the client it is in the client's best interest to provide a full statement in relation to this. The client must check all information that has thus far been provided to decision makers including the form and statement and then provide the corrected information for example in the form of a detailed statement and a detailed explanation as to why the incorrect information was provided. Where incorrect information has been provided, decision makers may form the following concerns:

- concerns as to the identity of the applicant;
- adverse assessment of credibility;
- and face a lack of information as to the true matters relating to the applicant's fears of persecution.

Statement setting out why incorrect or incomplete information has been provided

It is important that the client explain their belief as to *why* incorrect or incomplete information has been provided. Ask the client why the RMA would have written down XXX if it was incorrect. Ask the client where s/he think the RMA got that information. This should form part of the statement providing the correct details.

Matters that may be relevant include:

- Specific description of any or all meetings with the RMA;
- A description of the documents the applicant handed the RMA (eg passport, identity cards, statement about fears in client's own language);
- A description of what the agent told the client.

Advising decision makers of any action against the RMA

In this statement the client should also include any complaints s/he is making against the RMA, as well attach any decisions against the RMA which are analogous to the experience of the client, or generally show the RMA to be unscrupulous.

3.3.2 Complaints against RMAs or people holding themselves out to be RMAs.

Clients can complain about migration advice to the following bodies:

- The Migration Agent;
- The Migration Agents Registration Authority (MARA) in relation to RMAs and/or;
- The Department of Immigration and Multicultural Affairs (DIMA) in relation to unregistered agents and/or;

- The relevant Law Association in relation to agents whom are also lawyers.

Provide the client with:

- Any decision by MARA relating to his/her prior migration agent;
- MARA Form M03 Complaint Form (from website);

Complaints to the Migration Agents Registration Authority (MARA)

To complain to MARA, client should either fill out the complaints form available from the MARA website or write a letter to MARA.

A complaint can be lodged in either English or client's own language.

Client should include ALL information and copies of documents that are in his/her possession, including records of conversations and correspondence which he/she had with the agent, a copy of the contract and any receipts received from the agent.

MARA has the power to investigate complaints about migration agents. If the agent is no longer registered at the time of the complaint, the complaint must be lodged within 12 months of the agent's registration expiring. If a complaint is not lodged within this time, MARA cannot investigate the complaint.¹⁹

Complaints should be sent to:

Migration Agents Registration Authority
PO Box Q1551
QVB NSW 1230

MARA may discipline the agent. MARA may:

- Investigate the agent.²⁰
- Caution the agent. This may be lifted if certain conditions are met.²¹
- Suspend an agent's registration for period of up to 5 years, or until certain conditions for lifting the suspension are met.²²
- Cancel the agent's registration and remove the agent from the Register of Agents.

Complaints to the Department of Immigration, Multicultural and Indigenous Affairs (DIMA)

The Department has the power to investigate allegations of criminal conduct by both unregistered and registered agents. To complain a client may contact the nearest departmental office or write a letter setting out such allegations.

¹⁹ Migration Act 1958 s316(1A), (1B).

²⁰ Migration Act 1958 s316

²¹ Migration Act 1958 ss304A, 306AGA.

²² Migration Act 1958 ss303, 306AGA.

Complaints to Law Associations

The Law Council of Australia website has links to the independent legal complaint bodies and law society websites in each of the States and Territory. There you will find the relevant contact details and, in some cases, complaints forms and procedures on how to lodge a complaint about an immigration lawyer with that organisation.