

[288] Recent Decisions in the AAT relating to the Conduct of Registered Migration Agents

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Practice as a registered migration agent carries with it the risk of a complaint to the regulatory body for the migration advice profession, MARA. Where MARA investigates an agent's conduct following receipt of a complaint and finds that it falls short of the standards expected of the profession, the agent may be the subject of a disciplinary decision by MARA ranging from caution, through suspension (with or without conditions) to the ultimate sanction of cancellation of registration.

Additionally, an agent's conduct must be considered by MARA when it makes a decision on the agent's annual application for re-registration. Here again, conduct falling short of that expected of the profession could result in the ultimate sanction — removing the right to practice as a migration agent.

MARA's regulation of the conduct of agents has not been without public comment.¹

This article examines recent decisions by the AAT in its role as the body which undertakes merits review of MARA's disciplinary decisions and its decisions to refuse re-registration applications where the grounds for MARA's decision involve an agent's conduct. Such an examination is timely given the removal of the sunset clause for the operation of the MARA scheme², the fact that the scheme has now been operational for nearly five years³, and the recent spate of negative media comments regarding the conduct of migration agents referred to above.

Outline

This article will examine:

- when MARA's decisions in relation to an agent's conduct are enlivened and what conduct will trigger exercise of MARA's regulatory powers;
- reviews to the AAT from MARA decisions — the process and statistics;
- principles discussed in AAT merits review of MARA decisions;
- four categories of agent's conduct reviewed in the AAT by reference to decided cases; and
- cases which consider an agent's entitlement to continue in practice pending the AAT's merit review.

MARA's reviewable sanctions — caution, suspension, cancellation

MARA's functions are, among other things, to deal with registration applications, investigate complaints and take disciplinary action against registered agents: s 316(1) of the MA.

The express power of MARA to sanction an agent is dealt with in s 303 of the MA⁴. This power, however, is discretionary. While MARA may proceed to sanction an agent for conduct falling within any one of the four express heads of unacceptable conduct listed in this section, it is equally open to take no action.

Suspension of registration may be given on conditions (including conditions for the lifting of the suspension) and can be set for a period of up to five years: s 304. A caution or suspension is noted against the agent's name in the Register of Agents. Cancellation removes the agent's name from the Register.

Section 305 of the MA provides that MARA's cancellation or suspension decisions must be recorded in writing and set out the reasons for the decision. The decision must be communicated to the agent and include information about a right of review to the AAT (s 27A of the Administrative Appeals Tribunal Act 1975 (the AAT Act)). Once all avenues of appeal have been exhausted, decisions may be recorded on MARA's website and the cancellation or suspension must be published in abbreviated form in the print media: reg 7(2) of the Migration Agents Regulations 1998. Few other professions, if any, are subject to the same

public scrutiny of disciplinary decisions by the industry regulator.

MARA's defacto reviewable sanction — refusal to re-register

Since the registration scheme requires an agent to apply for re-registration on an annual basis (s 299 of the MA), MARA also has the power — indeed an obligation — to exclude an agent whose conduct evidences a failure to meet professional standards by refusing to re-register the agent: s 290 of the MA.⁵

In circumstances where MARA makes a finding pursuant to s 290 not to re-register an agent, the agent's name is merely removed from the Register. This results in the agent avoiding the publicity required to follow a sanctions decision — unless MARA makes a further decision to bar the agent from being registered again: s 311A of the MA.

Sections 290 and 303 of the MA compared

Clearly, MARA's obligation to refuse re-registration in s 290 is significantly wider than its discretionary sanctions in s 303. Not only does it capture a greater range of acts and omissions of an agent (such as conduct leading to criminal proceedings and convictions, inquiries and disciplinary action by professional associations, as well as the all-encompassing "any other matter" relevant to an assessment of the person's fitness), but its ambit is triggered on an annual basis.

The distinction between the exercise of MARA's disciplinary powers and what I have referred to as its defacto sanction of refusing re-registration also impacts on the evidence that may be examined by the AAT in reviewing MARA decisions. Deputy President Forgie stated in *Re Griffiths and MARA* [2001] AATA 240 that where the decision under consideration is a cancellation, the tribunal must consider whether or not that decision was correctly made at the time it was made. It requires findings of fact as to whether or not the agent met the criteria in ss 303(d)–(h) at the date of cancellation. By comparison, where the decision relates to the entitlement to be registered to practice a trade or profession, the tribunal "may consider whether that entitlement exists at any time up to the date of the hearing" (at [39]). In both cases, regard must be had to all relevant evidence to determine the facts that are relevant in reviewing the particular decision.

The effect of this distinction is best appreciated in relation to agents who have challenged one or more of MARA's sanction decisions in the AAT and who find themselves also having to challenge refusal of their application for re-registration before the AAT has had time to consider the merits of the earlier sanction decisions. In *Re Lilienthal and MARA* [2001] AATA 797, the AAT considered the merits of three applications filed with the tribunal. The first two applications related to MARA's purported cancellation of Mr Lilienthal's registration as an agent following five complaints, and the third matter related to MARA's refusal of his application for re-registration. The tribunal affirmed all of MARA's decisions.

Challenging a decision by MARA in relation to an agent's conduct

Appeals from a decision by MARA to sanction an agent pursuant to s 303 of the MA, as well as appeals from a decision to refuse to re-register an agent pursuant to s 290, lie to the AAT: s 306 of the MA.⁶

The AAT has power under s 43(1) of the AAT Act to exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision that they are reviewing. Accordingly, the AAT may exercise all the powers of MARA when reviewing decisions of the MARA. However, this is not merely a case of "standing in the shoes" of MARA, but a reconsideration by an external review body — one with its own values, expertise and procedures.⁷

Section 44 of the AAT Act allows for an appeal to the Federal Court of Australia from a decision of the tribunal, on a question of law.

For completion, it should also be noted that the whole of Pt 3 of the MA (dealing with

Migration Agents and Immigration Assistance) has been excluded from the privative clause judicial review scheme that applies to all visa-related decisions made on and from 2 October 2001: s 474(4) of the MA.⁸ A handful of cases involving MARA decisions have been considered by the Federal Court.⁹ However, as French, Dowsett and Gyles JJ observed in *Griffiths v MARA* [2001] FCA 455 at [26], the “ultimate decision-maker as to (an agent’s) fitness to practice is the Tribunal (not the Authority or the Federal Court)”.

That the AAT is the appropriate forum for review of MARA’s administrative decisions has been reinforced in the recent decision of Branson J in *McGowan v MARA* [2003] FCA 482. Migration agent Ms McGowan had sought contemporaneous review in both the AAT and the Federal Court of MARA’s decision to suspend her registration. Branson J declined to exercise the court’s discretionary jurisdiction conferred by s 39B of the Judiciary Act to review MARA’s decision: “Full merits review is available to the applicant before the Tribunal ... The Tribunal is, in my view, in the circumstances of this case the appropriate forum for review of (MARA’s) decision” (at [77]).

Consequently, the balance of this article focuses on MARA’s repeat registration and sanction decisions made under Div 3 of Pt 3 of the MA in relation to an agent’s conduct as reviewed in the AAT.

Statistics

It is difficult to gauge with any degree of precision how many of MARA’s decisions made pursuant to the powers in Div 3 of Pt 3 of the MA have been the subject of review in the AAT. Sometimes these figures are included in MARA’s annual reports; sometimes they are not.¹⁰ When review figures have been provided by MARA, they relate to s 303 sanction decisions only. By way of example, the 2002 Annual Report indicates that MARA made 20 decisions to refuse re-registration and another 20 sanction decisions — comprising 2 cautions, 8 suspensions and 10 cancellations. During the same period, there were 12 applications to review s 303 sanction decisions and another 2 such decisions were still within the period allowed for a review.¹¹ It is unclear if these 12 review applications relate to AAT merits review only or include review applications filed in the Federal Court.

Anecdotally, of MARA’s sanction decisions made pursuant to s 303 and MARA’s decisions to re-refuse registration, approximately two-thirds are appealed and, of these, over half are affirmed by the AAT.

It is worth noting that any analysis of numbers regarding decisions taken on review to the AAT is somewhat illusory since a single agent may be the subject of more than one reviewable decision and yet have these multiple conduct decisions by MARA considered in a single combined AAT decision.¹² Further, the number of decisions taken on review (up to 14 in 2001–2002) needs to be considered in the context of just over 2000 repeat registration decisions and over 330 decisions made in relation to complaints which could have resulted in sanctions.¹³

Review in the AAT — conduct principles considered

Notwithstanding the difficulty in arriving at a meaningful number of MARA decisions that have been challenged in the AAT, it is clear that in the now nearly five years since the introduction of the MARA scheme the tribunal has articulated a number of key principles for guidance not only to MARA in its role as industry regulator, but also for agents (and their legal advisors) faced with a notice from MARA that either it is considering a sanction or considering refusing re-registration.

This is consistent with two of the five goals of a merits review system and considered in 1999 by the President of the AAT. Her Honour Justice Deidre O’Connor concluded that a merits review system (in this case, the AAT) should provide, and be seen to provide, a mechanism of review that:

- is independent of the agency (in this case, MARA) whose decisions it reviews;
- seeks to determine the correct, or if a discretionary power is under consideration, the

preferable decision;

- gives guidance to the agency (MARA) and so improves the quality and consistency of administrative decision-making;
- gives guidance and confidence to the members of the public (in this case, agents) who may seek review of administrative decisions (by MARA); and
- ensures that the body undertaking the external merits review (the AAT) is accountable to the public for the standard of its decision-making, its processes and for the efficient management of its public resources. ¹⁴

The key principles discussed in AAT decisions (many of which are sourced in case law on the conduct of tax agents) are outlined below:

1. The purpose of disciplinary proceedings in relation to a trade of a profession is “to protect the public and to maintain proper standards in the profession and not to take action by way of punishment”: *Re Griffiths and MARA* [2002] AATA 247 at [28]. This has significant ramifications if, by the time MARA’s decision on the agent’s conduct comes to be reviewed by the AAT, remedial measures (such as new office management procedures or completing a relevant course of instruction) have already been put into place which address shortcomings identified by MARA in its findings: *Re Griffiths* [2002] AATA 247 at [28];
2. The tribunal must be “comfortably satisfied” on the basis of all the evidence before it that the person affected by MARA’s decision is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance: *Re Prasad and MARA* [2002] AATA 423 at [50].
3. In relation to the expressions “person of integrity” and a “fit and proper person”:
 - (a) “regard must be had to the context in which the expression ‘fit and proper’ is used, namely, a registration scheme of migration agents designed to improve and maintain standards of professional conduct and quality of service”: *Re Hakaoro and MIMA* (1998) 26 AAR 534 at 540– 544;
 - (b) the expression “person of integrity” means “soundness of moral principle and character; uprightness; honesty” and encompasses “integrity, honesty, diligence and professionalism”: *Re Peng and MIMA* [1998] AATA 12 at [26];
 - (c) the expression “fit and proper” with respect to an office involves “three things, honesty, knowledge and ability: honesty to execute it truly without malice, affection or partiality; knowledge to know what he ought duly to do; and ability as well as in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it”: *Hughes and Vale Pty Ltd v NSW (No 2)* (1955) 93 CLR 127; [1955] ALR 525;
 - (d) the concept of “fitness and propriety” is not to be narrowly construed or confined but it is to be interpreted in the context of the activities in which the person is, or will be, engaged and the ends to

- be served by those activities: Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; 94 ALR 11;
4. While knowledge may not reflect on a person's integrity, it may mean that a person is not otherwise fit and proper to give immigration assistance: Re Lilienthal and MARA [2001] AATA 797; Re Prasad and MARA [2002] AATA 423; Re Khalsa and MARA [2000] AATA 1240;
 5. It is not necessary to consider each individual breach of an agent's conduct but, rather, consideration must be given to the overall conduct: Re Lilienthal and MARA [2001] AATA 797 at [103]–[106];
 6. Cancellation of an agent's ability to practice is a last resort and should be used where there is no likelihood that a caution or suspension would lead to an improvement in the behaviour and skills of the agent: Re Sosrohadipoespito and MARA [2001] AATA 293; Re Falcon and MARA [2002] AATA 1108;
 7. In addition to clients, an agent's duties are owed to DIMIA decision-makers:
 "The Act requires a person who is registered as a migration agent to be a fit and proper person to give immigration assistance and to be a person of integrity. The migration agent should therefore be a person who has a good knowledge of the migration laws, is able to prepare applications competently and should be a person of such reputation and ability that officers of the relevant Department may proceed upon the footing that the applications lodged by the agent have been prepared honestly and competently": Re Griffiths and MARA [2001] AATA 240;
 8. The final catch-all example of conduct listed in s 290(2)(h) "any other matter relevant to the applicant's fitness to give immigration assistance" is to be read ejusdem generis with the other examples in s 290(2), that is, with convictions, disciplinary action by a professional association and bankruptcy, and extends to include the agent's compliance with the Code: Re Mishalow and MARA [2002] AATA 411; Re Prasad and MARA [2002] AATA 423 at [38].

Review in the AAT — MARA's conduct decisions re-considered

There are four discernible categories of agents' conduct which the AAT has examined in its reviews of MARA decisions under Div 3 of Pt 3 of the MA: conduct evidencing a lack of integrity, conduct demonstrating a lack of competence or knowledge, conduct involving an agent's bankruptcy, and, for want of a better expression, a category that I have categorised as "other conduct".

Pervading all conduct decisions reviewed by the AAT are alleged or actual breaches of the Migration Agents Code of Conduct prescribed in Sch 1 to the Migration Agents Regulations 1998. For this reason, I have not treated breaches of the Code as a separate conduct

category. However, it is worth noting that a single breach of merely one provision of the Code could lead MARA (and the AAT on review) to be satisfied that an agent is not a person of integrity or not a fit and proper person to give immigration assistance such that a sanction under s 303 of the MA is warranted.

To date, there have been no published reports of the tribunal having reviewed MARA's decision on an agent's conduct in circumstances where: the agent's application for registration was known by the agent to be false (s 303(d)); where an agent has been the subject of criminal proceedings or convictions relevant to their fitness (s 290(2)(c)–(d)); where an agent is related by employment to a person who is not a fit and proper person or a person of integrity (s 290(1)(c) and s290(3)); or, in circumstances where the agent has been the subject of disciplinary proceedings by a professional association (s 290(2)(f)). The latter two categories of conduct will likely be the subject of an AAT decision handed down sometime in 2004 since migration agent James Woods has applied for a stay of MARA's decisions to suspend, and then cancel, his registration ¹⁵.

Conduct evidencing a lack of integrity

The AAT has fully endorsed MARA's reservation of the sanction of cancellation and refusal to re-register for cases involving integrity issues, that is, using a client's money for the agent's personal purposes (*Re Howard and MARA* [2002] AATA 1249); purporting to be a lawyer and swearing false or misleading statutory declarations (*Re Lillienthal and MARA* [2001] AATA 797); failing to cooperate with MARA investigations in breach of the MA and the Code (*Re Howard and MARA* [2002] AATA 1249); and knowingly preparing false material for lodgement with DIMIA (*Re Feng and MARA* [1998] AATA 12).

In *Re Lillienthal and MARA* [2001] AATA 797 the AAT considered the merits of three applications filed with the tribunal. The first two applications related to MARA's purported cancellation of Mr Lillienthal's registration as an agent following five complaints and the third matter related to MARA's refusal of his application for re-registration. Based on the evidence, the tribunal affirmed MARA's decisions and found that Mr Lillienthal had among other things:

- purported to be a lawyer (including on letterhead and in his Costs Agreements) by variously using expressions such as "Specialist Lawyer", "legal services provider", "immigration law services", "immigration law", "immigration lawyers" when he was not a lawyer; ¹⁶
- purported to be able to give a reference for a client stating that he had known him for "the last 6 months" when, in fact, he had met him on the day of giving the reference;
- breached a number of clauses of the Code of Conduct and, whilst individually these may not have been of great significance and may have only been subject to criticism or a need to attend a particular course, when "considered as a whole they indicated dereliction on the part of the agent of his responsibilities to the particular clients and to MARA" ¹⁷ (the agent had not retained copies of correspondence, file notes, statutory declarations on file nor maintained sufficient records of the nature and purpose of moneys received);
- displayed an inability to identify his professional obligations and the person to whom they are extended — by stating that he had obligations only to the person with whom a Costs Agreement had been entered into (as Guarantor) and not the person on behalf of whom he was completing a visa application;
- had taken an adversarial position with DIMIA; and
- had given immigration advice when not registered.

The decision in *Re Howard and MARA* [2002] AATA 1249 involved unsuccessful challenges to MARA's cancellation of Ms Howard's registration as a migration agent and then refusal to re-register her for breaches of the Code of Conduct, as well as for being satisfied that she was not a fit and proper person to be a registered migration agent. Ms Howard was found to have used client's funds for her personal purposes, fabricated documentation for the purposes of the tribunal hearing, misled the tribunal about her status as a registered agent at proceedings for a stay of MARA's cancellation decision, failed to keep records of her clients' accounts in accordance with the Code (and, presumably, since she is a practising solicitor, the NSW Law Society's rules regarding Trust Accounts) and, amongst other breaches, failed to respond to a MARA request within time.

In *Re Feng and MARA* 1998] AATA 12 the agent was found by the AAT to have prepared applications which he knew, or reasonably ought to have known, were false or misleading and with little regard to the circumstances of particular clients, made multiple pro forma protection visa applications for clients of which all but one had failed, been successful in only three of his 105 applications for 457 visas and, of 49 matters taken on review to the AAT on behalf of clients, all had been confirmed as failing to meet the character test. MARA's cancellation of the migration agent's registration was affirmed.

The decision in *Re Sosrohadipoespito and MARA* [2001] AATA 293 illustrates the risks that an agent takes in challenging a MARA s 303 sanction decision. The agent challenged the MARA's 18-month suspension decision in the AAT — only to find his registration cancelled by the tribunal instead. Senior Member Allen described MARA's decision to suspend the agent for 18 months as "counter productive" (at [44]).

The tribunal adopted the principles stated by Young J in *Story v National Companies and Securities Commission* (1998) (13) NSWLR 661; 13 ACLR 225 at [34]:

On the matter as to whether revocation should follow an opinion of inefficiency, various matters have to be weighed. One of these is the public interest that people should be permitted to follow a trade or profession which they are qualified to follow. Another is that the public expect those who fall short of the minimum standards to be removed from the profession, at least until such time as the regulatory body can be assured that they are able to perform their functions efficiently. A third consideration is that the step of revocation is purely for the public benefit and not punitive.

In considering Mr Sosrohadipoespito's behaviour, the tribunal found:

- a failure to provide a Statutory Declaration to MARA as required under s 308(1)(a) of the MA was "contumacious" (at [32]);
- an inability to grasp the issues MARA required him to address in its letters;
- abusive attitude to MARA (and apparently the AAT (at [32]));
- functional illiteracy — the agent utilised a translator to receive questions from the bench but replied in English (at [41]); and
- negligence in failing to put his client's case (for refugee status as a Chinese Christian in Indonesia having a well founded fear of persecution) or, alternatively, his willingness to subvert the system by merely lodging an application for refugee status to secure for his client at least a one year stay in Australia;

and concluded that he was not a fit and proper person to be registered as a migration agent because of his numerous breaches of the MA and the Code.

The lesson to learn from this case is that, should an agent take a matter on review to the AAT, be sure that you are confident of winning or, possibly, face a harsher penalty. As a result of the decision in Sosrohadipoespito's case, MARA is not making lengthy suspension orders — without adding conditions. Such conditions may include requiring the agent undertake a course of instructions or have their work supervised.

It was following the decision in Sosrohadipoespito's case that MARA introduced the requirement that registered migration agents must have at least functional English and provide evidence of that to MARA on seeking re-registration.

Conduct that demonstrates a lack of competence or knowledge

This conduct involves an agent's lack of competence in giving immigration assistance or an agent's failure to observe sound business procedures in their business, including record-

keeping and file management. It may also include lesser breaches of the Code involving client relationship management. In sanctioning agents, the AAT has typically suspended an agent on condition that he or she undertake a course of instruction designed to remedy the agent's lack of knowledge or shortcomings in business practices: see, for example, the decision in *Re Tung and MARA* [2002] AATA 920 which affirmed MARA's sanction of a three-year suspension or completion of a sound knowledge course.

The tribunal found that Mr Tung's knowledge of migration procedure to be so seriously lacking that he breached several clauses of the Code in failing to appreciate the significance of s 48 of the MA and that, as a consequence, MARA's decision to suspend him until such time as the agent had undertaken a sound knowledge course was appropriate. Further, the tribunal found the three-year period of suspension was appropriate since MARA's decision was rehabilitative rather than punitive, courses were held on a regular basis and the "period of suspension need only be as long as required by the applicant to complete the course" (at [58]).

Also in this category is the AAT's decision in *Re Griffiths and MARA* [2002] AATA 247. Following complaints from a number of Mr Griffiths' clients, MARA initially cancelled his registration in relation to two of those complaints for non-compliance with the Code, and having formed the view he was not a person of integrity (the first cancellation). Subsequently, MARA declined to renew Mr Griffiths' registration (having reviewed material before it, including the material on which the first cancellation decision had been made as well as subsequent matters) and it also issued him with a caution arising from another complaint.

The merits of all three MARA decisions were considered by the AAT in April 2003. After a 7-day hearing, the tribunal noted that, whilst initially Mr Griffiths' office management and his handling of clients' money and accounts had been "absolutely appalling", matters had improved substantially since September 1999 when he had employed an accountant. Moreover, Mr Griffiths' "character, integrity and general lack of compliance with the Code of Conduct is not as bad as it would have seemed for the Authority when it cancelled his registration" since a significant number of the complaint allegations had not been substantiated in the hearing (at [27]). However, there were a large number of significant and serious allegations of breaches of the Code which were substantiated and to which Mr Griffiths admitted. For example, he admitted failing to:

- confirm instructions in writing;
- obtain written evidence from clients of the terms of work to be done;
- provide supporting documentation with clients' applications to DIMIA despite having held same in his files;
- advise clients of the need to be in or out of Australia at the time of visa lodgement or grant;
- review applications in time to avoid a client becoming an unlawful non-citizen;
- correctly allocating points under the points test;
- advise clients of requests by DIMIA for further documentation resulting in clients' applications being rejected;
- provide certified copy documentation to DIMIA; and
- record clients' telephone communications.

In concluding that Mr Griffiths had fallen well short of the standard required of migration agents but, affording him the opportunity to rehabilitate himself and to revive his career, the tribunal concluded that, in order to protect the public, it was not necessary to cancel the agent's registration. Instead, it suspended Mr Griffiths' registration for two years. This would allow the agent "time out" to prepare for re-entry to the profession.

The decision in *Re Griffiths* was referred to by the tribunal in *Re Falcon and MARA* [2002] AATA 1108. This involved another of MARA's cancellation decisions that was set aside; instead, the agent was suspended for one year. The factors taken into account by Member Friedman included:

- the conduct of the agent involved only one transaction for one client and did not represent a course of conduct;
- the agent had examined and improved her administrative processes in relation to fee agreements and debt recovery — these had been the source of the client's complaint to

MARA initially; and

- numerous personal character references.

In *Re Hartnett and MARA* [2003] AATA 759 the AAT affirmed MARA's suspension of the agent for one year. The agent was found to have:

- not adequately advised a 457 sponsored employee that his involvement in establishing a company "was or could be" an activity that constituted a breach of his visa condition 8107 in circumstances where the visa applicant was the sole office holder of the company;
- failed to act in a timely manner by ensuring DIMIA's receipt of documentation in response to a Notice of Intention to Cancel a Visa; and
- knowingly made false, inaccurate and misleading assertions to DIMIA.

The tribunal found the agent's conduct was in breach of the standard of professional conduct required of migration agents and that such conduct was not related to a single event. Member Cowdroy noted that "by far the most serious breach" related to Mr Hartnett making written assertions to DIMIA that he "knew to be untrue" (at [135]). The agent has sought judicial review of the decision in the Federal Court. ¹⁸

Bankruptcy

There are two decisions illustrative of the AAT's view on the impact of bankruptcy. It will be recalled that this is discretionary ground for issue of a sanction under s 303 and one of the factors in s 290(2) to be taken into account when MARA is considering whether the agent is a fit and proper person to be re-registered.

In *Re Prasad and MARA* [2001] AATA 942 the agent challenged MARA's decision to cancel his registration pursuant to s 303 because of his bankruptcy. The tribunal set aside MARA's decision on the basis that:

- the complaint about Mr Prasad's work in a non-migration matter was an isolated incident; and
- medical evidence produced to the AAT indicated it would be unwise to place too much weight on how Mr Prasad had presented at Supreme Court proceedings in relation to his bankruptcy.

The tribunal concluded that bankruptcy itself is insufficient to establish that a person is not a person of integrity and otherwise fit and proper to give immigration assistance.

Just four days after the AAT's decision to reverse MARA's cancellation decision, Mr Prasad found his application for re-registration was refused. Not surprisingly, the agent sought review of MARA's refusal. This time, his review application was unsuccessful.

Both Mr Prasad's merits review applications were heard by Deputy President Handley. The matters taken into account by the tribunal in the second review application included:

- a complaint from a client regarding failure to provide a statement of services;
- failing to keep a client's documents safe by losing a relevant computer disc and misfiling documents in another client's file;
- being disorganised and failing to maintain a proper file in relation to the client;
- failing to retain a hard copy of the client's visa application; and
- having truncated file notes and correspondence.

The tribunal noted that, notwithstanding the agent's reasonable working knowledge of migration procedure, the efficiency and effectiveness of giving immigration assistance was affected adversely by the disorganisation apparent in his file. Deputy President Handley restated the tribunal's earlier observation that the agent's bankruptcy does not, of itself, affect his ability to give immigration assistance. However, the tribunal noted that the events that gave rise to the bankruptcy were indicative of a lack of clarity in the agent's business operations, possible inadequate communication with his clients, and further, that his medical condition might be contributing to these problems. MARA's decision to refuse repeat registration was affirmed.

Conduct not warranting a sanction

As illustrated by the next two tribunal decisions, sometimes MARA arrives at a very wrong conclusion.

In *Re Khalsa and MARA* [2000] AATA 1240 the AAT reviewed MARA's decision to refuse an agent's application for repeat registration. The issue was whether the agent understood the law and policy relating to Bridging E visas, and whether the agent had breached s 283 of the MA in falsely representing that he was a registered agent when writing a follow-up letter to DIMIA on his agent's letterhead one month after his registration had lapsed. MARA's investigation of the agent's conduct arose out of a complaint from the MRT.

Senior Member Lindsay was "comfortably satisfied" that the agent's knowledge of migration procedures was sound: "the agent's erroneous interpretation was not egregiously unrealistic or fanciful" (at [45]). The tribunal found that, while the agent's conduct had fallen below the relevant standard set in s 283 of the MA as well as cl 2.17 (obtain client acknowledgment of instructions to lodge a vexatious application) and 6.1 (file notes to be kept of all relevant communications with a client), neither infringement involved dishonesty. Having regard to the evidence of Mr Khalsa's five referees who could attest to his knowledge of immigration procedure (including two barristers experienced in migration law and who had been briefed by the agent), the two instances amounted to technical breaches that needed to be assessed in the context of a migration agent with five years standing and an otherwise unblemished record. The tribunal also noted that the agent had considerably more than the minimum number of CPD points.

MARA's decision to refuse repeat registration was set aside. Of all reported AAT decisions on MARA sanctions, the decision in *Re Khalsa* is the most dramatic in terms of the outcome for the agent. Perhaps if the evidence available to the AAT had been available to MARA at the time its decision to refuse repeat registration was made, the result for the agent may have been different from the outset.

In *Re Mishalow and MARA* [2002] AATA 411 the tribunal set aside a decision to suspend an agent for two years following the MARA's consideration of a complaint in relation to a fee agreement allegedly made between the complainant and the agent. Senior Member Allen was critical of MARA for:

- failing to appreciate the well-known principle of company law that a contract signed with a company is not a contract signed with a natural person; and
- confusing an agent's "simple lack of candour" in pointing this out to MARA with attempts by the agent to mislead MARA.

In setting aside MARA's two-year suspension, the tribunal observed that where a person's business has been ruined by a decision made on "very flimsy bases ... it is unfortunate" that the AAT cannot award costs.

The problems presented by the MARA scheme in failing to distinguish between individuals and business entities, and between employed agents and their principals has not passed without comment. Kessels, in his article "Migration Agents and the Code of Conduct: Individual Responsibility in a Corporate Structure", proposes an eminently workable solution.¹⁹

Continuing to practice as a migration agent pending merits review in the AAT

The power of the AAT to grant a stay of a MARA decision is found in s 41(2) of the AAT Act.

For an agent whose livelihood is at risk, whose business and reputation may suffer damage, and whose staff may become redundant following an adverse decision by MARA, application for a stay of the decision is essential. Of reported decisions, stays appear to have been granted in all but a handful of cases.²⁰

However, agents seeking a stay of MARA's decision should be aware of the increasing tendency by the tribunal to impose conditions upon an agent during the stay which, in the

public interest, address alleged shortcomings in an agent's practice.

In *Re Howard and MARA* [2001] AATA 978 the agent indicated that 60% of her practice as a sole practitioner was represented by migration work. When considering the agent's application for a stay of MARA's decision to cancel her registration pending full hearing of the case, Senior Member Ettinger weighed the public interest and consumer protection against the applicant's livelihood. The damage which, in the interim, would be done to the agent's goodwill and her reputation if she were ultimately successful, was also taken into account.

The decision in Howard's case is of significance because the AAT imposed a number of conditions in granting the stay that impacted on the agent's practice, namely:

- only give migration advice and assistance subject to supervision of another solicitor/migration agent provided that person remained a registered migration agent and is willing and able to give such supervision — interestingly, there is no evidence presented in the AAT of that person's willingness to cooperate in such an order;
- submit all files concerning migration matters to her supervisor to be inspected and countersigned before matters are lodged or advice is given — the logistics of this in terms of telephone advice, conferences with clients, signing off on letters of advice or lodging documentation are not discussed in detail in the AAT decision (although the tribunal observes that the supervisor practiced from premises "unrelated" to the agent); and
- the supervisor has access to the agent's files and supervises and countersigns all transactions related to incoming money or expenditure of migration clients' money;
- the agent inform her supervisor in full about her clients.

This case was the first time in the AAT's consideration of MARA's sanction decisions that conditions were imposed during a stay. Whilst the logistics of conducting a practice under such conditions may be readily complied with in circumstances where a practitioner works within a firm, the consequences for practitioners practicing on their own account, especially those in isolated suburban areas, could be quite onerous.

The operation of s 300(2) of the MA ²¹ in the context of a stay application was considered in *Re Maarbani and MARA* [2003] AATA 1109. The agent was the subject of ongoing investigation by MARA at the time of his application for re-registration. A stay of MARA's decision to refuse the agent's re-registration application was granted on conditions. Deputy President Handley granted a stay for a limited period only — 10 months from the expiry of the agent's registration, to avoid bringing s 300(2) into operation. The decision in Maarbani's case was cited with approval in *Re Amin and MARA* [2003] AATA 1095. Since this decision, the Federal Court has confirmed that MARA's decision to refuse renewal of an agent's registration is capable of being stayed. ²²

What is the effect of a stay on a later but different s 303 sanction decision? In *Re Woods and MARA* [2003] AATA 396 the tribunal upheld the validity of a decision by MARA to suspend an agent on conditions where the agent's registration had continued by virtue of a stay granted in the AAT of an earlier cancellation decision. It would be open for the agent to apply for a second stay — this time, of MARA's suspension decision.

Application for suppression of an agent's name

Section 35 of the AAT Act provides for the tribunal hearing to be in public, except in special circumstances. In proceedings in the AAT, an agent applied unsuccessfully pursuant to s 35(2) of the AAT Act to have her name suppressed in the tribunal's review of MARA's cancellation decision as well as on the MARA Register: *Re Howard and MARA* [2002] AATA 1245.

Senior Member Ettinger noted that the fundamental principle of s 35 of the AAT Act is that the tribunal's proceedings be considered in public on the basis that openness is in the interests of maintaining public confidence in the fairness and integrity of the proceedings. This approach should be departed from only if there are proper and cogent reasons for doing so (at [28]). Wanting to avoid possible personal embarrassment and preserving one's income were not proper and cogent reasons (at [40]).

Conclusion

The President of the NSW Court of Appeal recently noted that tribunals “help ensure the effective and just delivery of government programs”.²³ Section 316 of the MA provides that the government program for regulating the conduct of migration agents is MARA’s responsibility. As the independent body appointed by s 306 to review MARA’s decisions on an agent’s conduct, the AAT’s deliberations over the past five years since introduction of the MARA scheme have given guidance to both MARA and agents of the standards expected of them.

Further review of decisions by MARA should be welcomed. While MARA’s record in the AAT indicates that it appears to get it right most of the time, decisions such as those in *Re Griffiths* and in particular *Re Khalsa* and *Re Mishalow*, indicate there is still room for continued improvement in the quality and consistency of MARA’s administrative decision-making. The role of the AAT in affording aggrieved agents a merits review forum will, consistent with the rule of law, ensure the continued accountability of MARA’s decision-making. It should also go a long way to ameliorating public concerns that the watchdog of the migration advice profession is, indeed, being watched.

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¹. See, for example, recent media reports including “Who is watching the watchdog”, *The Weekend Australian*, 20–21 September 2003 in which MARA is likened to “a star chamber” and is described as being “a law unto itself”. See also “A case of déjà vu”, *The Weekend Australian*, 4–5 October 2003, “Migration agents accused of illegal activities”, *The 7.30 Report* ABC TV, 11 September 2003 and available at www.abc.net.au/7.30/content/2003/s944211.htm. MARA’s response to these criticisms can be seen on its website www.themara.com.au.

². Prior to removal of the sunset clause, the MARA scheme would have ceased in March 2003. Following commencement of the Migration Legislation Amendment (Migration Advice Industry) Act 2003 on 24 February 2003, the MARA scheme will continue indefinitely.

³. The MARA scheme commenced on 23 March 1998.

⁴. Section 303 provides that MARA may cancel or suspend the registration of an agent or caution the registered agent if it is satisfied that the agent’s application for registration was knowingly false or misleading, or the agent becomes bankrupt, or if the agent is not a person of integrity or not fit and proper to give immigration assistance, or if the agent has not complied with the Code of Conduct.

⁵. Section 290 provides that the applicant must not be registered if MARA is satisfied that the applicant is not a fit or proper person to give immigration assistance, or the applicant is not a person of integrity, or the applicant is related by employment to an individual who is not a

person of integrity and should not be registered because of that relationship. The MARA must take into account the extent of the applicant's knowledge of migration procedure, whether the applicant has a qualification prescribed by the MR or knowledge of migration procedure that MARA considers to be sound, and any conviction of the applicant of a criminal offence that is relevant to the application.

- ⁶. An appeal also lies to the AAT by a former agent who has been barred from being registered for periods of up to five years: s 311F of the MA.
- ⁷. P Cane, "Merits Review and Judicial Review: The AAT as Trojan Horse", *Federal Law Review*, vol 28, 2000, p 242.
- ⁸. Accordingly, a decision (conduct leading to a decision or failure to make a decision) by MARA may be judicially reviewed in the Federal Court or the Federal Magistrates Court under the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) or the Judiciary Act 1903. Sections 5 and 6 of the ADJR Act respectively facilitate review of "decisions" of MARA and "conduct" engaged in by MARA for the purpose of making a decision. Section 7 of the ADJR Act also affords an avenue of judicial review in the Federal Court or the Federal Magistrates Court where MARA has failed to make a decision. This was of particular relevance in the context of re-registration applications before the introduction of s 300 to the MA. The choice of whether to use the Federal Court or the Federal Magistrates Court is left to the person making the application. Either court has the power to transfer the matter to the other court. Even wider than rights of review under the ADJR Act is the right of review in s 39B of the Judiciary Act which permits review in the Federal Court's original jurisdiction of " ... any matter ... arising under any laws made by the Parliament ...". In addition, the Federal Court's interlocutory jurisdiction under s 23 of the Federal Court of Australia Act 1976 has been recognised as empowering the court to grant an interlocutory injunction for the purpose of protecting a registered agent's entitlement to a continuous series of registrations – without the need for the court to have "any specially clear proof of the strength of the applicant's case for final relief": see *Griffiths v MARA* [2001] FCA 441 at [4]. The need for agents to resort to this jurisdiction has now been overcome by s 300 of the MA.
- ⁹. See for example *Griffiths v MARA* (2001) 110 FCR 297; (2001) 65 ALD 407. See also *Joel v MARA* (2000) 110 FCR 202; 63 ALD 380; *Bulos v MARA* BC200201173; [2002] FCA 336 and *McGowan v MARA* BC200302447; [2003] FCA 482. We can expect developments in the Federal Court in 2004 following a spate of applications in late 2003 to stay the operation of a MARA decision on suspension subsequently affirmed in the AAT (see *Hartnett v MARA* BC200306184; [2003] FCA 1165) and a MARA decision to refuse re-registration subsequently affirmed by the AAT (see *Wang v MARA* [2003] FCA 1394).
- ¹⁰. The recently published 2003 Annual Report confirms repeat registration refusals (19) and sanctions (12) but does not include information in relation to reviews: see pp 13 and 44 respectively.
- ¹¹. See MARA Annual Report 2002 for statistics on s 290 refusals to re-register, s.303 sanction decisions numbers and reviews of sanction decisions filed at pp 15, 38 and 42 respectively.
- ¹². For example, currently suspended migration agent Mr Griffiths was the subject of a decision by MARA to cancel his registration on 21 December 2000, a caution made 21 March 2001 and a second cancellation decision made 13 July 2001. These three decisions were re-considered in a single AAT merits review decision: see *Re Griffiths* [2002] AATA 247 and *Re Lillenthal*.
- ¹³. Above n10 at pp 15 and 25 respectively.
- ¹⁴. Justice D O'Connor, "Accountability and Independence", keynote speech, Second Annual Australian Institute of Judicial Administration Tribunal Conference, 1999, available at <http://www.aija.org.au/online/o'connor.htm> .
- ¹⁵. Reported in *Re Woods and MARA* [2003] AATA 396. Mr Woods has been the subject of disciplinary proceedings by the Victorian Legal Ombudsman which resulted in his practising certificate as a solicitor being cancelled, a bar on re-applying to practice as a solicitor for eight years and a costs order in excess of \$250,000 (in the Matter of Woods T0392/2000, Legal Professional Tribunal, Victoria). The matters the subject of the Victorian Legal Ombudsman's deliberations related to Mr Woods, his law firm and another partner of the firm giving immigration assistance to two Chinese businessmen. Such conduct is in breach of s 48C of the Legal Profession Act 1987 (NSW) and a breach of

- ¹⁶. cl 1.9 of the Migration Agent's Code of Conduct. Equivalent legislation exists in other Australian States and Territories.
- ¹⁷. Above, n16 at [103].
- ¹⁸. A stay of the AAT's decision in this matter has been granted by the Federal Court: see *Hartnett v MARA* [2003] FCA 1165.
- ¹⁹. Immigration Review No 7 [105] at 14.
- ²⁰. A stay of MARA's cancellation decision was not granted in *Re Falcon and MARA* [2002] AATA 300 on the basis that the tribunal found the agent derived only 20% of her income from her migration work, had just eight files, and failed to recognise the need to comply with provisions in the Code that had given rise to the complaint from her client. See also *Shi v MARA* [2003] FCA 1304, a Federal Court decision reversing the AAT's refusal to grant a stay of MARA's refusal to re-register an agent following introduction of s 300 of the MA. In the unreported AAT decision on the stay application, the AAT member had formed the view that the tribunal had no power to grant a stay.
- ²¹. Section 300 provides for the automatic continuation of an agent's registration for 10 months from an agent's date of registration. However, if MARA has not made a decision on the application within those 10 months, the application is deemed to have been granted.
- ²². Above n20.
- ²³. Justice K Mason AC, "The Bounds of Flexibility in Tribunals", AIAL Forum No 39, Australian Institute of Administrative Law Inc, September 2003.