

Migration Agents Amendment Regulations 2002 2002 No. 229

EXPLANATORY STATEMENT

STATUTORY RULES 2002 No. 229

Issued by the Authority of the Minister for Citizenship and Multicultural Affairs

Migration Act 1958

Migration Agents Amendment Regulations 2002

Subsection 504(1) of the *Migration Act 1958* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, subsections 276(4) and 282(5) of the Act provide respectively that the regulations may prescribe circumstances in which a person does not give "immigration assistance" or "make immigration representations".

Broadly, subsections 276(1) and 276(2) provide that a person gives "immigration assistance" if he or she uses, or purports to use, knowledge of, or experience in, migration procedure to assist a visa applicant, a cancellation review applicant or a person nominating or sponsoring a visa applicant. Under subsection 280(1), a person who is not a registered migration agent must not give immigration assistance.

Subsection 282(4) provides that a person "makes immigration representations" if he or she makes representations to, or otherwise communicates with, the Minister (being the Minister or Minister's administering the provision), a member of the Minister's staff or the Department on behalf of a visa applicant, a cancellation review applicant or a person nominating or sponsoring a visa applicant about specified migration matters. Under subsection 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.

The Regulations amend the *Migration Agents Regulations 1998* (the Regulations) to prescribe the circumstances where a person may lawfully give immigration assistance or make immigration representations on behalf of another person without being a registered migration agent.

The circumstances arise when an employer, or an employee of an employer, provides immigration assistance to, or makes immigration representations on behalf of, another employee or prospective employee of the employer where:

- the employer intends or is likely to sponsor or nominate the migrating employee; and
- the advice is in relation to an application for one of the following classes of visa:
 - Employer Nomination (Migrant)(Class AN);
 - Employer Nomination (Residence)(Class BW);
 - Labour Agreement (Migrant) (Class AU);
 - Labour Agreement (Residence)(Class BV); or

- Temporary Business Entry (Class UC).

The amendments give effect to the 1999 Review of Statutory Self-Regulation, and exempt genuine employers from the requirement to use a migration agent when providing "in-house" migration advice to prospective migrating employees who would be directly employed by the employer.

The Regulations also prescribe for subsection 311B(2) of the Act, the way in which the Migration Agents Registration Authority (MARA) must publish a statement about a decision under subsection 311A(1) to bar a former registered migration agent from being a registered migration agent for a period.

Under section 311A of the Act MARA may decide to bar a former registered agent from further registration for a period of time if, after investigating a complaint relating to the agent's provision of immigration assistance while a registered agent, MARA is satisfied that the complaint is made out.

Statements about a decision, including the reasons for the decision, are to be published in the public notices section of the Saturday edition of a specified newspaper or in a specified ethnic press publication.

Details of the Regulations are set out in the Attachment.

The Regulations commence on 1 November 2002.

ATTACHMENT

Regulation 1 - Name of Regulations

This regulation provides that these Regulations are the *Migration Agents Amendment Regulations 2002 (No. 1)*.

Regulation 2 - Commencement

This regulation provides that these Regulations commence on 1 November 2002.

Regulation 3 - Amendment of *Migration Agents Regulations 1998*

This regulation provides that Schedule 1 to these Regulations amends the *Migration Agents Regulations 1998* (the Regulations).

Schedule 1 - Amendments

Item [1] - Before regulation 1

This item inserts a new heading into the Regulations, being "Part 1 Introductory".

The item is a technical amendment consequential to the insertion of new Part 2 into the Regulations. The insertion of the heading distinguishes the introductory provisions of the Regulations from other substantive provisions.

Item [2] - After regulation 3

This item inserts new Part 2 into the Regulations.

The intention of Part 2 is to enable an employer, or an employee of an employer, to lawfully provide "in-house" immigration assistance to, and make immigration representations on behalf of, another employee or prospective employee of the employer without being a registered migration agent, if.

- the employer intends or is likely to sponsor or nominate the migrating employee; and
- the advice is in relation to an application for one of the following classes of visa:
 - Employer Nomination (Migrant)(Class AN);
 - Employer Nomination (Residence)(Class BW);
 - Labour Agreement (Migrant) (Class AU);
 - Labour Agreement (Residence)(Class BV); or
 - Temporary Business Entry (Class UC).

Broadly, subsections 276(1) and 276(2) of the Act provide that a person gives "immigration assistance" if he or she uses, or purports to use, knowledge of, or experience in, migration procedure to assist a visa applicant, a cancellation review applicant or a person nominating or sponsoring a visa applicant.

Under subsection 280(1) of the Act it is an offence for a person who is not a registered migration agent to give immigration assistance. Subsection 276(4) of the Act provides that a person does not give immigration assistance in prescribed circumstances.

Similarly, subsection 282(4) of the Act broadly provides that a person "makes immigration representations" if he or she makes representations to, or otherwise communicates with, the Minister, a member of the Minister's staff or the Department on behalf of a visa applicant, a cancellation review applicant or a person nominating or sponsoring a visa applicant about specified migration matters.

Under subsection 282(1) of the Act it is an offence for a person who is not a registered migration agent to ask for or receive any fee or other reward for making immigration representations. Subsection 282(5) of the Act provides that a person does not make immigration representations in the circumstances prescribed by the regulations.

New regulations 3C and 3D prescribe for subsections 276(4) and 282(5) of the Act respectively, the circumstances in which a person will not give immigration assistance or make immigration representations under the Act.

New regulation 3A - Definitions for Part 2

Subregulation 3A(1) provides that an "employer" and "employee" has the meaning given by regulation 3B inserted by these Regulations.

Subregulation 3A(1) defines a "migrating employee" to mean, in relation to an employer, an employee, or a prospective employee of the employer:

- whom the employer intends to sponsor or nominate for the *Migration Regulations 1994*; or
- whom the employer is likely to sponsor or nominate for those Regulations.

The intention of the definition is to restrict the employees in relation to which assistance or representations may be given or made to employees whom the employer intends or is likely to sponsor or nominate under the Regulations.

Finally, subregulation 3A(1) defines a "specified application" to mean an application for one of the following classes of visa:

- Employer, Nomination (Migrant)(Class AN);
- Employer Nomination (Residence)(Class BW);
- Labour Agreement (Migrant) (Class AU);
- Labour Agreement (residence)(Class BV); or
- Temporary Business Entry (Class UC)

The intention of the definition is to restrict the kind of visa application in relation to which assistance or representations may be given or made to an application for one of the above classes of visa.

Regulation 3B - Meaning of *employer* and *employee*

New regulation 3B sets out the meaning of "employer and employee" for the purposes of Part 2.

Regulation 3B provides that a person is the employer of an individual, and the individual is the employee of the person, if:

- the person engages the individual to work in the person's workplace for an indefinite period rather than for a specified term or for the duration of a specified task; and
- the person is responsible for paying the individual's salary or wages.

The purpose of the regulation is to limit the applicability of new Part 2 to persons in an employment relationship of a kind defined in the regulation. In particular, the intention of the definition is to exclude employment arrangements based on fixed term or defined task contracts, and where the employer is not responsible for paying the individual's salary or wages.

Specifically, the intention is to require an employer who is a labour hire or recruitment company, or a person a person employed by a labour hire or recruitment agency, who gives immigration assistance or who makes immigration representations to be a registered migration agent.

Regulation 3C - Assistance given by employers

Subregulation 3C(2) provides that an employer in the relevant circumstances does not give immigration assistance, and an employee who acts on behalf of the employer in the relevant circumstances does not give immigration assistance.

Subregulation 3C(1) defines the "relevant circumstances".

The relevant circumstances are that an employer (defined in new regulation 3B) gives assistance of the kind mentioned in subsection 276(1) or (2) of the Act to a migrating employee (defined in new subregulation 3A(1)) of the employer (also defined in new subregulation 3A(1)) in relation to a specified application (specified in new subregulation 3A(1)) made by the migrating employee.

The purpose of new regulation 3C is to allow assistance of a kind mentioned in subsections 276(1) or (2) of the Act to be given by employers and employees, in relation to a migrating employee, whether or not that employer or employee is registered as a migration agent.

Regulation 3D - Representations made by employers

Subregulation 3D(2) provides that an employer in the relevant circumstances does not make immigration representations, and an employee who acts on behalf of the employer in the relevant circumstances does not make immigration representations.

Subregulation 3D(1) defines the "relevant circumstances".

The relevant circumstances are that an employer (defined in new subregulation 3B) makes representations of the kind mentioned in subsection 282(4) of the Act on behalf of a migrating employee (defined in new subregulation 3A(1)) of the employer (also defined in new subregulation 3A(1)) in relation to a specified application (specified in new subregulation 3A(1)) made by the migrating employee.

The purpose of new regulation 3D is to allows the making of representations of a kind mentioned in subsection 282(4) of the Act by employers and their employees, in relation to a migrating employee, whether or not that employer or employee is registered as a migration agent.

Item [3] - Before regulation 4

This item inserts a new heading into the Regulations, being "Part 3 Migration Agents".

The item is a technical amendment consequential to the insertion of new Part 2 into the Regulations. The insertion of the heading distinguishes the part of the Regulations dealing with migration agents from other substantive provisions.

Item [4] - After regulation 7

This item inserts new regulation 7A into the Regulations.

New regulation 7A prescribes for subsection 311B(2) of the Act the way in which the Migration Agents Registration Authority must publish a statement about a decision under subsection 311A(1) to bar a former registered migration agent from being a registered migration agent for a period.

Regulation 7A provides that, for the purposes of subsection 311B(2) of the Act, the Migration Agents Registration Authority must publish the notice in the same way that a notice is published under regulation 7.

Broadly, subregulation 7(2) requires a notice to be published in the public notices section of the Saturday edition of a specified newspaper or in a specified ethnic press publication.

This amendment is consequential to the insertion of new Division 4A of Part 3 into the Act dealing with disciplining former registered migration agents into the Act by the *Migration Legislation Amendment (Migration Agents) Act 2002*.