Protecting Migrants and Constitutional Freedoms

31 August 2017

A submission to the Senate Legal and Constitutional Affairs Committee in response to the Senate Inquiry into the *Migration Amendment (Regulation of Migration Agents) Bill 2017*

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Table of Contents

Glossary

2014 Inquiry	The inquiry which resulted in the 2014 Independent Review of the Office of the Migration Agents Registration Authority
Act	*Migration Act 1958* (Cth)
Bill	*Migration Amendment (Regulation of Migration Agents) Bill 2017*
Chapter 3	Chapter 3 of the Report
Code	Code of Conduct for Registered Migration Agents
Cunliffe	*Cunliffe v Commonwealth* (1994) 182 CLR 272
Graduate Certificate	Graduate Certificate in Australian Migration Law and Practice
Graduate Diploma	Graduate Diploma in Australian Migration Law and Practice
Guide	Consumer Guide
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Impugned Law	The law[1] which inserted Part 2A into the Act
LCA	Law Council of Australia
LIV	Law Institute of Victoria
MARA	Migration Agents Registration Authority
MARN	Migration Agents Registration Number
MARS	Migration Agents Registration Scheme
Memorandum	Explanatory Memorandum to the Bill
MIA	Migration Institute of Australia
MoU	Memoranda of Understanding
OMARA	Office of the Migration Agents Registration Authority
PC	Legal Practising Certificate
PII	Professional Indemnity Insurance
Regulations	*Migration Regulations 1994* (Cth)
Restricted PC	Restricted Legal Practising Certificate
RMA	Registered Migration Agent
RMA Law Graduate	Anyone who becomes an RMA and is subsequently granted, and holds, a Restricted Legal Practising Certificate
Recommendation 1	Recommendation 1 of Chapter 3 of the Report
Report	2014 Independent Review of the Office of the Migration Agents Registration Authority
Schedule 1	Schedule 1 of the Bill
Unrestricted PC	Unrestricted Legal Practising Certificate

[1] *Migration Amendment Act (No.3) 1992* (Cth)

Summary

1. Australian immigration laws are extremely complex and migrants are considerably vulnerable. For that reason, both lawyers and non-lawyers must presently be Registered Migration Agents (**RMA**s) in order to give 'immigration assistance' as defined under the *Migration Act 1958* (Cth) (**Act**).[2] RMAs are subject to the Code of Conduct for Registered Migration Agents (**Code**). Although some lawyers oppose the need to register as RMAs, such a registration is the best way of ensuring consumer protection.

2. **Schedule 1** of the *Migration Amendment (Regulation of Migration Agents) Bill 2017* (**Bill**) would abolish the requirement for lawyers to register as RMAs and would also prohibit them from so registering. The proposed changes would be beneficial to very few immigration lawyers, but disastrous to thousands of migrants, non-lawyer RMAs, other lawyers and businesses, including small businesses.

3. The effects of Schedule 1 of the Bill are that: lawyers would no longer need to comply with the Code, which contains very specific provisions tailored to the protection of vulnerable migrants; non-lawyers and graduate lawyers would be discouraged from offering immigration assistance; there would be a significant reduction in the number of professionals giving immigration assistance, leading to higher professional fees. Those effects would ultimately curtail the safeguards currently in place for consumers.

4. If, however, Parliament deems that consumers would be better assisted if dual registration were not compulsory, it should at least be optional. Otherwise, many individuals who have been practising as non-lawyer RMAs and who have subsequently become lawyers and hold restricted legal practising certificates (**Restricted PC**s) would, as much as their clients and other stakeholders, be harshly impacted upon by Schedule 1.

5. Further, if Parliament believes that giving lawyers the option of dual registration is not in the best interests of consumers, RMAs who hold Restricted PCs should at the very least be given a transition period of 5 years so that they, and their clients, are not severely affected by the changes.

6. In any event, the Bill is most likely unconstitutional to the extent that it purports to prohibit RMAs who have subsequently been granted, and hold, Restricted PCs from giving unsupervised immigration assistance in that such a prohibition impermissibly interferes with the freedom of political communication and of interstate trade protected by the Constitution. To give those RMAs, as an alternative, a transition period of less than 5 years, would most likely also be unconstitutional.

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[2] *Migration Act 1958* (Cth), Section 276.

Introduction

7. This submission is comprised of Divisions 1, 2 and 3.

8. Division 1 starts by outlining the current regulatory scheme for the provision of immigration assistance, followed by an overview of its history, which demonstrates that the protection of migrants has seen increasing prominence and is now paramount to the regulation of the industry. That is followed by a short description of Schedule 1 of the Bill.

9. Subsequently, Division 1 shows that Schedule 1 of the Bill essentially implements **Recommendation 1** contained in **Chapter 3** of the 2014 Independent Review of the Office of the Migration Agents Registration Authority (**Report**). Thus, given the importance of the Report, Division 1 dissects the most relevant parts of Chapter 3 and demonstrates, by raising several arguments in favour of dual registration, that the analysis contained in Chapter 3 is, with respect, superficial, centred on lawyers and not consumers, and that it fails to engage in an in-depth analysis of the submissions addressed by the Report.

10. Next, Division 1 raises other relevant arguments in favour of dual registration, which disappointingly were not addressed in the Report, including: the need for RMAs to keep a professional library tailored to the needs of migrants; RMAs' overriding duties to clients as opposed to the courts; how the Bill would create two tiers of professionals, namely lawyers and RMAs, which would have unfortunate consequences for migrants in the long-term; how the Bill would extinguish the Migration Agent Registration Number (**MARN**) of many RMAs', which is not in the best interests of clients; and an example of other anomalies produced by the proposed changes.

11. Division 1 then concludes that the segregation between lawyers and RMAs benefits a few lawyers to the detriment of many consumers, non-lawyer RMAs, other lawyers and businesses, including small businesses.

12. Division 2 essentially transcribes, with a few variations, a submission letter dated 31 July 2017 and sent by the writer of this submission and other co-authors of that letter[3] to the Assistant Minister for Immigration and Border Protection, the Hon Alex Hawke MP. Division 2 starts by summarising the harsh effects of Schedule 1 of the Bill on lawyer RMAs holding Restricted PCs. Then, it discusses in greater depth the impacts of Schedule 1 of the Bill to those Restricted PC holders and their clients, followed by an analysis of the severe effects of Schedule 1 on immigration agencies, other lawyers, direct access barristers and their respective clients.

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[3] Crawford York, Hannah Malewska, Julie Briggs, Mark Northam, Martin Udall, Olena Brodovska, , Peter Michalopolous, Tonnou Ghothane, Yew Han Hee and Zersha Saeeda.

13. Later, Division 2 discusses the illogicality and unfairness of Schedule 1 of the Bill, followed by an examination of the human rights implications of the proposed changes. A simple alternative is then suggested should Parliament decide that the requirement for dual registration should be abolished, namely to allow each lawyer to choose whether or not to be dually registered. Division 2 finally proposes a further alternative in case Parliament does not wish to render dual registration optional, namely to give RMAs holding Restricted PCs a transition period during which they can adapt to the changes and avoid negative consequences to themselves and their clients.

Division 1

Current Regulatory Framework

14. Australian immigration laws are extremely complex and most migrants find it impossible to navigate through them without professional support. Millions of Australian visas are applied for every year, which means that significantly large numbers of well-qualified professionals are needed to assist migrants.

15. In Australia, only RMAs, whether or not they are also lawyers, are allowed to give immigration assistance. Currently, generally speaking, a person who wants to register as an RMA must satisfy character requirements[4] and either have completed a Graduate Certificate in Australian Migration Law and Practice (**Graduate Certificate**)[5] or hold a current PC.[6] As of 1 January 2018, the study requirement for non-lawyers will be elevated from a Graduate Certificate to a more stringent Graduate Diploma in Australian Migration Law and Practice (**Graduate Diploma**) comprising twice as many units of study, although the Bill has nothing to do with this elevation.

16. Non-RMAs who give immigration assistance are liable to 60 penalty units, with few exceptions such as parliamentarians and close family members.[7] Additionally, it is a criminal offence, punishable by imprisonment for ten years, for non-RMAs to give immigration assistance or make immigration representations for a fee or other reward.[8]

17. Both lawyer and non-lawyer RMAs are subject to the Code, the administration of which is the responsibility of the Office of the Migration

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[4] *Migration Act 1958* (Cth), Section 290.
[5] Ibid Section 289A(c), *Migration Agents Regulations 1998* (Cth), Regulation 5(1), IMMI 12/097.
[6] *Migration Act 1958* (Cth), Section 289A(c), *Migration Agents Regulations 1998* (Cth), Regulation 5(6).
[7] *Migration Act 1958* (Cth), Section 280.
[8] Ibid Sections 281 and 282.

Agents Registration Authority (**OMARA**).[9] The OMARA is currently appointed to act as the Migration Agents Registration Authority (**MARA**). The OMARA is not an association of RMAs. On the contrary, it is an external body that regulates the registration and conduct of RMAs, meaning that the industry is not self-regulated, which is a welcome safeguard for consumers.

18. The Code is tailored to address the specific needs and vulnerabilities of migrants, many of whom do not speak English and have very little awareness of their legal rights. For instance, it requires that RMAs maintain a professional library which includes the Act, the *Migration Regulations 1994* (Cth) (**Regulations**), other legislation relating to migration procedure and portfolio policies and procedure.[10]

Overview of the History of the Migration Advice Industry

19. One of the first Acts of Parliament enacted after federation concerned the regulation of immigration into Australia.[11] However, it was not until 1948 that persons were prohibited from giving immigration for a 'fee, commission or other reward' unless they were registered as agents,[12] punishable with two hundred pounds or imprisonment for one year.[13] Non-agents were not prohibited from giving immigration assistance if they did not do so in exchange for a fee or other reward.

20. A decade later, with the introduction of the *Migration Act 1958* (Cth), the 1948 scheme 'was replaced with a system of negative licensing. Accordingly, agents were automatically licensed upon giving notice of their intention to practice to the Secretary of the Immigration Department. Agents were then allowed to practice until the Minister established that they were not fit and proper to continue... [T]his scheme came at the cost of reduced consumer protection, as there was no specialist body to monitor and investigate registered agents'.[14]

21. In 1992, the 'negative licensing' model was replaced with the Migration Agents Registration Scheme (**MARS**) under the administration of the Department of Immigration, Local Government and Ethnic Affairs (**DIEA**). The MARS was administered by the Secretary of the DIEA and the Migration

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[9] Ibid Section 314; *Migration Agents Regulations 1998* (Cth), Regulation 8 and Schedule 2.
[10] Code of Conduct, Subparagraph 2.5(b)(i).
[11] *Immigration Restriction Act 1901* (Cth).
[12] See the amendments to the *Immigration Restriction Act 1901* (Cth) contained in the *Immigration Act 1948* (Cth).
[13] *Immigration Act 1948* (Cth), Section 7.
[14] Jordan Clare Clitheroe, *The Making of a Profession: The regulation of migration agents in Australia – Historical background and conceptual issues*, Migration Australia, A Journal of Studies, Ideas and Analysis about Migration, Volume 3, Migration Institute of Australia.

Agents Registration Board. Under the MARS, both lawyers and non-lawyers were required to register as agents in order to give immigration assistance. The requirement for lawyers to register as agents was unsuccessfully challenged in the High Court in *Cunliffe v The Commonwealth* (1994) 182 CLR 272 (***Cunliffe***). That decision, which will be discussed below, provides the basis for the conclusion that the Bill is most likely unconstitutional in certain aspects.

22. The MARS was abolished in 1998, when the MARA was established and the Migration Institute of Australia (**MIA**) was appointed as the MARA, a statutory self-regulating body. However, given that the MARA and the MIA shared the same executive board, which was comprised of migration agents, there was an obvious conflict of interest in the MIA acting as the MARA. As a result, in 2009, the OMARA, which is currently part of the Department of Immigration and Border Protection (**DIBP**), was appointed as the MARA, thus abolishing the self-regulation of RMAs.

23. Notably, all the regulatory changes implemented since 1948 point to a paramount objective: the protection of vulnerable migrants against unscrupulous professionals, be them lawyer or non-lawyer agents. The protection of consumers has become so important, and desirably so, that: the prohibition against non-RMAs giving immigration assistance now applies even if the assistance is not given for a fee or other reward;[15] the giving of immigration assistance by a non-agent for a fee or other reward is now punishable with imprisonment for ten years. Such a severe criminal penalty indicates how seriously the protection of migrants is currently dealt with. Punishment of that magnitude usually attaches to serious criminal offences. For instance, in NSW, ten years of imprisonment applies to:

    - 'A person ... who has sexual intercourse with a person who has a cognitive impairment, and ... who is responsible for the care of that person';[16] 'Dangerous driving occasioning death';[17]
    - 'Possessing or making explosives or other things with intent to injure';[18] 'A person who intentionally or recklessly, and knowing its contents, sends or delivers, or directly or indirectly causes to be received, any document threatening to kill or inflict bodily harm on any person';[19] 'Reckless grievous bodily harm'.[20]

24. This brief analysis of the history of the regulatory scheme of the immigration assistance industry informs the current regulatory framework, the background to the Bill and its effects.

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[15] Except for immigration assistance of a kind covered by Subsection 276(2A) of the Act; see Subsection 280(5) of the Act.
[16] *Crimes Act 1900* (NSW), Subsection 66F(2).
[17] Ibid Subsection 52A(1).
[18] Ibid Section 55.
[19] Ibid Subsection 31(1).
[20] Ibid Subsection 35(2).

The Bill

25. The Bill was introduced on 21 June 2017 by the House of Representatives. It brings several changes to the regulation of the migration advice industry. Some of them are contained in Schedule 1 of the Bill, which is the object of this submission. In essence, Schedule 1 of the Bill not only abolishes the need for lawyers to register as RMAs in order to give immigration assistance, but also prevents them from being so registered. Further, RMAs who complete a Graduate Certificate and subsequently complete a Law Degree and obtain, and hold, a Restricted PC will only be able to provide immigration assistance through a legal practice under the supervision of an Unrestricted PC holder.

26. The Explanatory Memorandum (**Memorandum**) of the Bill includes the following passages:

> *'The* [Bill] *amends the* [Act] *to improve the effectiveness of the scheme that regulates migration agents.*
> *Specifically, the Bill amends Part 3 of the* [Act] *to:*
> - *remove lawyers from the regulatory scheme that governs migration agents such that lawyers cannot register as migration agents and are entirely regulated by their own professional bodies;*
>
> [...]
> *SCHEDULE 1 – Australian legal practitioners providing immigration assistance*
> *Background*
>
> *9. Recommendation 1 of the* [Report] *is that lawyers be removed from the regulatory scheme that governs migration agents such that they cannot register as migration agents and are entirely regulated by their own professional bodies. The amendments made by Schedule 1 to the Bill implement Recommendation 1 by making a number of key changes to Part 3 of the [Act].*
> *10. Section 276 of the Migration sets out a definition of immigration assistance, and section 277 sets out a definition of immigration legal assistance. Currently, lawyers may give immigration legal assistance without needing to be registered as a migration agent. However, in order to lawfully give immigration assistance, lawyers must be registered as a migration agent (subsection 280(1)). This has resulted in the dual regulation of lawyers, whereby many lawyers who desire to work in the immigration law field have registered as a migration agent in order to be able to provide the full range of immigration services without running the risk of breaching subsection 280(1).*
> *11. Lawyers are already subject to one of the most stringent professional regulatory regimes in Australia and currently practice in a range of complex areas outside the field of migration law, without the need for dual regulation in these areas'.*

27. Given that Schedule 1 of the Bill essentially implements Recommendation 1 of Chapter 3 of the Report, what follows is a discussion of Chapter 3.

The Report

28. This section will dissect the most relevant parts of Chapter 3 of the Report. The pattern to be used here is to, for each of those relevant parts, quote a passage from the Report in italics and then subsequently critique it using non-italicised words.

'International Comparisons'

29. *'Canada, the United Kingdom and New Zealand have comparable registration schemes for migration agents. While registration requirements vary across these countries, none of them require lawyers to be registered in order to provide immigration advice or assistance. Australia is thus the only country to require migration lawyers to be regulated as migration agents in order to practice in this area'.*[21]

30. The mere fact that some countries do not require dual registration does not mean that Australia should necessarily follow suit. The Report unfortunately fails to engage in an analysis as to why those countries do not require dual registration. To simply state that Australia has different rules to three other countries does not provide any answers as to the desirability of dual registration. What if Australian immigration laws as such so as to justify dual registration, for instance by being more complex than the immigration laws of those other countries? What if the lack of dual registration in those countries renders consumers less protected against unscrupulous lawyers and agents?

31. Given the complexity of Australian immigration laws and the particular vulnerability of migrants, dual registration provides consumers with the adequate level of protection they need, as will be explained in this submission.

32. Further, while it is true that Canada and The United Kingdom do not *require* 'lawyers to be registered in order to provide immigration advice or assistance', those countries do not *prohibit* them from so registering. It is one thing not to require dual registration. But to prohibit it is very different and bring disastrous consequences, as will be discussed in this submission.

[21] Report, page 41.

'Migration Assistance v Migration Legal Assistance' [22]

33. *'The LCA argues*:

> *[...] There is also considerable confusion for lawyers, whose primary practice is not migration law and who consequently choose not to register as agents, as to whether they will be in breach of the Act if they provide any immigration advice or assistance in the context of a different scheme of regulation'.*
>
> *This confusion is difficult to reconcile with a solicitor's duty to provide comprehensive legal advice to their clients which addresses all relevant legal issues. For example, if an immigration issue, such as the need to lodge a visa application, arises in the process of a non-agent lawyer giving advice on a family law matter, unless the lawyer is registered as a migration agent the client will be unable to obtain the comprehensive, strategic advice they require'.*[23]

34. There is no 'duty to provide comprehensive legal advice to [...] clients which addresses all relevant legal issues'. On the contrary, '[a] prudent solicitor who lacks knowledge or expertise in a field should refer the client to another solicitor who possesses that experience or knowledge, or, with the client's informed consent, engage a specialist to fill the gap in expertise or experience'.[24] Further, migration law is overly complex and migrants are too vulnerable for lawyers to give immigration assistance if that assistance is not their primary practice.

35. The Report further reads thus:

> *'The LCA notes that in these situations the system imposes an unjustified burden on a client who requires advice on immigration issues arising from some other matter by requiring him or her to seek out another solicitor or agent who is registered with the OMARA'.*[25]

36. The prohibition against non-RMA lawyers providing immigration assistance is far from an unjustified burden. If it even is a burden, it is one that is more than justified by the need to protect consumers. By analogy, lawyers need to register as tax agents if they want to provide tax agent services.[26] In any event, whilst clients of criminal or family lawyers are often vulnerable consumers, migrants are often even more so. That is because many of them

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[22] Ibid 44.
[23] Ibid 45.
[24] G E Dal Pont, *Lawyers' Professional Responsibility*, 6th edition, [3.180], citing *Un v Schroter* [2002] NTSC 2 at [58] per Martin CJ and *LM v K Lawyers* [2015] WASC 244 at [39] per Boyle R.
[25] Report, page 45.
[26] *Tax Agent Services Act 2009* (Cth), Sections 50-5 and 90-5.

have not only been victims of crimes, including torture and domestic violence, but also face the additional challenge of being foreigners, with usually less financial power and command of the English language than the average Australian citizen, not to mention that many of them reside overseas, some in refugee camps.

37. *'Other areas of concern raised by the LCA* [...]*:*

> *[L]egal practitioners must pay both practicing certificate fees and migration agent registration fees in respect of the same regulated activity'.*[27]

38. That concern can easily be addressed by reducing, or even abolishing, OMARA registration fees for lawyers.

39. *'Other areas of concern raised by the LCA* [...] [(continued)]:

> *[C]onfusion for consumers as to their entitlements and avenues to obtain compliance with regulatory requirements and redress in relation to immigration services provided by legal practitioners'.*[28]

40. The LCA has not provided any evidence of the said confusion. Since all the above assertion amounts to is mere speculation, one could speculate that, given the obligation under the Code for RMAs to provide clients with a copy of the Consumer Guide (**Guide**),[29] clients are not confused. That is because the Guide, under the heading '[c]omplaints', invites clients to contact OMARA for help. And it can be assumed that the OMARA would explain to clients whether complaints should be made to the OMARA or a legal profession regulator.

41. *'Other areas of concern raised by the LCA* [...] [(continued)]:

> *[T]he prospect of legal practitioners being subject to up to three separate complaints handling processes in relation to the same alleged conduct (with the prospect of separate complaints handling processes by the legal services regulator, the OMARA and the state and territory fair trading offices, or equivalents)'.*[30]

42. Non-lawyer RMAs are also subject to separate complaints handling processes, namely 'the OMARA and the state and territory fair trading offices, or equivalents'. In any case, a couple of simple changes to the Act would address this concern. The Act could provide that all complaints against lawyer RMAs should be dealt with by the legal profession regulators and that all complaints received by the OMARA against those lawyers should be

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[27] Report, page 45.
[28] Ibid.
[29] Code, Clause 3.2A.
[30] Report, page 45.

redirected by it to those regulators, with notice to complainants. In that case, lawyers would be subject to two sets of conduct obligations, but only one regulator. Further, the Guide could be changed so as to reflect those simple changes.

43. The above suggestions concerning the abolition of registration fees for lawyer RMAs and their removal from the OMARA regulatory framework echo the submission made by Ernst and Young to the inquiry which led to the drafting of the Report (**2014 Inquiry**):

> *'It is submitted that dual regulation should only apply to legal practitioners in a more limited manner than at present. Decreasing the cost of professional standards and integrity monitoring through developing a clear framework for referring complaints concerning the conduct of migration agents who are lawyers to the appropriate legal services regulator could relieve the burden for lawyers.*
>
> *While legislative change would be required to give effect to this recommendation, the benefits that may flow from such a change could be widespread. To some degree, the cost of dual compliance is currently passed onto consumers in the form of higher advisory fees, without any guarantee that this double layer of administrative burden fosters higher standards or realises better consumer protection outcomes.*
>
> *Furthermore, removing legal practitioners from the OMARA's regulatory framework would decrease costs of legal practice and enable the OMARA to focus its attention upon a smaller and more distinct cohort of advisers, namely registered migration agents'.*[31]

44. *'Other areas of concern raised by the LCA* [...] [(continued)]*:*

> *[A]n apparent need for memoranda of understanding* [(**MoU**)] *between the OMARA and the legal profession regulatory bodies as to complaints-handling and referrals'.*[32]

45. The Report does not articulate why the need for an MOU is a problem. In any event, if the suggestion under paragraph 42 of this submission were implemented, there would be no need for MoUs.

46. *'Other areas of concern raised by the LCA* [...] [(continued)]:

> *[T]wo sets of mandatory annual [CPD] obligations'.*[33]

47. That concern has been addressed after the Report was published.

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[31] Ibid 51.
[32] Ibid 46.
[33] Ibid.

48. *'Other areas of concern raised by the LCA* [...] [(continued)]:

> *[T]wo sets of conduct obligations – legal profession rules of professional conduct as embodied in the Australian Solicitors' Conduct Rules and the* [Code]'.[34]

49. The suggestion made in paragraph 42 would address the concern about double regulation. Additionally, it would be in the best interests of consumers for lawyers to be subject to dual registration and conduct obligation, for the reasons given under the section '[w]hy dual registration should remain in place' of this submission.

'Disqualification of clients from the protection of the Law Societies' fidelity fund and professional indemnity insurance coverage'

50. *'Under all State and Territory Legal Profession Acts, legal professionals are required to contribute to a fidelity fund by way of a compulsory levy included in the practicing certificate fee. Legal professionals are also required to hold a very high level of professional indemnity insurance (PII) cover, of up to $2 million (compared with only at least $250,000 for migration agents).*

These indemnity schemes benefit clients as follows:

a. *In the event of a defalcation of trust monies by the lawyer, a client is entitled to indemnity from the fidelity fund* [...]
b. *In the event of a finding of negligence against a law practice in the provision of legal advice or assistance, any subsequent award of damages to the client will be paid by the law practice's PII insurer.*

The LCA notes that, following recent findings by the NSW Administrative Decisions Tribunal and NSW Supreme Court, "immigration assistance" as defined in the Act has been interpreted as falling outside the definition of migration legal assistance. In Portale v Law Society of NSW (No.1) (LSD) [2003] NSWADTAP 56 [(**Portale**)], *it was held that conduct falling within the definition of 'immigration assistance' was effectively removed from the ordinarily broad concept of 'business conducted by a solicitor'*[...] *The LCA explains that* [...]*:*

> *the removal of the distinction between "immigration assistance" and "immigration legal assistance" would provide an opportunity for the Law Society to reconsider its previous position and provide greater certainty to consumers'.*[35]

51. The above passages suggest, without making it explicit, that what has disqualified clients from the protection of the Law Society' fidelity fund was the fact that it had been held in *Portale* that immigration assistance was not

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[34] Ibid.

[35] Ibid 46 and 47.

part of the 'business conducted by a solicitor'. If that is the case, the disqualification had nothing to do with the existence of the distinction between 'immigration assistance' and 'immigration legal assistance' under the Act. Thus, removal of that distinction would not change the view as to whether immigration assistance is part of the 'business conducted by a solicitor'.

52. Further, the LCA has not provided any evidence that the Law Society would in fact reconsider its previous position. It might well not reconsider it, given that, as explained above, it was not based on the distinction between immigration assistance and immigration legal assistance. Also, there has been a hiatus of about 3 years between the date the Report was released and the introduction of the Bill. During that period, the legal regulatory regimes have changed significantly across the Australian states and territories. Now, under a different legal regulatory scheme, it could well be the case that the removal of the distinction would not make the Law Society reconsider its previous position even if the reason for that position was in fact the distinction between immigration assistance and immigration legal assistance.

53. Interestingly, if immigration assistance is not part of the 'business conduct of a solicitor' and thus it is not an activity covered by solicitors' PCs, there is no reason why non-lawyers should be required to register as RMAs in order to provide immigration assistance if lawyers are not so required.

54. In any event, this concern could be addressed if the Act required both non-lawyer and lawyer RMAs to pay for a fidelity fund. If the fidelity funds do not currently cover the giving of immigration assistance, lawyer RMAs should not be charged by their legal profession regulators for a fidelity fund fee. If they are, then they are paying for something which does not benefit their clients and should not, in which case they should discuss the matter with their respective regulators. That way, lawyer RMAs would not be disadvantaged compared to non-lawyer RMAs.

55. Alternatively, the Act could require fidelity funds to cover immigration assistance without charging more than lawyer RMAs currently pay for those funds.

56. What would actually confuse clients is an exemption for lawyers to register as RMAs and thus the possibility that immigration lawyers would provide clients with the protection of a fidelity fund, should the legal profession regulators change their mind and start covering immigration assistance, whereas non-lawyer RMAs would not provide that same benefit to consumers.

'Professional Indemnity Insurance [(PII)]'

57. '[...] *[T]he New South Wales Office of the Legal Services Commissioner observed that:*

> *LawCover will reject any claim in relation to a legal practitioner providing migration assistance, as current legislative definitions dictate that this does not constitute 'legal work' and thus could potentially represent a grave lacuna in that practitioner's insurance coverage.*

[...] *The LCA considers that removing lawyers from the scope of the current legislative distinction between migration assistance and migration legal assistance would reduce any uncertainty as to whether clients are covered by their lawyer's professional indemnity insurance policy'.*[36]

58. This argument is misconceived. Immigration assistance would not be rendered 'legal work' by the enaction of the Bill. The only change is that lawyers would no longer need to be RMAs in order to offer that same service, namely immigration assistance, not legal work. As a result, nothing suggests that LawCover would change its view of whether immigration assistance equates to legal advice if the Bill were enacted and thus whether that service should be insured. One of the consequences of Schedule 1 of the Bill is that immigration lawyers would not no longer be required to comply with Clause 2.3A of the Code, which requires RMAs to have professional indemnity insurance. Consequently, clients of imprudent immigration lawyers who decide not to take out insurance would not be indemnified by an insurer for loss caused by those professionals. Such a change would be irresponsible and disastrous to consumers.

59. In any event, the LCA's concern could be addressed if the Act were changed to require both non-lawyer and lawyer RMAs to hold the same level of PII cover as that held by lawyers. If the likes of LawCover do not currently cover the giving of immigration assistance, lawyer RMAs should not be charged by their legal profession regulators for it. If they are, then they are paying for something which does not benefit their clients and should not, in which case they should discuss the matter with their respective legal profession regulators. That way, lawyer RMAs would not be disadvantaged compared to non-lawyer RMAs.

60. Alternatively, the Act could require the likes of LawCover to cover immigration assistance without charging more than lawyer RMAs currently pay for their PII. What would actually confuse clients is an exemption for lawyers from the need to register as RMAs and thus the possibility that lawyers would have a different level of cover compared to non-lawyer RMAs for the same type of work, should the likes of LawCover change their mind and start covering immigration assistance.

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[36] Ibid 47.

'Double Jeopardy and Regulatory Gaps'

61. *'The LCA also submits that, as a result of applying two regulatory schemes, immigration lawyers can be subject to "double jeopardy" or may altogether avoid disciplinary action necessary to preserve the integrity of the legal profession due to blurred lines of regulatory responsibility'.*[37]

62. The suggestion made in paragraph 42 of this submission would address this concern. Actually, it is very fact that lawyers would no longer be subject to the Code that would create a regulatory gap.

'Client Legal Privilege'

63. *'The LCA further advises that when clients seek advice from a person who is deemed to be a lawyer, they are entitled to assume that client legal privilege applies to their communications. The requirement for lawyers to register and hold themselves out as "agents", alongside non-lawyers, creates the potential for confusion* [...]' [38]

64. Given that the immigration assistance provided by lawyer and non-lawyer RMAs is the same, the Report does not explain why only the clients of lawyer RMAs should be entitled to legal professional privilege. A simple solution would address this concern. The Act could extend legal professional privilege to clients of non-lawyer RMAs. That would both avoid confusion and protect consumers.

'Negative Impact on Provision of Services to Those Most in Need'

65. *'The LCA also argues that another impact of dual regulation for lawyers is that many lawyers will simply refuse to practice as migration agents. This, the LCA argues, impacts negatively on the migration advice industry by:*
    - *precipitating 'brain drain' from Community Legal Advice Centres (CLCs); and*
    - *reducing the number of migration lawyers willing and able to advise and receive instructions from clients.*

    [...] *[T]he cost and administrative trouble involved with becoming registered as a migration agent has been identified as the single most important factor inhibiting the supply of willing lawyers to the non-profit immigration advice sector and restricting the services those bodies are able to provide'.*[39]

66. The suggestion made under paragraph 38 of this submission would address this concern.

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[37] Ibid.
[38] Ibid 49.
[39] Ibid 49 and 50.

'Shortage of Practitioner Agents Able to Assist Migrants'

67. *'The LCA notes that vast numbers of applications are made to the Migration and Refugee Tribunals and to the Federal Courts each year challenging decisions made by the Immigration Minister and the Department.*

The shortage of available counsel caused by the withdrawal of lawyers from a migration agency work thus presents a significant problem for migrants and for courts [...]'[40]

68. The suggestion made under paragraph 38 of this submission would address this concern. Interestingly, the LCA submissions would actually aggravate the shortage of professionals, for the following reasons.

69. The number of accredited specialists in immigration law in Australia is significantly low compared to other areas of specialisation. To take NSW and Victoria as examples, the average number of accredited specialists per area of law in those states is listed in Table 1 below.

Table 1 – Number of accredited specialists by area of specialisation

Areas of specialisation	Victoria[41]	NSW[42]
Business Law	104	118
Children's Law	40	43
Commercial Litigation	72	104
Criminal Law	143	186
Family Law	267	380
Immigration Law	**43**	**41**
Mediation	18	6
Personal Injury Law	119	523
Property Law	67	152
Tax Law	18	6
Wills & Estates	76	67
Average	**92.4**	**158.5**
Aggregate average	**125.45**	

70. Table 1 shows that the average amount of immigration law accredited specialists within those two states in only 42, compared to an average of 125.45 for other areas of law.[43] In NSW alone, the amount of immigration law

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[40] Ibid 50.

[41] https://www.liv.asn.au/Specialists as at 17 August 2017.

[42] http://www.lawsociety.com.au/community/findingalawyer/findalawyersearch/index.htm as at 17 August 2017.

[43] Only those areas of law which are common to the classifications adopted by both states, except for immigration law, have been included above and in the calculation of the averages.

accredited specialists is only 41 compared to an average of 158.5 accredited specialists in other areas of law. Yet, most likely, the average amount of matters dealt with by immigration lawyers is far higher than those dealt with by other lawyers. That is because immigration lawyers are often RMAs and each provides immigration assistance to dozens, if not hundreds, of visa applicants every year. In NSW, there are 523 accredited specialists in personal injury law, almost 13 times the number of immigration law accredited specialists. Yet, it would be odd to suggest that the number of personal injury claims lodged over any period of time is higher than the number of visa applications lodged over the same period. In summary, Table 1 indicates that immigration law accredited specialists are extremely under-represented compared to other areas of law. This is a problem for the following reasons.

71. At present, Restricted PC holders can provide immigration assistance so long as they are RMAs, which is a considerable incentive for many of them to choose immigration law as their area of practice. If the Bill were enacted, those lawyers would only be able to provide immigration assistance through a legal practice. As a result, while under the period of supervision,[44] lawyers Restricted PCs lawyers would only be able to provide immigration assistance under the supervision of Unrestricted PC holders. However, arguably, only immigration law accredited specialists are well equipped to supervise immigration lawyers holding Restricted PCs. The short amount of accredited specialists in the field of immigration law would mean that competition for jobs with those specialists among Restricted PC holders would be very high and would thus discourage graduate lawyers from giving immigration assistance. If the Bill were enacted, many of those lawyers would hesitate to entre an industry which would in fact be controlled by very few accredited specialists. Those very few lawyers would in practice be able to control what immigration lawyers stay in or out of the industry. This would in turn be contrary to the interests of consumers, as fewer lawyers in the industry and thus less competition would lead to higher professional fees for clients.

'Law Institute of Victoria [(LIV)]'

72. *'The LIV provides the following background in information in relation to the current regulatory scheme:*

The [MARS] *was implemented by the federal government in 1992 by the Migration Amendment Act (No 3) 1992 (Cth)* [...] *The rationale for bringing lawyers within the scheme was not a concern about their qualifications, knowledge, skills or experience. Rather, it is clear from the Second Reading Speech that the concern was that complaints against lawyers were not being dealt with by the self-regulatory model then in existence "with adequate timeliness or vigour".*

[44] Usually two years.

This concern is now irrelevant given that the legal profession is no longer self-regulating and in light of the independent, impartial and accessible system for managing complaints against legal practitioners administered, in Victoria, by the Legal Services Commissioner [...]'[45]

73. Self-regulation still exists in the territories.[46] The OMARA, in contrast, is not a self-regulating body and thus the current regulatory framework offers consumers more protection than the self-regulating schemes for lawyers operative in the territories.

74. *'The LIV then notes the qualifications of legal practitioners as follows:'*

'Legal profession admission requirements require a higher standard of qualification'

'Law graduates have four to five years of high-level university training to gain their Bachelor of Laws degrees [...] *By way of contrast, a non-legally qualified person who wishes to practise as a migration agent is required only to undertake a six month course to obtain a Graduate Certificate in Australian Migration Law and Practice to be registered* [...]'[47]

75. Firstly, the LIV omits the fact that most Law Degree graduates have not studied any immigration law subject, which is an elective unit, whereas non-lawyer RMAs are presently required to complete four such units. KPMG made a similar argument in its submission to the 2014 Inquiry by saying that '[t]here is no requirement to have studied migration law to become a lawyer'. Secondly, as of 1 January 2018, non-lawyer RMAs will be required to complete eight migration law units.

76. The LIV continues:

'Legal practitioners are subject to a significant degree of regulation in comparison with migration agents. This includes trust accounts, which are subject to annual independent auditing [...] *There are strict rules governing the disbursement of trust account funds and in the application of these funds to costs. Legal practitioners also have rigorous cost disclosure requirements* [...]'[48]

77. That assertion is ill founded. Non-lawyer RMAs submit a copy of the balance of their Clients' account to the OMARA every year and are subject to auditing

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[45] Report, page 52.
[46] See the *Legal Profession Act 2006* (ACT), Sections 394, 576 and 577; the website of the Law Society of the ACT reads: 'The Council is the governing body of the ACT Law Society [...] Councillors are elected by the membership of the Society'.
[47] Report, page 52.
[48] Report, page 53.

too. The Code's provisions concerning the use of clients' money is at least as stringent as those applied to lawyers in general.

78. Later, the LIV says:

'All of these requirements are designed to provide the highest possible protection to clients. They are not matched by the requirements of OMARA'.[49]

79. On the contrary, the OMARA requirements provide higher protection to clients, as discussed under the section '[w]hy dual registration should remain in place' of this submission.

80. The LIV continues:

'A number of lawyer representative bodies, including the LIV, operate an Accredited Specialisation scheme for immigration lawyers. To be eligible for accredited specialisation in immigration law under the LIV's programme, legal practitioners must (a) have five years' experience in full-time practice and a substantial involvement in the area of specialisation, and (b) sit comprehensive assessment tasks in three areas covering interviewing techniques, a written examination on all aspects of immigration law, and a take-home examination covering a factual scenario common in day-to-day practice. In contrast, registered migration agents can use the title "immigration law specialist" without having to undergo specialist training equivalent to that of the LIV's Accredited Specialisation scheme in immigration law'.[50]

81. The fact that a body has a programme that uses the term "specialist" does not give it exclusive rights over the use of that term. In any event, the MIA has a similar programme for RMAs.

Hall and Wilcox Lawyers and the Queensland Legal Services Commission

82. The Report than goes on to state that the submissions from the two above bodies essentially mirror the LCA's submission. Thus, it is unnecessary to discuss them here.

'Discussion and Recommendation' [51]

83. Only about five of the two hundred and twenty pages of the Report are dedicated to the discussion and recommendation concerning Schedule 1 of the Bill. Even more disappointingly, those five pages, with respect, do nothing more than to re-state the concerns expressed by those who made submissions to the 2014 Inquiry and to say who the Report agrees with, without explaining why.

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[49] Report, page 53.
[50] Report, page 53.
[51] Report, pages 67 to 72.

84. To give just one example, the Report states thus:

> *'In relation to consumer risk and confusion, the* [2014 Inquiry] *notes the concerns raised by the MIA in relation to access to indemnity funds, insurance coverage for lawyers and the inability of legal regulators to effectively prosecute agents who fail to adhere to the standards expected of them – all concerns that, in the opinion of the* [2014 Inquiry], *arise from the distinction in the Migration Act between "migration assistance" and "migration legal assistance" in the Act.*
>
> *The* [2014 Inquiry] *rejects, however, the MIA's claim that, in light of these concerns, consumers may be without protection if dual regulation is discontinued, finding instead that any inequities caused by the Act's distinction between migration assistance and migration legal assistance will be addressed once lawyers are removed from the current regulatory scheme and the Act is amended accordingly'.*[52]

85. The Report does not, however, state why it has rejected the MIA's claims. Nor does it explain why the said inequities would be addressed by the removal of the distinction between immigration assistance and immigration legal assistance under the Act. Let alone does it support its assertion for the existence of the said inequities. Those are mere assertions, not supported by any analysis.

86. Additionally, the Report fails to discuss the several above objections made by the writer of the present submission to the submissions received by the 2014 Inquiry. Also, it fails to consider the additional matters raised under section '[w]hy dual registration should remain in place' of this submission. Instead, in response to the majority of the concerns raised in the submissions received by the 2014 Inquiry, it merely provides statements such as '[the 2014 Inquiry] accepts the conclusions of the LCA' or '[the 2014 Inquiry] does not accept this conclusion, again preferring the analysis raised by the LCA'. It is far from sufficient to say that the 2014 Inquiry accepts or prefers the submissions of the LCA without discussion why. While it is true that, on some topics, the Report does express the reason why it has accepted the LCA's suggestions, it only does so in a very superficial manner.

87. Moreover, the Report centres on how to address the inconveniences the law currently imposes on lawyers. Although the Report claims otherwise, it actually places lawyers at the centre of the analysis of the current regulatory framework, failing to recognise that, whilst the impacts of that framework on lawyers, if they do exist, should not be ignored, the current regulatory scheme must be assessed through the prism of consumer protection.

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[52] Report, page 67.

Why Dual Registration Should Remain in Place

88. Several reasons have been given above by the writer of this submission in favour of the maintenance of dual registration and many others will be given below. Schedule 1 of the Bill has the effect that lawyer RMAs would no longer be subject to the Code. That in itself presents numerous problems for many stakeholders, especially consumers, for the following reasons.

Professional Library

89. Clause 2.5 of the Code requires RMAs to maintain a professional library that includes the Act, the Regulations, 'other legislation relating to migration procedure' and 'portfolio polices and procedures'. It is virtually impossible for any RMA, whether lawyer or non-lawyer, whether extremely experienced or not, to navigate through the tens of thousands of provisions contained in those pieces of legislation and policies without a digital library which is very sophisticated and which interconnects those provisions through several hyperlinks.

90. The most well known digital library is named LegendCom, which is maintained by the DIBP. The level of detail of the thousands of policy provisions contained in LegendCom cannot be found anywhere else. The only "alternative" method of having access to the DIBP's policies is through Freedom of Information (**FOI**) requests, which usually take months to be responded to. However, given that policies change at an astonishing pace, it is simply impracticable to rely on FOIs. In short, LegendCom is indispensable to anyone who wants to give sound immigration assistance.

91. Both lawyer and non-lawyer RMAs are, regardless of the Code, subject to the general law duty of skill, care and diligence to clients. As a result, it is reasonable to conclude that the requirement under the Code for RMAs to subscribe to LegendCom is additional to that general law duty. To suggest otherwise would render Clause 2.5 otiose. That addition is a welcome one, given the complexity of immigration law and the unique vulnerability of migrants.

92. Once no longer subject to the Code, lawyer RMAs would not be required to have access to LegendCom. If lawyers give immigration assistance without using LegendCom, they are most likely to provide a poor service. Surely, one could argue that as the law, regardless of the Code, already places on lawyers the duty of competence, it would be unwise for lawyers to choose not to subscribe to LegendCom. However, immigration law is too complex and migrants are too vulnerable for the law to rely on the wisdom of their service providers. Thousands of complaints are made against lawyers every year in Australia. The number of written complaints received by the Law Society of New South Wales has risen by 7.5% to 2,709 in the year ending on 30 June

2016 compared to the previous year.[53] To rely on the wisdom of the less scrupulous lawyers as to whether or not to subscribe to LegendCom would be an open invitation for them not to subscribe to LegendCom and to provide poor immigration assistance. This is not a suggestion that a lawyer, nor an RMA, is unscrupulous on the mere basis of having received a complaint.

93. The above is just one example of the several other requirements specific to the immigration assistance industry provided for in the Code, which would no longer apply, to lawyers if the Bill were enacted. Those requirements were designed to protect consumers. To abolish dual registration would curtail the current level of protection accorded to migrants under the Code.

Two Tiers of Professionals

94. The Bill would create two tiers of professionals, namely RMAs and lawyers. Clients would most likely be confused with two types of professionals offering the same service. Further, lawyers would not be subject to the specific requirements contained in the Code and which are aimed at protecting vulnerable migrants, such as the requirement for LegendCom. That would further confuse clients, who would not understand why RMAs are subject to more stringent requirements compared to lawyers.

95. There already exists a certain level of disdain between many lawyer and non-lawyer RMAs. As pointed out by Dr Mary Crock, Professor at The University of Sydney:[54]

> *'The role that lawyers have played in* [the formal regulatory schemes] *is quite interesting as, from the start, there were a few lawyers who decided that they would bat with the non-legal team and work from the inside as well as just criticising from the outside. Throughout this period, I was actually Chair of the Migration Committee of the* [LCA] *and I made myself quite unpopular by inviting people I regarded as the top migration agents to be part of that process'.*

96. That division, however, is kept at reasonably low levels given the following requirements under the Code:

> *'4.3 A registered migration agent must not encourage another agent's client to use the first agent's services, for example by denigrating other agents or offering services that the first agent cannot, or does not intend to, provide.*

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[53] *Professional Standards*, 2016 Annual Report, The Law Society of New South Wales: https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1230585.pdf.

[54] *The making of a profession, and the role of migration agents in the development of immigration law*, Migration Australia, A Journal of Studies, Ideas and Analysis about Migration, Volume 3, Migration Institute of Australia.

4.4 A registered migration agent must not take over work from another registered migration agent unless he or she receives from the client a copy of written notice by the client to the other agent that the other agent's services are no longer needed.

4.5 A registered migration agent must act with fairness, honesty and courtesy when dealing with other registered migration agents'.

97. If lawyers are no longer subject to the Code, does that mean that they could denigrate RMAs and vice-versa? Does that mean that they would not refrain from unscrupulously targeting each other's clients? Does that mean that they would no longer need to be fair to each other? Surely, scrupulous lawyers and RMAs would avoid that type of conduct. However, to rely on the wisdom of the less scrupulous professionals would only expose already vulnerable migrants to predatory business practices.

98. Further, because of the need for RMAs to act fairly and courteously to other RMAs, non-lawyer RMAs are currently discouraged from advertising themselves as being more knowledgeable than lawyers on the basis that non-lawyer RMAs have completed four (eight from 1 January 2018) immigration law units of study, whereas most lawyer RMAs have completed none. Conversely, lawyer RMAs are currently discouraged from advertising themselves as being more knowledgeable then non-lawyer RMAs on the basis that lawyer RMAs have completed units of study in general law, whereas most non-lawyer RMAs have completed none.

99. If the Bill were enacted, less scrupulous lawyers and RMAs would not feel prohibited from engaging in predatory conduct against each other. That would only confuse, and be detrimental to, consumers.

100. Finally, clients are usually not aware of the existence of the profession of RMA until they have decided to apply for a visa, whereas the profession of lawyer is well known around the world. That, combined with the fact that the name 'agent' wrongly conveys the idea of a mere conduit, would place lawyers in a position of advantage compared RMAs, which will likely discourage individuals from registering as RMAs. Less RMAs means less competition and higher fees for clients.

Overriding Duty

101. Solicitors have an overriding duty to the court.[55] In fact, Mason CJ ruled that '[t]he peculiar feature of counsel's responsibility is that he owes a duty to the court as well as to his client. His duty to his client is subject to his overriding duty to the court'.[56]

102. In contrast, the Code provides that RMAs have an overriding duty to clients. The result is that RMA lawyers, if no longer RMAs and thus not subject to the Code, would owe an overriding duty to the court, not to those clients. That is not in the best interests of consumers.

'MARN' as an Asset

103. Each RMA has a MARN, the first two digits of which represent the year the RMA was first registered. To many RMAs, that is an asset, as it shows how long they have been practising for. That is also a valuable asset to clients, who can easily infer how much experience RMAs have based on their MARN. To prohibit lawyers from keeping their RMA registration would mean they could no longer use their MARN. Clients would no longer be able to easily ascertain how many years of practise in migration law a lawyer has. That is not in the best interests of clients.

Other Anomalies

104. Clause 5.1 of the Code requires RMAs to charge reasonable fees. That clause applies both to lawyer and non-lawyer RMAs. That is because although the legal professional rules applied to lawyers across the different Australian states and territories also have similar requirements, Section 109 of the Constitution provides that Commonwealth laws should prevail to the extent of any inconsistency with state laws.

105. If the Bill were enacted, RMAs would be subject to Clause 5.1 of the Code, whereas lawyers would be subject to their own practice rules' version of that requirement. That would introduce anomalies into the regulatory scheme.

106. To give just one example, Section 245AR of the Act applies to, among other persons, any professionals offering services to migrants in connection with work visa sponsorships. Thus, regardless of the Bill, that section applies, and will continue to apply, to both lawyer and non-lawyer RMAs. It imposes criminal sanction (imprisonment for 2 years or 360 penalty units, or both) to professionals who charge clients unreasonable fees. In criminal proceedings under that section, a finding by the OMARA or a legal profession regulator

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[55] See, for instance, the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, Rule 3.1.

[56] *Giannarelli v Wraith* (1988) 165 CLR 543, 556-7.

that a professional has charged reasonable or unreasonable fees for the giving of immigration assistance could be used as part of the defence or the accusation. The problem that arises is that the OMARA would be assessing the reasonableness of the fees under a legislative scheme that includes the Code, whereas the legal profession regulator may well not take the Code into consideration in its assessment. In short, those two regulators would use different criteria to determine the reasonableness of the fees charged. That would introduce a level of arbitrariness on the effect that the charging of unreasonable fees would have on criminal proceedings.

107. Put simply, if the OMARA found that a professional charged reasonable fees, that finding could be used as part of that professional's defence in criminal proceedings under Section 245AR. However, if it were the legal professional body which carried out the investigation taking into consideration a different legislative framework, and it found that the fees charged were unreasonable, that finding could be used against the professional in criminal proceedings. Conversely, if the OMARA found that a professional charged unreasonable fees, that finding could be used as part of the accusation in criminal proceedings under Section 245AR. However, if it were the legal professional body which carried out the investigation taking into consideration a different legislative framework, and it found that the fees charged were reasonable, that finding could be used as part of the defence.

108. That arbitrariness is against the interests of justice. Both lawyer and non-lawyer RMAs should be subject to the more specific and stringent requirements imposed by the Code and the assessment as to whether or not they have charged unreasonable fees should always take those requirements into consideration.

Summary of Division 1

109. To abolish dual registration would discourage non-lawyers from registering as RMAs and would dissuade graduate lawyers from choosing immigration law as their area of practice, thus reducing the amount of professionals in the industry and increasing the professional fees migrants would be charged. Only very few lawyers would benefit from the change, to the detriment of thousands of stakeholders including migrants, non-lawyer RMAs, other lawyers and businesses. Consequently, Schedule 1 of the Bill should be rejected.

Division 2

110. What follows is a discussion about the harsh consequences of Schedule 1 of the Bill to migrants, graduate lawyers, lawyers working at immigration agencies and businesses.

Summary of the Effect of Schedule 1 on Lawyer RMAs Holding Restricted PCs

111. In short, Schedule 1 of the Bill provides that legal practitioners would only be able to give immigration assistance "in connection with legal practice". According to Section 1 of Schedule 1, "legal practice means the provision of legal services regulated by a law of a State or Territory". As a result, legal practitioners would only be able to give immigration assistance in connection with the provision of legal services regulated by a law of a State or Territory. Thus, broadly speaking, Restricted PC holders would only be able to lawfully give immigration assistance through, and to the clients of, law firms.

112. As a general rule, graduate lawyers must hold a Restricted PC for a period of two years during which they must be supervised by Unrestricted PC holders. During that period, Restricted PC holders cannot establish their own law firms and therefore can only give legal advice as an employee of someone else's law firm.

113. There is a significant number of RMAs that have established, and own, dedicated small businesses who have chosen, as a result of their exposure to immigration law through their work, to subsequently become lawyers. Many of those RMA lawyers are Restricted PC holders, and will hereafter be referred to as **RMA Law Graduates**.

114. If the Bill were enacted, RMA Law Graduates would be forced to close their existing businesses because they would no longer be able to give immigration assistance through them. While many of these businesses are small, most employ support staff who will be left unemployed. The Bill lacks any clarity about how the existing clients of the firms that are forced to close will be catered for.

115. In addition, there are numerous migration agencies, both for-profit and not-for-profit that employ lawyers (whether holding Restricted or Unrestricted PCs). The enactment of the Bill would force these lawyers to leave their employment.

The Impacts of Schedule 1 on RMA Law Graduates and their Clients

116. If the Bill were enacted, RMA Law Graduates would be forced to hand over their clients to someone else's law firm for the above reasons and hope for that law firm to employ them and not dismiss them shortly after. Several stakeholders would be severely impacted by that transfer for a number of reasons, as follows.

117. Those clients might end up being transferred to a law firm against their will. But assuming they do consent to the transfer, another problem could arise: client A might only consent to being transferred to law firm 1; client B might only consent to being transferred to law firm 2; client C might only consent to being transferred to law firm 3, and so forth. Unless RMA Law Graduates could work for all of those law firms at the same time, which is virtually impossible, the services offered to their current clients would be suddenly disrupted and they would no longer be able to represent many of those clients, who would be left in the dark.

118. Further, RMA Law Graduates might not be able to find a law firm willing to accept their clients. In that case, those clients would be effectively abandoned and would need to look for another RMA or immigration lawyer. That would be particularly troubling considering that many immigration matters span over several months and even years, are highly complex, involve extremely vulnerable clients (i.e. asylum seekers or partner visa applicants who have become victims of domestic violence before the visa application is decided) and rely on the knowledge RMA Law Graduates have accumulated for a long time about each individual matter. If clients were to look for another RMA or immigration lawyer, they would incur additional costs, as their new service provider would need to familiarise him/herself with the matter, gather documents, interview clients, etc. That would be a traumatic experience for already traumatised and vulnerable clients.

119. Even if an RMA Law Graduate did manage to transfer all his/her clients to a single law firm, those clients would have no assurance that they would continue to receive immigration assistance the RMA Law Graduate. After all, the law firm could simply dismiss that RMA Law Graduate after having being handed over his/her clients. It would be in the best interests of clients to be able to continue to be given immigration assistance by their existing service providers, without disruptions. Additionally, law firms could offer clients a "take it or leave it" option of paying higher fees or face the loss of all fees they have already paid as they try to find another firm to take over the case.

120. The Bill would financially impact RMA Law Graduates too. Paragraph 50 of the Memorandum, according to which a legal practitioner "may need to adjust the way in which they provide such services" seems to imply that they could avoid the negative impacts of the Bill by making simple adjustments. That is not the case. Schedule 1 of the Bill would give RMA Law Graduates limited choices: either they give up their businesses, clients and livelihoods

or they give up their Restricted PCs. It is hardly a reasonable choice to force upon someone with no transition arrangements and no appeal available. Virtually all law firms would only accept those clients if they received a significant portion of the fees RMA Law Graduates charge their clients. Those clients would then "belong" to the law firm, which could dismiss those RMA Law Graduates as soon as they have been handed over their clients. That would represent a catastrophic reduction of income to the families of RMA Law Graduates whose entire livelihoods depend on the income produced through the operation of their businesses that exclusively provide immigration assistance.

121. RMA Law Graduates might not be able to find employment at a law firm and would suddenly lose their single source of income. The only "alternative" would be for them to simply give up their Restricted PCs. That would be harsh and grossly unfair, as they have studied for years to obtain their Law Degrees and Restricted PCs. The combination of their Law Degrees and Graduate Certificates should allow them to provide better services to their clients, not require them to offer up their clients as an incentive to a supervising law firm which can then do what they wish with their clients.

122. Some individuals have suggested that RMA Law Graduates can easily avoid the above issues by converting their migration agencies into incorporated legal practices. That is not true at least in NSW, where incorporated legal practices must have at least one director who is an Unrestricted PC holder. That director would have considerable power over the legal practice, including being the only person who could operate the firm's trust account. Even if RMA Law Graduates do manage to find Unrestricted PC holders who they trust, which is not always the case, if those Unrestricted PC holders do anything that damages the interests of clients (e.g. misappropriation of money from a trust account), the firm would be liable, which in turn would damage the interests of those RMA Law Graduates. In any event, those RMA Law Graduates would need to give up a considerable share of their income in order for those Unrestricted PC holders to be interested enough in becoming directors to the point of incurring the liabilities associated with being directors and authorised principals. Further, the income of some RMA Law Graduates might well be lower than the amount of money Unrestricted PC holders would demand from them in order to become directors, which would also be harsh on the livelihoods of RMA Law Graduates.[57]

[57] See *Legal Profession Uniform Law 2015* (NSW), Sections 6, 102, 103 and 105.

The impacts of Schedule 1 on Immigration Agencies and their Clients

123. Many immigration agencies currently employ lawyers (whether on Restricted or Unrestricted PCs) for the giving of immigration assistance. If the Bill were enacted, those lawyers would suddenly have to cease their employment with those agencies. That would cause disruption to clients who receive immigration assistance through those lawyers. Although there would not be financial disruption to existing clients, those clients would be disrupted in terms of having to deal with another RMA who knows nothing about their matter. It should be emphasised that some of those matters are complex and lengthy and that many of those clients are vulnerable.

124. Those immigration agencies themselves would suffer financially, as they would need to hire and train an RMA to take over the matters previously under the responsibility of those legal practitioners and also train them on their modus operandi, IT systems, etc. As much as RMAs strive not to pass on costs to consumers, that is the inevitable nature of any business. To a significant extent, any additional costs incurred by a business are passed on to the consumers, even if only future consumers. That is not in the best interest of clients.

125. Those lawyers would suddenly become unemployed and might not be able to find employment at a law firm for a long time, significantly impacting on their livelihoods and the livelihoods of their families. Further, it would be unfair to require that they give up their PC if they want to keep their jobs, for the same reasons discussed above.

The Impact of Schedule 1 on Direct Access Barristers and their Clients

126. Many RMA barristers who currently give immigration assistance on a direct access basis would no longer be able to give immigration advice to clients, as they do not work in a legal practice. That is not in the best interests of clients.

Illogicality and Unfairness

127. Schedule 1 of the Bill is illogical, unfair and thus not in the best interests of consumers, for the following reasons.

128. Generally, only lawyers are allowed to prepare for, and represent, clients in court proceedings. Yet, under Section 276 of the Act, non-lawyer RMAs can represent clients in court proceedings, even though they usually have had no training in those types of proceedings. Curiously, if the Bill were enacted, RMA Law Graduates, who have completed both a Graduate Certificate and a Law Degree and thus did go through extensive legal training, including training relating to court proceedings, would not be able to represent clients

in those proceedings for the period during which they are looking for a job with law firms.

129. In other words, on the one hand, non-lawyer RMAs can do court work and, on the other hand, RMA Law Graduates might well not be able to do that same work from a practical perspective for a significant period of time. Many clients retain RMA Law Graduates precisely for their unique knowledge acquired through having completed both a Graduate Certificate and a Law Degree. Yet, that client could be told "I am sorry, I can no longer look after your case because I have been admitted to practice as a lawyer and cannot find a job with a law firm".

130. As discussed above, as of 1 January 2018, the requirements for non-lawyers to register as an RMA will rise from a Graduate Certificate to a Graduate Diploma. It is illogical to, on the one hand, recognise the benefits to clients of a higher qualification (i.e. a Diploma instead of a Certificate) and, on the other hand, financially punish RMAs for seeking to complete an even higher qualification (i.e. a Law Degree).

131. To prohibit RMA Law Graduates from keeping their RMA registration would be the equivalent to prohibiting holders of tax agent registrations to keep those registrations merely because they have subsequently studied hard to become accountants; or to prohibit holders of nurse registrations from keeping those registrations merely because they have subsequently studied hard to become doctors. As a matter of fact, registrations have an inclusive, not exclusive, effect. They add to the activities one is allowed to carry out, but never exclude. Schedule 1 of the Bill effectively financially punishes RMA Law Graduates for studying hard to complete both a Graduate Certificate and a Law Degree in the hope of offering a better service to their clients. Once again, many clients have retained them for the very fact that they have completed both qualifications.

132. Schedule 1 is full of other illogical consequences. For instance, there is no guarantee that an RMA Law Graduate will find employment/supervision at a law firm specialising in immigration law. He/she might have no alternative but to accept a job offer/supervision from a law firm operating in another area of law, for instance family law. In that case, there would be no connection between the supervised work in family law and the unsupervised immigration assistance given by the RMA Law Graduate. In short, that professional would be prevented from giving unsupervised immigration assistance by reason of being supervised in another area of law with no connection with the work of an RMA. This would be as absurd as to prevent an RMA from giving unsupervised immigration assistance on the mere basis that he/she is also employed as a taxi driver, which has nothing to do with the work of an RMA.

133. On the topic of New Zealand lawyers, paragraph 21 of the Memorandum contains the following passage:

> *'Under the Trans-Tasman Mutual Recognition Act 1997, lawyers who are eligible to practice in New Zealand are entitled to be registered in Australia as an Australian legal practitioner (section 16). As such, a lawyer from New Zealand need not register as a migration agent in order to give immigration assistance, as they will simply be able to register with the relevant Australian legal professional body as an Australian legal practitioner and will be able to give immigration assistance on this basis'.*

134. It would be illogical and unfair to, on the one hand, prohibit RMA Law Graduates who have by definition completed both a Graduate Certificate and a Law Degree in Australia and, on the other hand, allow lawyers from New Zealand, with absolutely no academic or practical knowledge in Australian Migration Law, to give immigration assistance in Australia.

'Financial Impact Statement'

135. The Memorandum's outline contains the following passage: 'These amendments will have low financial impact'. It is not clear whom that financial impact statement refers to. But assuming that it refers to consumers, migration agencies, RMA Law Graduates and lawyers working for migration agencies, that passage is misconceived. As argued, the Bill would financially impact upon all of those groups of persons, some harshly so.

Human Rights

International Covenant on Civil and Political Rights (ICCPR)

136. Attachment A to the Memorandum contains the following passages:

> *'This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.*
> [...]
> *Schedule 1: Australian legal practitioners providing immigration assistance (OMARA Review Recommendation 1)*
>
> *Schedule 1 proposes to give effect to Recommendation 1 of the OMARA Review, which states:*
>
> *"The* [2014 Inquiry] *recommends that lawyers be removed from the regulatory scheme that governs migration agents, such that lawyers:*
> - *cannot register as migration agents; and*
> - *are entirely regulated by their own professional bodies."*

The implementation of this recommendation is deregulatory in nature and is aimed at removing unnecessary red tape from the migration advice industry, while ensuring that important consumer protections are maintained. Considerable amendment to Part 3 of the [Act] is required to give effect to the recommendation.
[...]
Human rights implications

Schedule 1

As this amendment prevents lawyers from being able to register as migration agents, the right not to be subjected to discrimination under Article 2 and Article 26 of the International Covenant on Civil and Political Rights (ICCPR) may be engaged. Article 2 of the ICCPR states:

> *"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

Article 26 of the ICCPR states:

> *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

As lawyers can still provide immigration assistance on the basis that they hold a practising certificate and are subject to regulation by their own professional bodies, being prevented from registering as a migration agent with the OARA has no practical discriminatory effect on lawyers. This amendment is therefore compatible with human rights'.

137. The assertion that the 'Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*' has no basis, for the following reasons.

138. Firstly, the option of dual registration is not unnecessary red tape if individuals benefit, or more correctly would not suffer damage, from it. Those negatively impacted by the Bill in its current form would prefer that dual

registration be an option. The only unnecessary red tape being avoided by the Bill is the *requirement* that lawyers be dually registered, not the *option* of being dually registered. By analogy, how could a prohibition on accountants keeping their tax agent licenses be seen as the removal of unnecessary red tape?

139. Secondly, Articles 2 and 26 of the ICCPR respectively prescribe against 'distinction[s] of any kind' and 'discrimination [...] on any ground', the list of which is expressly non-exhaustive. To prohibit from, and to effectively punish a particular group of people (i.e. RMA Law Graduates) for carrying what is not only a benign, but also a valuable, activity such as the giving of immigration assistance is to make a distinction and discrimination of a material kind and thus incompatible with the ICCPR.

140. Further, Attachment A states that:

> *'lawyers can still provide immigration assistance on the basis that they hold a practising certificate and are subject to regulation by their own professional bodies, being prevented from registering as a migration agent with the OMARA has no practical discriminatory effect on lawyers'.*

141. Whilst it is true that lawyers would be able to provide immigration assistance if the Bill were enacted, the above passage omits an extremely important aspect of the Bill, namely that some lawyers would only be able to provide immigration assistance at the expense of clients being disrupted both financially and emotionally, at the expense of those lawyers' own livelihood, the livelihood of their respective families and the financial impact to migration agencies, most of which are small businesses.

International Covenant on Economic, Social and Cultural Rights (ICESCR)

142. Australia has also ratified the ICESCR,[58] which relevantly provides thus (underlining added):

> *'Part II, Article 2*
> *2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
>
> *Part III, Article 6*
> *1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain*

58 http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/CFB1E23A1297FFE8CA256B4C000C26B4.

his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

143. If Schedule 1 were enacted, RMA Law Graduates who have been practising as RMAs for several years would in effect be prevented from choosing to continue to work as such without supervision. To prevent them from doing so on the basis that they have, after becoming RMAs, also completed a Law Degree, is to discriminate against them in violation of the ICESCR. After all, RMAs who have never completed a Law Degree would not be subject to the same requirement of supervision, which evidences discrimination.

A Simple Alternative

144. There is nothing inherently problematic about allowing those lawyers who want to keep their RMA registrations to do so. Dual registration has existed for many years without any difficulties, apart from the inconvenience experienced by some lawyers who oppose it. If, as suggested by the Report, other jurisdictions should indeed be considered, although other countries such as the United Kingdom and Canada do not require dual registration, they not prohibit it either. To require double registration is one thing. To not give the option of dual registration is a completely different thing.

145. A simple solution would satisfy the needs of *all* lawyers and would thus avoid impacts on clients. Lawyers should be able to choose dual registration. Those lawyers who want to keep their RMA registrations can choose to do so. Those who would rather not could simply opt out. This is no different than lawyers who choose to become qualified as mediators and are then subject to ethical provisions of that specialty in addition to the requirements imposed upon them as lawyers.

146. It has come to the knowledge of the writer of this submission that, on about 31 August 2017, the LCA, which has been the strongest proponent of the abolition of the *requirement* for dual registration, has claimed that it has never opposed the *option* of dual registration. On the contrary, the LCA has further claimed that it has advocated for a transitional period for RMA Law Graduates. If that is correct, it appears that there has been no opposition to the *option* of dual registration, which further suggests that the prohibition against that option has no foundation.

A Less Disruptive Further Alternative

147. If Parliament does not accept the option of dual registration, a less disruptive solution would be for the Bill to provide for a transition period of 5 years for those RMAs who would otherwise be affected. During that period, a lawyer would be free to be granted or retain an RMA registration, but after that period, that registration would be automatically cancelled. The reason for that length of time is as follows. Legal supervision usually takes 2 years on

a full-time basis, but most RMA Law Graduates are under supervision only on a part-time basis so that they can also work on their own immigration agencies during that period in order to keep their current level of income. As a result, they would not be able to set up their own law firm for at least 4 years. Additionally, there could be periods of unemployment due to the potential difficulty in finding a job with a law firm, personal commitments such as family, pregnancy periods and other problems exemplified later. Theoretically, it is possible for legal regulatory bodies to waive the requirement of supervision or to reduce its duration significantly, although that reduction is rarely granted.

148. It appears that the transitional period suggested by the LCA is of 2 years, which is far from being a real solution for the above and the following reasons. Even if RMA Law Graduates do manage to find full-time supervised work for 2 years while also working on their own immigration agencies (i.e. outside normal business hours) so as to maintain their level of income, further problems would arise. Let us suppose that: an RMA is granted a Restricted PC on 01 July 2018, in which case the transition period would start that same day and end on 01 July 2020; that RMA Law Graduate has arranged with a law firm to start supervised work on 01 July 2018; that, however, work only really started on 01 August 2018, due to illness. In that case, by 01 July 2020, which is the end of the transition period, that RMA Law Graduate would have completed only 23 months of supervised work.

149. Consequently, he/she would not be able to apply for an Unrestricted PC until 01 August 2020. As a result, between 01 July 2020 and 01 August 2020, that supervised worker will be neither an RMA nor an Unrestricted PC holder. Therefore, that worker would not be able to give unsupervised immigration assistance during that 1 month period and would be forced either to abandon his/her clients or hand them over to a law firm, which is harsh to several stakeholders, as discussed before. After all, clients cannot afford the luxury of waiting for a month (or even more in other scenarios) before that worker can resume working on their cases, given that immigration law imposes stringent deadlines which, if not observed, could in many circumstances result in detention and removal from Australia. Not to mention how unforgiving it would be to effectively force those professionals to work on 2 full-time jobs at the same time in order to keep their income.

150. Moreover, RMA Law Graduates are only able to apply for Unrestricted PCs once they have completed the 2-year supervision period. Even if they make such an application on the day of completion of supervision, the legal regulatory bodies could take a long time to process their applications. During that time, those professionals would be neither RMAs nor Unrestricted PC holders and thus could not give immigration assistance through their own immigration agencies. That is, once again, significantly detrimental to clients for the same reasons given before. Thus, it is a fallacy to state that 2 years of transition would solve the problem. While a 2-year period "may" be sufficient for the clients of some service providers who will have completed most of the supervised work by the start of the transition period, it would be disastrous

to the clients of professionals who will have been granted Restricted PCs only after the start of the transition period.

151. Nevertheless, if Parliament decides to give only 2 years of transition, which would be not only unrealistic but also most likely unconstitutional for the reasons discussed in Division 3, the beginning of the transition period should be either the day of the commencement of the Bill or the day the person has obtained his/her first Restricted PC, at his/her choice, for the following reasons.

152. Let us suppose an RMA Law Graduate will complete the 2-year supervision period at the commencement of the Bill (1 July 2018) and the transition began when he/she became a Restricted PC holder (1 July 2016). Let us assume that, for reasons such as illness, that person is not supervised between 1 June 2018 to 1 July 2018. In that case, that person would only be able to apply for an Unrestricted PC on 1 August 2018. At least between 1 July 2018 and 1 August 2018, that person would be neither an RMA nor an Unrestricted PC holder and thus would be prohibited from providing unsupervised immigration assistance during that period, which would be highly problematic for clients. If, however, the transition period started on the commencement of the Bill, the above problem would be avoided.

153. Conversely, let us suppose another RMA is a Law Degree final semester student and can only start the 2-year supervision period on 1 August 2018. If the transition period starts on the commencement of the Bill, 1 July 2018, that individual would have completed only 23 months of supervised work by 1 July 2020, which would be the end of the transition period. Between 1 July 2020 and 1 August 2020, that person will be neither an RMA nor an Unrestricted PC holder, causing the same problems. If, however, the transition period started on the date of grant of the Restricted PC, the above problem would be avoided.

154. Therefore, the least problematic solution would be to allow each RMA Law Graduate to chose whether the transition starts on the commencement of the Bill or on the date of grant of their Restricted PC. Although slightly longer periods of transition would present similar problems, they are accentuated in the case of a short 2-year transition period. As demonstrated, such a short period is replete with difficulties and is simply impracticable. Hence the suggestion of a 5-year transition in case the option, not the requirement, of dual registration is not accepted.

155. Further, a clause could be added where if, at any time during the 5-year period, the RMA Law Graduate became the holder of an Unrestricted PC, their RMA registration would automatically be cancelled 6 months from the date they are granted the Unrestricted PCs. If a lawyer already has an Unrestricted PC on the day this part of the bill becomes effective, a 6-month or other transition period would be provided to allow the lawyer to transition their migration clients to their law practice. This would provide both an overall transition period for existing RMAs who become lawyers, and impose a limit

to how long an Unrestricted PC holder who is then free to bring their migration clients over to their own law practise can hold both registrations.

156. The proposed transition period would address the goals of the bill in eliminating dual registration for lawyers, the needs of RMA Law Graduates of being able to complete a supervision period without having to give up their clients to a supervising firm, and the best interests of clients in being able to retain their RMA Law Graduates and the important continuity of case-specific knowledge and experience that is of critical important to consumers.

Summary of Division 2

157. In a democratic society, individuals should not be punished for studying hard in the hope of offering a benign, valuable and more qualified service. Schedule 1 is a disproportionate response to the wishes of some lawyers who are against dual registration and should be rejected. If, however, Parliament believes that dual registration is no longer required, it should be optional or, at the very least, RMA Law Graduates should have a 5 year-transition period.

Division 3

Introduction to *Cunliffe*

158. Based on *Cunliffe*, Schedule 1 of the Bill is most likely unconstitutional insofar as it purports to prohibit RMA Law Graduates from providing immigration assistance without being supervised.

159. *Cunliffe* was a decision of the High Court of Australia where it was held that a law (**Impugned Law**) that inserted Part 2A into the Act, which prohibited both lawyers and non-lawyers from giving immigration assistance without being registered agents, was constitutionally valid. The proceedings were brought by two lawyers (**Plaintiffs**) who unsuccessfully argued that to prevent them from giving immigration assistance without being registered agents would violate the constitutional freedoms of political communication and interstate intercourse.

160. The implied freedom of political communication was crystallised in the High Court decisions in *Nationwide News Pty Ltd v Wills (1992)* 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth (1992)* 177 CLR 106, both of which were followed in *Cunliffe*.

161. To avoid confusion, it should be noted that Their Honours were not assessing Parliament's wisdom of requiring lawyers to register. That assessment is a political one and the object of Parts 1 and 2 of this submission. For a court to engage in that analysis would interfere with the supremacy of Parliament. Instead, what Their Honours did was to merely apply the proportionality test commonly adopted in assessing the constitutionality of statutes. In other words, Their Honours were not judging whether or not the registration requirement should be imposed on lawyers as a matter of policy, but whether to do so would infringe constitutional freedoms. Therefore, when a minority of Their Honours states that the requirement for lawyers to register as agents is disproportionate, they are solely referring to a legal test, not to the desirability of that policy.

162. The importance of *Cunliffe* to the present submission does not lie in the outcome of the decision itself, but rather in the reasons given by the individual decisions of each of the seven judges who ruled on that case. It will be seen that the reasons given by all of those judges, except for that of Brennan J, support the assertion that Schedule 1 is unconstitutional in the sense discussed above.

163. Excerpts from Parts 3 and the now repealed Part 2A of the Act are found in **Attachment A.** Those excerpts show that Subsections 114B(1), 114F(1), 114G(1) and 114H(1) of Part 2A were almost identical to their replacements now found in Subsections 276(1), 280(1), 281(1) and 282(1) of Part 3 of the Act. As a result, the slight differences between those two parts would most

likely not make any material difference had *Cunliffe* been decided with reference to Part 3. Hence that decision being used here to shed light on Schedule 1.

The judgements in *Cunliffe*

Extracts of each individual judgement are transcribed below in italicised words and then discussed in non-italicised words.

Mason CJ

164.

'Freedom of communication

34. [...] *The provision of advice and information, particularly by lawyers, to, and the receipt of that advice and information by, aliens in relation to matters and issues arising under the Act falls clearly within the potential scope of the freedom. Non-citizens who are actually present within this country, like citizens, are entitled to the protection afforded by the Constitution and the laws of Australia* [...]

Infringement of the implied freedom: how is it to be determined?

36. [...] *[F]reedom of communication is not absolute in the sense that it denies any capacity on the part of the Parliament to regulate communications made in the course of, or for the purposes of, representative government or democracy* [...] *[W]e are concerned with a law which endeavours to regulate the making of a certain class of communications and the provision of other assistance by confining them to persons who satisfy certain requirements and by requiring those persons to comply with a prescribed code of conduct in the interests of protecting aliens seeking to enter Australia and enhancing the quality of assistance given to them by "migration agents", even though that regulation imposes a burden or restriction on freedom of communication.*

37. That burden or restriction is justifiable if it is reasonable in the sense that it is reasonably appropriate and adapted to the preservation or maintenance of an ordered society under a system of representative democracy and government, the efficacy of which depends upon the exercise of that very freedom [...] *The conception of such an ordered society embraces a framework of laws which protect the rights and interests of the members of the society. In determining whether a particular burden or restriction is reasonably appropriate and adapted, it is relevant to ascertain whether the burden or restriction is disproportionate to the attainment of that objective. That determination calls for a weighing of the public interest in free communication as to political matters and the competing public interest sought to be protected and enhanced.*

Does Pt 2A infringe the implied freedom?

> *42.* [...] *In the abstract or at a broad level of generality, one can agree that any enhancement in the quality of immigration assistance given to aliens is desirable. But, in the context of the implication of freedom, it is material to inquire whether the means adopted are reasonably appropriate and adapted to and whether they are disproportionate to the end in view.*
>
> *47.* [...] *[B]ecause legal practitioners already satisfy certain standards to gain admission, and because the scope and extent of the mischief which [Part 2A] is designed to remedy, in its additional requirements of competence and integrity imposed on legal practitioners, have not been identified or established, those requirements are, in their application to lawyers admitted to practise, disproportionate to the legitimate end sought to be achieved and, in my view, are not reasonably appropriate and adapted to that end and are therefore invalid'.*

165. To His Honour, the assessment as to whether a statute impermissibly burdens the implied freedom involves the balancing of two competing public interests. The public interest sought to be achieved by Part 2A (and its substitute, Part 3 of the Act) is the protection of migrants. At the other end of the scale lies the public interest of protecting the implied freedom of political communication. His Honour observed that as lawyers were already subject to a legal regulatory framework and as it was not demonstrated that the Code would enhance consumer protection, the increase in the level of that protection sough to be achieved by the registration requirement for lawyers was not enough to justify the requirement for them to register as agents.

166. That is not to say that the Code would not aid consumer protection, but merely that the Commonwealth did not provide sufficient evidence to that effect. In short, His Honour was not suggesting that dual registration would not advance the public interest of protecting consumers, but rather that that extra level of protection was not sufficient to justify dual registration from a constitutional sense. Today, almost 25 years after *Cunliffe*, the Code is even more important than in 1994, given that immigration law has become increasingly more complex since then. In any event, as discussed before, this is a political discussion and not the focus of Division 3 of this submission.

167. Back to the constitutional analysis, the practical effect of the Impugned Law in *Cunliffe* was that, if lawyers did not register as agents, they could not provide immigration assistance. If that was sufficient for His Honour to invalidate the Impugned Law, the prohibition against RMA Law Graduates giving immigration assistance unless supervised should be an even more unjustified violation of the implied freedom. After all, several RMA Law Graduates spend months and even years looking for a job at a law firm, during which they would not be allowed to give immigration assistance if Schedule 1 of the Bill were enacted.

168. Further, the Plaintiffs were prohibited from giving immigration assistance only if they were not willing and able to register, whereas Schedule 1 of the

Bill would, in practice, prevent many RMA Graduate Lawyers from giving immigration assistance while they looked for job even if they were willing to keep their registration as RMAs. To prevent RMA Law Graduates from giving immigration assistance unless supervised would be completely out of proportion with the need to protect consumers. After all, for RMAs to subsequently become lawyers and obtain Restricted PCs is not only not against consumer protection, but is actually in favour of it, given that RMA Law Graduates not only have the competence acquired through the completion of a Graduate Certificate, but also the competence acquired through the completion of a Law Degree. Additionally, by being subject to two sets of conduct rules, RMA Law Graduates offer no less protection to consumers.

169. Even if RMA Law Graduates had the guarantee that they would find work with law firms, which is far from being the case, to prohibit them from giving immigration assistance unless supervised while allowing them to carry out that same work without supervision so long as they gave up their Restricted PCs would not advance the public interest of consumer protection. On the contrary, as explained above, to allow professionals who have completed both a Graduate Certificate and a Law Degree to give unsupervised immigration assistance would actually further advance the interests of migrants.

170. Most importantly, clients would be harshly impacted upon by Schedule 1 of the Bill, whether or not their RMA Law Graduates find a job with a law firm, for the reasons discussed under Division 2 of this submission. As a result, to prevent RMA Law Graduates from giving unsupervised immigration assistance unless they gave up their Restricted PCs is grossly disproportionate and antithetical to the objective of Part 3 of the Act and thus unconstitutional to that extent.

Deane J

171.

> *'11.* [...] *[C]ommunications of the kind which constitute "immigration assistance"* [...] *are among the most important of all political communications and political discussions in this country. In my view, the freedom of the ordinary citizen to lend support and assistance, by advice, encouragement and representation, to an applicant for admission to this country as a visitor, an ordinary immigrant or a refugee clearly falls within the central area of the freedom of political communication and discussion which the Constitution's implication protects.*
>
> *12. The overall effect of the provisions of Pt 2A is to curtail the freedom of the citizen, who is not a registered agent, to give immigration assistance, whether paid or voluntary* [...] *[S]uch a direct restriction of a class or type of communication and discussion which is inherently political in its nature is beyond the legislative powers of the Parliament except to the extent that*

it can be justified in the public interest [...] *The exceptions from the general prohibition are considerably wider in the case of immigration assistance which is provided gratuitously* [...] *In considering whether the curtailment of the freedom of political discussion and communication resulting from the prohibition can be justified, it is necessary to bear in mind the distinction which the Part draws between that which is done for a fee or other reward and that which is done gratuitously.*

(i) Paid immigration assistance and representations

14. [...] *The critical question is whether the legislative curtailment of the freedom to provide paid immigration assistance and representations which supports that registration system can be relevantly justified in the public interest.*

15. The purpose or object of that registration system is not to curtail freedom of political communication or discussion. It is to ensure that those who make immigration representations or provide immigration assistance in return for a fee or other reward possess necessary minimum qualifications and knowledge and observe necessary minimum standards [...]

16. Immigration law, practice and procedure represent an area of special expertise. The "entrance applicants" whom Pt 2A is concerned to protect constitute an extraordinarily vulnerable group of people. The provisions of the Act regulating and controlling the provision of paid immigration assistance and representations can legitimately be justified as necessary in the public interest in much the same way as can the provisions of other statutory schemes aimed at protecting the vulnerable by ensuring that those who provide expert advice or engage in particular types of transaction for reward to themselves are possessed of minimum qualifications or observe minimum standards [...]

17. [...] *[I]mmigration law, practice and procedure represent an area of specialized expertise. The particular vulnerability of "entrance applicants" is such that the restrictions and burdens of Pt 2A's registration regime are, in their application to those who practice for reward in that area* [...], *justifiable in the public interest notwithstanding the fact that some of the persons concerned will already possess other professional or trade qualifications* [...]'

172. To His Honour, the complexity of immigration law and the vulnerabilities of migrants justified the burden on the implied freedom and thus the registration of lawyers as agents. In *Cunliffe*, the effect of the Impugned Law was to protect consumers and that is why it was deemed valid by His Honour. Schedule 1 of the Bill, however, has the opposite effect. Preventing RMA Law Graduates from keeping their RMA registrations is not only not inductive to protecting consumers, but is actually detrimental to them, as discussed above. For that reason, Schedule 1 is probably unconstitutional in that

regard. In any event, Deane J's reasons concerning the voluntary giving of immigration assistance, as discussed below, make it even more likely that Schedule 1 would be deemed unconstitutional in the relevant sense.

173.

'(ii) Voluntary immigration assistance

19. As a matter of substance, the effect of sub-ss.(1) and (5) of s.114F is that the ordinary citizen is prohibited from providing voluntary immigration assistance if it is either given in his or her capacity as an employee of, or a voluntary worker for, another person or organization or given in the course of, or in association with, the conduct of a profession or business [...]

21. In so far as the citizen who is subjected to Pt 2A's prohibition of voluntary immigration assistance is concerned, the prohibition represents a serious curtailment of freedom of political communication and discussion [...] *[T]he prohibition upon voluntary assistance in the designated circumstances cannot be justified on the ground that it does no more than protect "entrance applicants" by maintaining standards of propriety and proficiency among those who seek to profit from their special needs. The effect of the prohibition of such voluntary assistance is to deprive "entrance applicants" of both the advantages and the disadvantages of voluntary communication and discussion with persons who could well be fully qualified to provide them with free informed advice* [...]

22. In the result, the main arguable justification of Pt 2A's prohibition of the giving of voluntary "immigration assistance" by the unregistered citizen who wishes to give assistance to an "entrance applicant" would seem to be that, in the circumstances in which the prohibition applies, the voluntary "immigration assistance" may prove not to be in the interests of the particular "entrance applicant". Such a justification of the infringement of the freedom of the citizen to engage in political communication and discussion is essentially illusory. It is true that there may be some voluntary workers with charitable organizations or some persons with a professional or commercial relationship with prospective immigrants who are justifiably seen by the authorities as trouble-makers or nuisances. That is, however, an unavoidable concomitant of the freedom of political communication and discussion which is an incident of representative government and which the constitutional implication is concerned to protect. The fact that freedom of political communication and discussion is likely to be abused by some trouble-makers or nuisances does not, under our Constitution, justify a legislative abolition of the freedom itself.

23. It follows that Pt 2A's restrictions of voluntary immigration assistance cannot be legitimately justified as necessary in the public interest [...] *To that extent, the provisions of the Part infringe the constitutional implication of freedom of political communication and discussion and are beyond the legislative powers of the Parliament'.*

174. Schedule 1 of the Bill would prevent RMA Law Graduates from giving voluntary immigration assistance unless they did so through law firms or a legal community centres. However, as discussed above, RMA Law Graduates often spend months, and in many cases years, looking for employment with those employers. During that period of unemployment, they would be effectively prohibited from giving immigration assistance. To suggest that such a restriction advances the protection of consumers is equally 'illusory'. In any event, even if it were easy to find employment, which is not the case, many RMA Law Graduates who can presently give voluntary immigration assistance without supervision would be discouraged from continuing to give that assistance if, in order to do so, they would need to be supervised.

175. Moreover, Subsection 114F(5) of the now repealed Part 2A allowed non-agents to provide voluntary immigration assistance outside an organisation and not in the conduct of a profession or business. Schedule 1 of the Bill would make the prohibition against RMA Law Graduates giving voluntary immigration assistance without supervision even broader, considering that they would not be able to carry out that type of work whether outside or inside an organisation and whether or not in the conduct of a profession or business. It would be artificial and incongruent to suggest that RMA Law Graduates need to be supervised in order to give immigration assistance so as to protect migrants, given that they would not need to be supervised if they gave up their Restricted PCs. That is one more reason why Schedule 1 would most likely be deemed unconstitutional in certain aspects.

Dawson J

176.

'45. [...] *In pursuit of an object which is not the erection of State borders as barriers against freedom of intercourse, a law may incidentally restrict movement interstate, provided the means adopted are neither inappropriate nor disproportionate. The means adopted will be inappropriate or disproportionate, having regard to s.92 [of the Constitution], if the impediment to freedom of interstate intercourse is greater than is reasonably required to achieve the object of the legislation which is otherwise within power.*

46. The achievement of the object of the legislation in question - the protection of aliens seeking advice or assistance with regard to permanent entry to the country - necessarily interferes with communication. Upon the assumption that some of that communication is between States, the legislation necessarily interferes with interstate communication. But it is clearly not the purpose of the law to impede interstate communication and the extent to which it does so is no more, in my view, than is reasonably required to achieve the purpose of the legislation. Any scheme which would seek to protect aliens against advice of an unsuitable kind must necessarily inhibit communication to some extent. The extent to which Pt 2A of the Migration Act does so is fairly incidental to the object of the legislation'.

177. The reason why Dawson J did not rule the Impugned Law to be invalid is that it sought to 'protect aliens against advice of an unsuitable kind' and that the means adopted to achieve that end was appropriate and adapted. Contrastingly, RMA Law Graduates, having completed both a Graduate Certificate and a Law Degree, should be seen as providing advice of a rather suitable kind, at least as suitable as the advice provided by other RMAs. Consequently, Schedule 1 of the Bill would lessen the level of safeguards currently in place for aliens, as discussed before. For that reason, His Honour's position favours the view that Schedule 1 is most likely unconstitutional to the extent that it purports to prevent RMA Law Graduates from giving unsupervised immigration assistance.

Toohey J

178.

> *'19.* [...] *The basic provisions of Pt 2A directly affect the right of aliens to obtain or receive advice on an important aspect of immigration. And they seek* [...] *to protect aliens from exploitation and bad advice in relation to entrance applications* [...]
>
> *35.* [...] *[The implied freedom of communication] must include the communication of information and the expression of opinions regarding matters that involve a minister of the Government.*
>
> *45.* [...] *[T]he scheme adopted is not disproportionate to the legitimate aim to be achieved* [...]'

179. In essence, His Honour also applied the proportionality test. If that test were applied to Schedule 1 of the Bill, which purports to impose a more stringent burden on the implied freedom of RMA Law Graduates compared to the one imposed by the Impugned Law upon lawyers in general, it is most likely that Toohey J's judgement also supports the proposition that Schedule 1 is unconstitutional in some respects, for the reasons discussed before.

Gaudron J

180.

> *'11.* [...] *Where the implied freedom is concerned, the test is* [...] *whether the law is reasonably appropriate and adapted to the relevant purpose.*
>
> *20. The prohibition in s.114F, as it affects unpaid or voluntary assistance, can only work to severely limit the opportunities for an entrance applicant to obtain competent assistance without charge. That being so, that aspect of the prohibition is not reasonably and appropriately adapted to the stated purpose of Pt 2A of the Act and is, thus, invalid* [...]

> *22.* [...] *[T]he subjection of lawyers to the same regime with respect to paid assistance* [...] *is, to my mind, reasonably appropriate and adapted to the stated purpose of Pt 2A, namely, the protection of entrance applicants from incompetent and unscrupulous advisers and agents* [...]'

181. Her Honour's reasons also support the suggestion that Schedule 1 of the Bill is unconstitutional in the relevant sense, for the reasons discussed above. Further, paragraph 27 of Gaudron J's judgement suggests that Schedule 1 would also offend Section 92 of the Constitution.

McHugh J

182. In assessing whether the Impugned Law offended Section 92 of the Constitution, His Honour observed thus:

> '9. *To prohibit persons from giving immigration assistance unless they register as agents is not a measure that is disproportionate to the need to protect entrance applicants from exploitation or incompetence. Honest and competent persons will have no difficulty in obtaining registration* [...]'

183. If Schedule 1 of the Bill were enacted, RMA Law Graduates would have more than a mere 'difficulty in obtaining registration'. In fact, the law would not allow them to keep their registrations whatsoever. For that reason, His Honour's views also endorse the argument that Schedule 1 would most likely be deemed unconstitutional in some respects.

Brennan J

184. To His Honour, '[it was] *not apparent that Part 2A* [inhibited] *communications of a political kind in any way*'. As a result, Brennan J's judgement, if applied to Part 3 of the Act, would suggest that Schedule 1 of the Bill does not infringe the implied freedom.

Summary of Division 3

185. Subsequent decisions have confirmed the existence of the implied freedom of political communication and that the High Court should apply the proportionality test.[59] That same test has also been confirmed as the one to be applied in determining whether a statute is unconstitutional by reason of offending Section 92 of the Constitution.[60]

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[59] See *Lange v Australian Broadcasting Corporation (1997)* 189 CLR 520, [567].
[60] In *AMS v AIF (1999)* 199 CLR 160, Gleeson CJ, McHugh and Gummow JJ at [179], with whom Hayne J concurred, applied the proportionality test; In *APLA Ltd v Legal Services Commissioner (NSW) (2005)* 224 CLR 322, 4 out of the 7

186. Consequently, the fact that Part 3 and the now extinct Part 2A of the Act are almost identical in all material aspects relevant to this discussion and that the reasoning in *Cunliffe* was confirmed in subsequent High Court decisions leads to a strong proposition that Schedule 1 of the Bill is unconstitutional insofar as it purports to prohibit RMA Law Graduates from giving unsupervised immigration assistance.

187. To introduce, as an alternative, a short transition period, would not address the problem. To give RMA Law Graduates only 2 years of transition would most likely also be unconstitutional, as that would in fact impermissibly curtail the above freedoms, given that those professionals would be prevented from giving unsupervised immigration assistance for a potentially significant period of time, for the reasons explained before. If Parliament does decide to give a transition period, that should be of 5 years.

Conclusion

188. The object of Part 3 of the Act is to protect consumers from unscrupulous and unqualified professionals. Regrettably, Schedule 1 of the Bill was based on a Report which lacked depth and omitted several important aspects of the regulatory scheme. To abolish dual registration would free lawyers from the need to comply with the Code. However, the provisions of the Code are tailored to the specific needs of migrants and are not matched by any of the conduct rules to which lawyers are subject across the different Australian states and territories. Thus, once no longer bound by the Code, unethical lawyers would be more prone to engage in practices deleterious to consumers. Migrants are too vulnerable for the law to rely on the professionalism of service providers. High ethical standards should not be optional.

189. Another problem presented by Schedule 1 of the Bill is that it would create two tiers of professionals, thus lifting the barriers currently in place against predatory business practices. If Schedule 1 were enacted, unethical lawyers and RMAs would engage in disparaging conduct against each and thus damage consumers. Clients would be confused about the existence of two types of professionals and would be more likely to choose lawyers for the simple fact that they are more familiar with that profession. That would discourage non-lawyer individuals from registering as RMAs, thus increasing professional fees.

190. Further, graduate lawyers are presently allowed to give unsupervised immigration assistance if they have registered as RMAs, which is a significant incentive for them to entre the industry. However, if required to be supervised in order to provide that assistance, graduate lawyers would be

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judges considered Section 92. Three of them, Gleeson CJ and Heydon J at [353] and Gummow J at [394], confirmed the proportionality test.

dissuaded from pursuing that pathway, given the extraordinarily high competition for jobs in that space. And once those lawyers are subsequently granted Unrestricted PCs and have been working in another area of law for some years, they will be much less likely to provide immigration advice.

191. Should Parliament decide that the *requirement* for dual registration ought to be abolished, it does not follow that lawyers should necessarily be prevented from being RMAs. In other words, dual registration should at least be made *optional*. After all, to force all lawyers to give up their RMA status only to satisfy the wishes of few lawyers who oppose dual registration would be harsh to several stakeholders, especially vulnerable migrants. As an alternative to the option of dual registration, RMA Law Graduates should at the very least be given a transition period of 5 years to avoid harsh consequences to themselves and their clients.

192. Finally, nothing suggests that RMA Law Graduates are neither less qualified nor less scrupulous than other professionals within the same industry. To the contrary, by having completed both a Graduate Certificate and a Law Degree, RMA Law Graduates have obtained a more comprehensive qualification compared to RMAs who have completed either one or the other qualification. Further, RMA Law Graduates are subject to no less stringent requirements against unethical conduct. Consequently, it would be illogical, against the protection of clients and thus disproportionate to that public interest for the law to prohibit RMA Law Graduates from giving unsupervised immigration assistance. Schedule 1 is therefore unconstitutional to that extent.

Attachment A

Immigration assistance

114B(1) For the purposes of this Part, a person gives immigration assistance if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist an entrance applicant by:

(a) preparing, or helping to prepare, the entrance application; or

(b) advising the entrance applicant about the entrance application; or

(c) preparing for proceedings before a court or review authority in relation to the entrance application; or

(d) representing the entrance applicant in proceedings before a court or review authority in relation to the entrance application.

276 (1) For the purposes of this Part, a person gives immigration assistance if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist a visa applicant or cancellation review applicant by:

(a) preparing, or helping to prepare, the visa application or cancellation review application; or

(b) advising the visa applicant or cancellation review applicant about the visa application or cancellation review application; or

(c) preparing for proceedings before a court or review authority in relation to the visa application or cancellation review application; or

(d) representing the visa applicant or cancellation review applicant in proceedings before a court or review authority in relation to the visa application or cancellation review application.

Restrictions on giving of immigration assistance

114F

(1) Subject to this section, a person who is not a registered agent must not give immigration assistance.
Penalty: $5,000.
[...]
(5) This section does not prohibit an individual from giving immigration assistance if the assistance is:

(a) not given for a fee or other reward; and

(b) not given in his or her capacity as an employee of, or a voluntary worker for, another person or organisation; and

(c) not given in the course of, or in association with, the conduct of a profession or business.

280

(1) Subject to this section, a person who is not a registered migration agent must not give immigration assistance.
Penalty: 60 penalty units.
[...]
(5) This section does not prevent an individual from giving immigration assistance of a kind covered by subsection 276(2A) if the assistance is not given for a fee or other reward.

276(2A) For the purposes of this Part, a person also gives immigration assistance if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist another person by:

(a) preparing, or helping to prepare, a request to the Minister to exercise his or her power under section 351, 417 or 501J in respect of a decision (whether or not the decision relates to the other person); or

(aa) preparing, or helping to prepare, a request to the Minister to exercise a power under section 195A, 197AB or 197AD (whether or not the exercise of the power would relate to the other person); or

(b) advising the other person about making a request referred to in paragraph (a) or (aa).

Restriction on charging fees for immigration assistance

114G (1) Subject to subsection (3), a person who is not a registered agent must not ask for or receive any fee or other reward for giving immigration assistance.
Penalty: Imprisonment for 10 years.

281(1) Subject to subsection (3), a person who is not a registered migration agent must not ask for or receive any fee or other reward for giving immigration assistance.
Penalty: Imprisonment for 10 years.

Restriction on charging fees for immigration representations

114H (1) A person who is not a registered agent must not ask for or receive any fee or other reward for making immigration representations.
Penalty: Imprisonment for 10 years.

282(1) A person who is not a registered migration agent must not ask for or receive any fee or other reward for making immigration representations.
Penalty: Imprisonment for 10 years.

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- **Juris Doctor** (*final semester*) - The University of Sydney
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