



## DECISION RECORD

<b>AGENT</b>	NGUYEN Hoan Tranh
<b>FILE NUMBER</b>	0531235
<b>COMPLAINT NUMBERS</b>	CMP-9446, CMP-17084, CMP-17085, CMP-17086 and CMP-30483
<b>DECISION</b>	CANCELLATION
<b>DATE OF DECISION</b>	14 December 2017

## DEFINITIONS

1. The following abbreviations are used in this decision:

ABN	Australian Business Number
ACN	Australian Company Number
Act	<i>Migration Act 1958 (Cth)</i>
Agent	NGUYEN Hoan Tranh
Authority	Office of the Migration Agents Registration Authority
Code	The Migration Agents Code of Conduct prescribed under Schedule 2 of Regulation 8 of the Regulations
Department	Department of Immigration and Border Protection (and its former manifestations)
MARN	Migration Agent Registration Number
Migration Regulations	<i>Migration Regulations 1994 (Cth)</i>
Regulations	<i>Migration Agents Regulations 1998 (Cth)</i>
Register	Register of Migration Agents kept under section 287 of the Act

## BACKGROUND

2. The Agent was first registered as a migration agent on 31 March 2005 and was allocated MARN 0531235. The Agent's registration had been renewed annually to date, with the most recent registration proceeding pursuant to section 300(5) of the Act. The Agent lodged his latest application for registration on 15 May 2017. A decision is yet to be made on this application pending the finalisation of the five complaints the subject of this decision.
3. The Register records the Agent business as East West Lawyers with ABN 49 112 439 746.

## PRIOR DISCIPLINARY ACTION

4. The Agent does not have a history of prior disciplinary action.

## SUMMARY OF COMPLAINTS

5. The Authority has considered five complaints relating to the Agents conduct as a registered migration agent and the principal migration agent of East West Lawyers, four of which were received from the Department. The complaints are outlined below:

	Business sponsor	Complaint received
CMP-30483	N/A – Conduct highlighted with former complaint CMP-9061	Former complaint received 12 March 2014
CMP-9446	[HI]	18 November 2013
CMP-17084	[RC]	18 November 2013
CMP-17085	[TMIX]	22 February 2013
CMP-17086	[AIA]	15 March 2013

6. The business nomination and visa application matters discussed within the decision also encapsulate immigration assistance which may have been provided by Ms [QN] while in the Agent's employ.<sup>1</sup>
7. According to the Agent's letter to the Authority, dated 16 December 2013, Ms [QN] resigned from East West Lawyers on 1 May 2013, following three months maternity leave, which commenced 28 January 2013. Accepting the dates as correct, I consider that Ms [QN] effectively ceased her services with East West Lawyers on 28 January 2013.
8. One complaint was received directly by the Authority on 12 March 2014 from a former client of the Agent [formerly CMP-9061] and was discussed with the Agent on 9 July 2015, following which he had submitted a number of documents to the Authority, including his correspondence with the Office of the Legal Services Commissioner (LSC).

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<sup>1</sup> Ms [QN]'s registration as a migration agent lapsed on 14 November 2013.

9. While the former complainant withdrew her complaint on 19 November 2015, matters highlighted during the investigation gave rise for the Authority to continue to consider the conduct emerging from the information before it, through an own motion complaint. Specifically, in respect of a subclass 457 visa application, subsequent review before the then Migration Review Tribunal (**MRT**), advertising associated with the Agent's migration agency and his correspondence with the LSC.

## **COMPLAINT CMP- 30483 (FORMER CMP-9061)**

### ***Former client and correspondence with LSC***

#### Background

10. A former client consulted with the Agent following an advertisement where his agency claimed to offer assistance with applications for subclass 457 visas for people with '*no English and qualifications.*'
11. The former client's application for a subclass 457 visa was lodged with the Department on 9 September 2011 and refused on 20 October 2011. The Agent was the representative migration agent for the purpose of the application. The basis for the refusal related to the fact that the applicant's skills and qualifications did not meet the requirements of the nominated position. Namely, that the applicant's Bachelor of Science (Chemistry) was not related to the nominated position of '*Café and Restaurant Manager*'.
12. A review of the decision was submitted with the MRT on 8 November 2011 where the Agent was the listed representative migration agent and attended the hearing with the applicant on 16 January 2014. The MRT affirmed the primary decision on 29 January 2014 and the decision record contained a number of findings in respect of the fraudulent nature of the supporting documentation submitted to the MRT. Specifically, the Diploma of Management and academic transcript, which were purportedly issued by TAFE NSW.
13. The former complainant additionally submitted a complaint to the LSC in respect of the same matter and when such was raised with the Agent on 9 July 2015 the Agent submitted a number of documents to the Authority, including his response to the LSC dated 9 May 2014.

#### Allegations

14. The former complainant outlined the same allegations put to the Agent by the LSC, a copy of which the Agent had provided to the Authority together with his response to the same. Amongst other matters, the former client alleged that the Agent:
  - i. had misled clients of immigration services that '*no English and no qualification for applying for Business (Long Stay) or any kind of skill visa*' was required given the information contained within the Agent's published newspaper advertisements;
  - ii. led her to believe that she would meet the requirements for a subclass 457 visa;
  - iii. had knowledge of the source of the '*fake*' TAFE certificate she had received by post.

15. Statements in the form of a statutory declaration, copy of receipt 1185 for an amount of \$ 5000.00,<sup>2</sup> decision records from the Department and the MRT, and a copy of the Agent's newspaper advertisement (in Vietnamese) were submitted to the Authority in support of the complaint.

## **COMPLAINT CMP-9446**

**[HI]**

### Background

16. On 5 December 2012, while in the Agent's employ, Ms [QN] lodged a business nomination application on behalf of business sponsor [HI] and a subclass 457 Temporary work visa application on behalf of Ms [HB]. The applications indicated that Ms [HB] was nominated for the position of a Customer Service Manager. The 956 form, dated 25 August 2012, submitted with the visa application indicated that the Agent was appointed as primary migration agent and that Ms [QN] was the secondary migration agent.<sup>3</sup>
17. On 10 December 2012, the Department approved the nomination application and on 13 March 2013 Ms [HB]'s subclass 457 visa was granted.
18. On 17 June 2013, the Agent advised the Department (by way of email) that the sponsor instructed him to withdraw the sponsorship and nomination in association with Ms [HB]<sup>4</sup> as she had failed to commence her employment with the sponsor. The Agent included a completed 956 form with this notice, signed by Dr [CVT] on 8 August 2012, as evidence of his authorisation to act on his behalf.
19. On 6 August 2013, the Department conducted a site visit to the sponsor's business premises as part of a routine business monitoring activity. Departmental officers met with Dr [CVT] the Medical Director and Proprietor of [HI].
20. Amongst other things, Dr [CVT] advised the following:
  - He does not know Ms [HB] and had never sponsored her to work for the company; and
  - Ms [BAL] was the only employee the company had sponsored in association with a visa.<sup>5</sup>
21. On the same day (6 August 2013), Dr [CVT] was requested to provide details in relation to the employees which were sponsored by the company.

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<sup>2</sup> Provided to the former complainant by Agent's migration agency.

<sup>3</sup> Attachment 2 of the s 308 notice - CMP-9446 Form 956 Mr Hoan NGUYEN primary migration agent.

<sup>4</sup> Attachment 3 of the s 308 notice - CMP-9446 Email from Agent - Withdrawal of sponsorship - Ms [HB].

<sup>5</sup> At the relevant time.

22. On 20 August 2013, the Agent notified the Department that he was appointed by Dr [CVT] to represent the sponsor<sup>6</sup> in association with the monitoring activity and submitted documentation in response to the request of 6 August 2013. Amongst other matters, he indicated that the company had only sponsored one individual for the purpose of a subclass 457 visa, namely Ms [BAL]. Further, in response to the request for *'Details of Any Primary Sponsored Subclass 457 visa holders who have ceased employment'* the Agent indicated *'Not applicable'* thereby not specifying details associated with Ms [HB].
23. On 30 August 2013, the Department requested that the Agent provide information in relation to Ms [HB]'s nomination application approved on 10 December 2012 and the subclass 457 visa granted to her on 13 March 2013. On 6 September 2013, the Agent advised the Department, by way of e-mail, that the information will be provided shortly. Despite indicating that the documentation would be provided, Departmental records reveal that no such information was received.
24. On 25 October 2013, Dr [CVT] provided a Witness Statement to the Department indicating the below listed matters:
- a. He had engaged East West Lawyers to represent his business, [HI] as Migration Agents;
  - b. On 3 July 2012, East West Lawyers lodged a Standard Business Sponsorship application which was approved by the Department on 8 August 2012;
  - c. On 21 August 2012 he instructed East West Lawyers to lodge a nomination for [BAL] which was approved on 25 August 2012;
  - d. On 6 August 2013, he was made aware, by the Department, that Ms [HB] was nominated and granted a subclass 457 visa in association with his company;
  - e. He does not know Ms [HB];
  - f. He did not instruct East West Lawyers to lodge a nomination or subclass 457 visa application for Ms [HB];
  - g. He neither provided the *Letter of Offer of Employment* for Ms [HB] nor did he offer her employment;
  - h. The letter of employment submitted to the Department did not have the correct company logo nor did it bear his signature; and
  - i. He had no knowledge of the notice sent to the Department advising that Ms [HB] had failed to commence her employment nor did he instruct East West Lawyers to send such a notice on his behalf.
25. 18 November 2013, the Authority received a complaint from the Department in respect of the information submitted as part of the business nomination and subclass 457 visa applications for Ms [HB].

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<sup>6</sup> 956 form, signed and dated 20 August 2013, was attached.

### Allegations

26. Dr [CVT], Director and Proprietor of [HI] and purported sponsor of Ms [HB], provided a witness statement on 25 October 2013 indicating that:
- a. he did not instruct East West Lawyers to lodge a nomination for Ms [HB];
  - b. he does not know Ms [HB];
  - c. he did not offer Ms [HB] employment;
  - d. the 'Letter of offer of Employment' (dated 20 Sept 12):
    - i. was not provided by him;
    - ii. did not bear the correct company logo; and
    - iii. did not bear his signature.
  - e. he did not instruct East West Lawyers to correspond with the Department in relation to the e-mail of 17 June 2013 and letter<sup>7</sup> where the Agent advises that Ms [HB] had failed to commence her employment and that her nomination is withdrawn; and
  - f. he was unaware of the notification sent to the Department in relation to the purported withdrawal which had a 956 form attached to it, dated 8 August 2012.

**CMP-17084**  
**[RC]**

### Background

27. On 12 March 2012, Ms [QN] as the representative migration agent lodged a business nomination application on behalf of sponsor, [RC] Centre (located at XXX) and a subclass 457 Temporary Work visa application on behalf of Ms [TLD]. The applications submitted included a Letter of Appointment for the position which specified that Ms [TLD] was nominated for the position of '*Customer Service Manager*' with a salary of \$50,000.<sup>8</sup>
28. On 26 March 2012, the nomination application was approved, followed by the grant of Ms [TLD]'s subclass 457 visa on 15 May 2012.
29. On 27 August 2013, the Department conducted a site visit to the sponsor's premises as part of a business monitoring activity. Departmental officers met with Ms [DB], the Director of [RC] and Ms [TLD].
30. According to the site visit report, the following information was acquired as a result of the site visit:
- a. Ms [DB] advised that Ms [TLD] was sponsored with the assistance of Ms [TLD]'s solicitor who completed the forms but did not have much further dealings with them;
  - b. presented a copy of the Letter of Appointment for Ms [TLD];
  - c. Upon comparing the Letter of Appointment presented by Ms [DB] and the letter submitted to the Department, departmental officers observed that the letter presented by the sponsor was not the same as the one submitted with the nomination application;

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<sup>7</sup> Dated 3 June 2013.

<sup>8</sup> Attachment 13 of the s308 notice - CMP-17084 Letter of Appointment lodged with appln - Ms [TLD].

- d. Ms [DB] advised that she had never seen the Letter of Appointment that was submitted to the Department and was surprised that the nomination was lodged for a *Customer Service Manager* and not for the position of a *Childcare Worker*;
  - e. Ms [DB] also advised that as the sponsor, she did not pay for any costs to sponsor Ms [TLD], including the fee for the sponsorship nomination application. Ms [DB] explained that the '*visa holders solicitor*' rang her, asked if they would like to sponsor Ms [TLD], stated that they would organise everything and advised that Ms [TLD] would pay for all the costs involved;
  - f. Ms [DB] was unaware of the sponsorship obligations as she had never been advised about them by the '*agent*';
  - g. Ms [TLD] advised that she was made aware of the migration agency through a Vietnamese Newspaper and a cousin in Sydney;
  - h. Ms [TLD] stated that she paid the lawyer about \$3000 for the visa sponsorship and nomination and \$10,000 for the lawyer's service fee. She added that the lawyer told her that she could acquire a permanent resident visa in two years; and
  - i. Ms [TLD] indicated that she was not aware that the Letter of Appointment submitted by her lawyer to the Department did not specify the role she performed. She stated that she signed the letter but did not see the job description.
31. Ms [DB] was advised that the approved nominated position for Ms [TLD] was for a *Customer Service Manager*, not for the *Room Leader* role that she performed;<sup>9</sup> and that the sponsor, not Ms [TLD], should have paid the sponsorship application and the nomination costs.<sup>10</sup>
32. On 24 September 2013, Ms [TLD] e-mailed a tax receipt to the Department, dated 26 May 2012, which was prepared by Ms [QN].<sup>11</sup> The receipt was a statement of service dated 26 May 2012, for a payment of \$835.
33. On 24 September 2013, in response to a question put forward by the Department Ms [TLD] stated that she '*thought [DB]*' paid for the sponsorship agreement and nomination cost and that she only paid for the amount on the receipt she had sent.
34. On 23 October 2013, Ms [DB] sent an email to the Department advising of Ms [TLD]'s contribution to the childhood centre. She explained that this was the first time the centre had sponsored someone for subclass 457 visa and acknowledged the discrepancy identified concerning the Ms [TLD]'s nominated position.
35. On 18 November 2013, the Authority received a complaint from the Department concerning Ms [QN]'s conduct as a migration agent as a result of the business monitoring activity of the business sponsor, [RC].

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<sup>9</sup> Ms [TLD] was therefore in breach of her visa condition as she was not working in the approved nominated position.

<sup>10</sup> Section 2.87 of the Migration Regulation 1994 – Obligation not to recover, transfer or take actions that would result in another person paying for certain costs.

<sup>11</sup> Refer to Attachment 14 of the s 308 notice - CMP-17084 Email from Ms [TLD] - Receipt from Agent.

36. On 13 January 2014, following a request from the Department, Ms [DB] advised by email that the migration agency told her that '*the sponsorship was very straight forward and was at no cost to the centre.*' She added that she remembers sending documents to the agency, such as '*financial statements*', however does not remember signing any documents.
37. On 28 April 2014, Ms [DB] sent an email to the Department with a copy of the Letter of Appointment and Duty Statement provided to Ms [TLD] for her position.<sup>12</sup> The *Letter of Appointment*, dated 1 March 2012 which was submitted to the Department with the nomination and visa applications, appears different in format and content to the *Letter of Appointment* received from Ms [DB]. Most significantly, the *Letter of Appointment* submitted to the Department indicated the position was for a '*Client Service Manager*' with a rate of \$50,000 per annum, while the *Letter of Appointment* from Ms [DB] indicated a position for a '*Toddler Room Leader*' with a pay rate of \$23.09 per hour.
38. The approval of this nomination resulted in the grant of Ms [TLD]'s subclass 457 visa, which would not have satisfied the visa requirements had the genuine *Letter of Appointment* been submitted.
39. The Authority contacted Ms [DB] on 1 March 2016, when she advised that:
- i. She did not speak to any 'lawyers' from the Agent's migration agency and only spoke to a person named 'XXX' who requested she fax business related documents to the agency. Ms [DB] also advised that she did not receive an Agreement for Services and Fees from the agency for the assistance provided in sponsoring Ms [TLD] for the subclass 457 visa.

#### Allegations

40. East West Lawyers had submitted to the Department a manufactured *Letter of Appointment* for the nomination application of [RC] in order to comply with the requirements of the nomination and visa applications and secure their approval. The applications listed Ms [QN] as the migration agent representing East West Lawyers at the relevant time.
41. The costs associated with the sponsorship and nomination applications, on behalf of [RC], were not paid by the sponsor and nominating employer as required by the Migration Regulation 2.87 but were borne by the visa applicant.

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<sup>12</sup> Refer to Attachment 15 of the s 308 notice - CMP-17084 Email from SP - Letter of Appointment - Ms [TLD].



**COMPLAINT CMP-17085**  
**[TMIX]**

Background

42. For the period 3 February 2012 to 6 September 2012, Ms [QN], as the representative migration agent lodged 14 business nomination applications on behalf of [TMIX] (trading as XXX), of which eleven were granted and three withdrawn. The positions and corresponding salaries contained within the nomination applications are outlined in Table A below.<sup>13</sup>

43. Ms [QN], as the representative migration agent, also lodged the corresponding subclass 457 visa applications for the clients listed in the below table presentation. As a result, nine subclass 457 visas were granted, four applications were withdrawn and one application was refused.

TABLE A

Client	Nomination lodgement	Nominated Positions	Salary	Nomination Approved date	Subclass 457 visa application lodgement	Visa grant date
Mr [TW]	03/02/2012	Assistant Restaurant Manager	\$50,000	21/02/2012	24/05/2012	6/07/2012
Mr [HS]	22/02/2012	Assistant Restaurant Manager	\$50,000	28/02/2012	22/02/2012	28/02/2012
Ms [RH]	27/02/2012	Marketing Specialist	\$55,000	12/03/2012	27/02/2012	16/03/2012
Ms [TNDH]	13/03/2012	Assistant Restaurant Manager	\$50,000	15/03/2012	13/03/2012	16/03/2012
Mr [HT]	29/03/2012	Assistant Restaurant Manager	\$50,000	10/04/2012	3/08/2012	<i>Withdrawn 15/10/2012</i>
Ms [TMMV]	29/03/2012	Assistant Restaurant Manager	\$50,000	10/04/2012	29/03/2012	10/04/2012
Mr [MAK]	29/03/2012	Assistant Restaurant Manager	\$50,000	28/06/2012	19/06/2012	15/08/2012
Mr [MAC]	05/04/2012	Functions & Events Manager	\$50,000	14/04/2012	5/04/2012	18/04/2012
Mr [GP]	02/05/2012	Customer Service Manager	\$60,000	10/05/2012	02/05/2012	<i>Refused 14/05/2012</i>
Mr [QDN]	02/05/2012	Assistant Restaurant Manager	\$50,000	10/05/2012	2/05/2012	10/05/2012
Mr [THT]	18/05/2012	Assistant Restaurant Manager	\$50,000	22/05/2012	18/05/2012	17/08/2012
Ms [MTL]	28/06/2012	Assistant Restaurant Manager	\$50,000	<i>Withdrawn 09/10/2012</i>	28/06/2012	<i>Withdrawn 09/10/2012</i>
Ms [KVT]	15/08/2012	Assistant Restaurant Manager	\$55,000	<i>Withdrawn 15/10/2012</i>	15/08/2012	<i>Withdrawn 15/10/2012</i>
Mr [VTKT]	06/09/2012	Events Organiser	\$60,000	<i>Withdrawn 09/10/2012</i>	6/09/2012	<i>Withdrawn 09/10/2012</i>

<sup>13</sup> Attachment 4 of the s 308 notice - CMP-17085 Employment docs included in applications (Note: this document does not include documents for Mr [TW] and Ms [RH].

44. On 13 September 2012, the Department sent an email to the sponsor advising that the sponsor had been identified for a routine business monitoring activity against the requirements of the Standard Business Sponsorship program. The letter requested a number of details in relation to the sponsored subclass 457 visa holder employees, and more specifically the position description and payment information for:

1. [HS];
2. [RH];
3. [TNDH];
4. [TMVH];
5. [MC];
6. [QDN]; and
7. [JAJ].

45. On 21 September 2012, the Agent advised the Department that the sponsor appointed him to represent them. Following several requests for an extension, the Agent was granted an extension until 26 October 2012 to provide the information.

46. On 4 October 2012, the Department conducted an announced site visit to the sponsor's business premises, a restaurant located in [XXX]. During the visit they met with the Agent, Mr [MS] (the company Director) and visa holder Ms [RH]. Department officers discussed sponsorship obligations as well as the positions associated with the nominations. During the meeting, the sponsor indicated that he was unaware of the employers' obligations in respect of the return travel arrangements and the migration agent costs.

47. According to a letter from the sponsor to the Agent, dated 15 October 2012,<sup>14</sup> the Agent held a conference with the sponsor on 9 October 2012 in relation to the information requested by the Department. The letter indicated that during this meeting, the discussion focussed on business nominations and subclass 457 visa applications which were lodged, and in some cases granted, of which the sponsor was not aware and which transpired without the sponsor's approval. It was also noted that during this meeting the Agent advised the sponsor that he would '*sort out the applications and withdrawals.*'

48. Departmental records indicate that on the same day that the meeting with the sponsor had taken place, 9 October 2012, migration agent Mr [TKL]<sup>15</sup> withdrew the nomination and visa application for Mr [VTKT]; while Ms [QN] withdrew the nomination and visa application for Ms [MTL].

49. On 15 October 2012, the sponsor sent the Agent written correspondence where he indicated that following his meeting with Department officers, it became evident that they had not approved all the applications for the subclass 457 visas.<sup>16</sup> The letter indicated they only approved sponsorship, under the 457 stream for employees: [RH], [TW], [HS], [MC], [JJ] and [GP].

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<sup>14</sup> Attachment 5 of the s308 notice - CMP-17085 Letters from SP to Agent - 15 and 22 Oct 2012.

<sup>15</sup> MARN XXXXX.

<sup>16</sup> Attachment 5 of the s308 notice - CMP-17085 Letters from SP to agent - 15 and 22 Oct 2012.

50. Moreover, the sponsor directed that other employees, who have lodged applications or are holders of subclass 457 visas, which were not authorised, must have their applications withdrawn and/or removed from the subclass 457 visas. Furthermore, the letter highlighted inconsistencies identified with the employee documentation. Specifically, where the sponsor's records did not match the records which were submitted to the Department and where the nominated occupations and visa subclasses were incorrect. An example was cited where a *'Training Kitchen Manager'* who should have been sponsored for a subclass 442 visa was nominated under the 457 program as a *'Restaurant Manager'*.
51. Departmental records reveal that on the same day the letter was dated (15 October 2012) Ms [QN] withdrew the nomination applications for Ms [KVT] and Mr [HT].
52. On 22 October 2012, the sponsor sent the Agent another letter, providing further detail, where he indicated that they were not aware of the nomination and subclass 457 visa applications lodged for employees: *'QDN, TMVH, TNDH and THT.'* The sponsor went on to state that these employees should have been sponsored for subclass 442 Occupational trainee visas as they were in training and being paid training wages.
53. Furthermore, the communication<sup>17</sup> also mentioned that the sponsor discovered that the employment documentation which East West Lawyers had submitted to the Department for Ms [TNDH] was different from the documents the sponsor held on file and provided to Ms [TNDH]. It was highlighted that the nominated occupation was incorrect in that she was employed as a *'Training Kitchen Manager'* and not a *'Restaurant Manager'* and that the visa application lodged should have been for a subclass 442 visa and not a subclass 457 visa. In addition, it was mentioned that the draft documents had not been sent to the sponsor for clearance prior to their submission to the Department and were thereby submitted without their *'approval and knowledge'*.
54. On 26 October 2012, the Department sent the Agent an email containing a Notice of Intention to Take Action (NOITTA) in respect of the sponsor's failure to comply with Regulation 2.83 (Obligation to provide records and information to the Minister) as the information requested by the Department on 13 September 2012 had not been submitted.
55. The Agent responded to the Department on the same day (26 October 2012) by way of email which included a submission put forward on behalf of the sponsor<sup>18</sup> dated 25 October 2012. The Agent's submission contained details of the employees who had been sponsored for a visa.

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<sup>17</sup> Letter from sponsor of 22 October 2012

<sup>18</sup> Attachment 6 of the s308 notice - CMP-17085 Agent's submission to Department 26 Oct 2012.

56. The Agent's submission to the Department, of 25 October 2012, contained the below outlined information:

- i. The list of sponsored primary subclass 457 visa holders which indicated that Ms [TNDH], Ms [TMVH], Mr [QDN] and Mr [MAK] had all ceased employment with the sponsor on 9 October 2012;
- ii. A statement from the Agent indicating that three employees '*...TNDH, TMVH and QDN, have been employed by the Sponsor as Assistant Restaurant Managers on the Subclass 457 visa.*' and '*After a review of the Employees skills the Sponsor has found the employees required further training to uplift their skills. As a result, the Sponsor has terminated the employment of the three employees, with the view of sponsoring them at a later date on the Subclass 442 Occupational Trainee in the very near future (sic);*'
- iii. Position descriptions, which the Agent had provided as annexure A<sup>19</sup> indicated that Ms [TMVH], Ms [TNDH] and Mr [QDN] were all employed as Assistant Restaurant Managers;
- iv. Payslips provided at annexure B<sup>20</sup> for Ms [TMVH], Ms [TNDH] and Mr [QDN] revealed that they were paid \$15 per hour. Furthermore, Mr [QDN]'s payslip indicated that he worked as a cleaner;
- v. Offer of Employment letters for Ms [TMVH], Ms [TNDH] and Mr [QDN] indicated that they were all to be employed as an '*Assistant Restaurant Manager*' with the '*potential earning*' of \$54,500; and
- vi. Employment contracts at annexure D<sup>21</sup> for the following:
  - [HS];
  - [RH];
  - [TNDH];
  - [TMVH];
  - [MC];
  - [QDN]; and
  - [JAJ].

57. On 26 October 2012, Ms [QN] sent a notice to the Department, on the Agent's behalf, to withdraw the sponsorships for: Ms [TMVH], Ms [TNDH], Mr [QDN], Mr [THT]<sup>22</sup> and Mr [MAK]. The notice stated that the Agent was instructed by the sponsor to withdraw the sponsorships.<sup>23</sup>

58. On 19 November 2012, the Department sent the Agent an email requesting employment details for Mr [JA]. On 26 November 2012, a reminder was sent to the Agent, at which time the Department expanded the request to include a further two employees. The Agent was to provide employment details for Mr [JA], Mr [THT] and Mr [MA].

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<sup>19</sup> To the Agent's submission, dated 25 October 2012, submitted to the Department.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> The Agent's submission dated 25 October 2012, failed to specify that Mr [THT] had also worked for the sponsor.

<sup>23</sup> Attachment 7 of the s308 notice - CMP-17085 Letter on behalf of Agent - Withdrawal of sponsorships 26 Oct 2012.

59. On 25 January 2013, the Department held a meeting with Mr and Ms [MS] and Mr [RL] as the Department was considering issuing an infringement notice or pursuing civil action against the sponsor. During the meeting the sponsor indicated the following:
- a. They did not know that the Vietnamese employees were sponsored on subclass 457 visas as they were trainees. They presented the letter sent to the Agent, dated 22 October 2012, which addressed this matter with him;
  - b. They advised the Agent by letter, dated 15 October 2012, to withdraw the sponsorship as the sponsor's records did not match the Agent's records;
  - c. The Vietnamese employees had employment contracts with pay rates of \$15 per hour and not \$50,000 per year as indicated on the contracts the Agent had submitted to the Department;
  - d. They will provide the Department with signed contracts for the employees as evidence that the employment was in line with the contracts entered into;
  - e. They trusted the Agent as a migration agent for professional assistance. The Agent had not returned their calls and they intended to cease their engagement as they were not satisfied with the Agent's service.
60. On 5 February 2013, the sponsor submitted to the Department copies of Ms [TNDH] and Ms [TMVH]'s signed employment contracts as held by their office.<sup>24</sup>
61. On 13 February 2013, the Department sent an email to the sponsor requesting employment documentation in respect of Mr [THT], Ms [RH], Mr [MC], Mr [JA] and Mr [HS].
62. On 15 February 2013, the sponsor instructed the Department to communicate directly with them.
63. On 18 February 2013, the sponsor submitted a copy of Mr [HS]'s signed employment contract as held by their office.<sup>25</sup> The sponsor noted that the *"original contract supplied to HS from [XXX] is different than the one supplied by East West Lawyers to Immigration."*
64. On 20 March 2013, the sponsor provided the Department with communication from Mr [RL] dated 19 March 2013<sup>26</sup> where he stated the following:
- a. He advised the agency that they will not be hiring the employees<sup>27</sup> for management positions and that they will pay them a trainee rate of \$15 per hour;
  - b. Their office did not have a *'HR form'* for Mr [QDN]'s employment in accordance with the company policy;
  - c. Mr [MAK] was transferred to the company as a trainee from another business of the sponsor; and

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<sup>24</sup> Attachment 8 of the s308 notice - CMP-17085 Email from SP Emp Docs - TNDH and TMVH.

<sup>25</sup> Attachment 9 of the s308 notice - CMP-17085 Email from SP Emp Doc - HS.

<sup>26</sup> Attachment 10 of the s308 notice - CMP-17085 Email from SP - Statement from Mr L.

<sup>27</sup> In respect of Ms TNDH, Ms TMVH, Mr THT and Mr HT.

- d. He does not believe he has met nor did he intend to hire Mr [HT].
65. Further information was provided by the sponsor on the 20 March 2013, in the form of email correspondence between Ms [QN] and Mr [RL].<sup>28</sup> The emails indicate that on 8 March 2012:
- a. Ms [QN] sent an email to Mr [RL] seeking confirmation of contractual employment details, including salary levels, for Ms [TNDH], Ms [TMVH], Mr [THT], and Mr [HT] and whether the lodgement of the visa applications could proceed;
  - b. In response Mr [RL] indicated that the employees listed would be employed '*on an hourly basis at a trainee rate*' and that they would be offered 35 hours a week. The Agent was included in this communication. Further, Mr [RL] requested that Ms [QN] confirm the details with the Agent as they could not offer the employees the same salary as a manager because it would '*not fall in line with [their] company pay structure.*' In addition, Mr [RL] indicated that he had asked the Agent for clarification on the matter and was advised that '*they would be on an hourly base agreement and the rate would be \$15 per hour*' which was the trainee rate; and
  - c. Ms [QN] replied to Mr [RL] (correspondence into which the Agent was included) acknowledging the information from him and stating that the '*new trainees will work 35 hours a week on the trainee rate in line with you company structure and not as a manager (sic).*' Ms [QN] also requested that Mr [RL] forward her a '*basic contract*' so that she could arrange for the '*trainees*' to sign them.
66. On 22 February 2013, the Authority received a complaint from the Department concerning the Agent's conduct as a migration agent. The referral was a result of the business monitoring activity in respect of business sponsor, [TMIX].
67. On 10 April 2013, the sponsor advised the Department that the Letter of Offer submitted by Ms [QN] in association with Mr [GP]'s nomination and subclass 457 visa applications were different from that held by their office.<sup>29</sup> Although the salary of \$60,000 was the same, they format was different (including the letterhead). Moreover, the contracts listed different employment positions in that the sponsor's letter listed it as '*General Manager*' while the letter submitted to the Department listed '*Customer Service Manager*'.

### Allegations

The complainant alleged the following:

68. The Agent was aware that Ms [QN] submitted false and manufactured letters to the Department in relation to Offers of Employment in association with the nomination and subclass 457 visa applications lodged on behalf of the sponsor for the following clients:
1. Ms [TNDH]
  2. Ms [TMVH]

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<sup>28</sup> Attachment 11 of the s308 notice - CMP-17085 Email from SP- Emails to Agent re hiring trainees.

<sup>29</sup> Attachment 12 of the s 308 notice - CMP-17085 Email from SP – GP contract.

3. Mr [QDN]
4. Mr [THT]
5. Mr [HS]
6. Mr [GP]

69. The Agent was aware that Ms [QN] lodged nomination and subclass 457 visa applications without the sponsors knowledge or authority and submitted false and manufactured letters to the Department in relation to the Offers of Employment for the following clients:

1. Mr [HT]
2. Mr [MAK]
3. Ms [MTL]
4. Ms [KVT]
5. Mr [VTKT]

70. The Agent provided false and misleading information to the Department as part of his submission, dated 25 October 2012, when he stated that the sponsor:

- i. Employed Ms [TNDH], Ms [TMVH] and Mr [QDN] as '*Assistant Restaurant Managers*'; and
- ii. After reviewing their skills the sponsor found that they required further training and as a result terminated their employment '*with a view of sponsoring them at a later date*' on subclass 442 visas.

71. The Agent provided false and misleading documentation to the Department as part of his submission dated 25 October 2012 by providing:

- i. Position descriptions<sup>30</sup> where it revealed that the sponsor employed Ms [TNDH], Ms [TMVH] and Mr [QDN] as '*Assistant Restaurant Managers*'; and
- ii. Offer of Employment<sup>31</sup> letters that were not those held by the sponsor.

## **CMP-17086**

**[AIA]**

### Background

72. On 12 July 2012, while in the Agent's employ, Ms [QN] as the representative migration agent lodged a business nomination application on behalf of business sponsor, [AIA]. On 30 July 2012, Ms [QN] lodged a subclass 457 Temporary work visa application on behalf of the Mr [CH].

73. The applications included an unsigned '*Letter of Offer of Employment*' dated 23 May 2012, from the Director of [AIA], Mr [ET]. The letter<sup>32</sup> indicated that Mr [CH] was nominated for the position of '*Sales and Marketing Manager*' with a salary of \$55,000 per annum.

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<sup>30</sup> Provided at annexure A to the submission submitted to the Department on 25 October 2012.

<sup>31</sup> Provided at annexure D to the submission submitted to the Department on 25 October 2012.

<sup>32</sup> Signed by Mr [CH] 30 May 2012.

74. On 14 July 2012, the Department approved the nomination application and on 18 September 2012 Mr [CH]'s subclass 457 visa was granted. On 12 January 2013, Mr [CH] arrived in Australia.
75. On 12 February 2013, the Agent advised the Department by email that the sponsor instructed him to withdraw the sponsorship for Mr [CH].<sup>33</sup> The Agent stated that Mr [CH] did not commence work with [AIA] as he *'was found not suitable for the job nominated'* and that *'the sponsor now wishes to withdraw their sponsorship effectively from today.'*
76. On 14 February 2013, Mr [ET] , advised the Department by email of the following:
- a. On 7 February [2013], the Agent accompanied Mr [CH] to his office for the purpose of securing a job placement with the company, however Mr [CH] was declined a position with the company;
  - b. On 11 February [2013] Mr [CH] telephoned him 'on his own accord' but he was unable to understand him due to his level of English. Mr [CH] then sent a text message to him indicating that he was *'under the impression'* that [AIA] had sponsored him for a subclass 457 visa;
  - c. He was surprised by the revelation as he had not authorised any sponsorship in association with Mr [CH] for a subclass 457 visa;
  - d. He contacted the Agent to enquire as to how he was able to apply for a subclass 457 visa without his authorisation at which time he was advised that the Agent had completed the application by 'electronic means'; and
  - e. He expressed concern about other applications which may have been lodged with the Department without his authorisation.
77. On 15 March 2013, the Authority received a complaint from the Department concerning the Agent's conduct as a migration agent as well as the conduct of Ms [QN].

#### Allegations

78. Following contact made to the Department on 14 March 2013 by Mr [ET], Director of [AIA] and purported sponsor of Mr [CH], it was alleged that:
- i. A nomination and subclass 457 visa application in relation to Mr [CH] were lodged without his knowledge, consent, or authority;
  - ii. The nomination and visa applications submitted to the Department contained false and misleading information;
  - iii. A fraudulent document was submitted to the Department in the form of a *'Letter of Offer of Employment'*;
  - iv. The Agent had misled Mr [CH] into thinking that he was sponsored by [AIA];

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<sup>2</sup> Attachment 1 of the s 308 notice - CMP-17086 Email from agent - Withdrawal of sponsorship - Mr [CH].



- v. The Agent accompanied Mr [CH] to the premises of [AIA] in an attempt to have him employed with the company subsequent to the visa grant; and
- vi. The Agent submitted false and misleading information to the Department when he advised the Department that he was instructed by the sponsor to withdraw the sponsorship of Mr [CH] on account that he was not found suitable for the job.

#### **Notice under section 308 of the Act (the section 308 notice)**

- 79. The substance of the five complaints was initially discussed with the Agent during a telephone conversation with the Authority on 9 July 2015. On 22 March 2016, the complaints were published to the Agent for comment under subsection 308(1) of the Act (section 308 notices) where the Agent was requested to provide a written response to specific questions raised by the Authority, in the form of a statutory declaration, and provide copies of a significant number of client files in addition to Ms [QN]'s employment contract.
- 80. Complaints CMP-9446, CMP-17084, CMP-17085 and CMP-17086 formed part of one section 308 notice, while former complaint CMP-9061 was published to the Agent separately, albeit on the same day. The Agent's response to the requests was to be received by 29 April 2016. An extension of time within which to respond was requested on 8 April 2016 and granted in line with the request until 29 June 2016. A further request for an extension was received on 22 June 2016 and provided until 27 July 2016.
- 81. At the time, the Agent was advised that the complaints raised possible issues under clauses 2.1, 2.4, 2.6, 2.8, 2.9, 2.23, 3.2A, 5.2 8.1, 8.2 and 8.5 of the Code.

#### **The Agent's response to the Authority's section 308 notice**

- 82. The Agent provided a response on 27 July 2016, through his legal representative, which included a submission from his legal representative and a statutory declaration, dated 26 July 2016. A substantial number of supporting documents were submitted with his response, annexed from A to M, in addition to a substantial number of client files. Further information and more client files were received by the Authority on 13 August 2016, where the documentation also encompassed sponsored monitoring activities and relevant correspondence. No less than 1280 pages were submitted for consideration by the Authority. A summary of the Agent's response, as relevant, and adopting my headings is outlined below.

#### **Agent's Statutory Declaration**

- 83. The Agent's statutory declaration, dated 26 July 2016, discussed a number of matters to be taken into account when considering the complaints before the Authority. Specifically, the Agent's background and personal circumstances, his former employee Ms [QN], the procedures and policies applied within his migration agency and those subsequently introduced.

The declaration concludes with lessons learnt, relevant application of the Code within the Agent's everyday practice, compensation afforded to aggrieved persons and his involvement and contribution to the community. The circumstances pertaining to complaints CMP-9446, CMP-17084, CMP-17085 and CMP-17086 discussed within the statutory declaration are addressed within the context of potential breaches of the Code, which forms part of this notice.

#### *Personal Circumstances*

84. Following the Agent's migration to Australia and upon obtaining his legal qualifications he registered as a migration agent in 2005 and commenced his own practice the same year. Migration matters represent around 40 per cent of his revenue income and any restriction on his ability to provide immigration assistance would likely result in the closure of his practice and his ability to provide for his dependents would be removed. The Agent requests the Authority to take into account that he has a family for which he is the only provider, that the business is his sole livelihood, and that any sanction impacting upon his ability to practice would cause him severe financial hardship. The Agent is of the view that such would not be warranted when he has not acted dishonestly nor has he deliberately attempted to mislead his clients or the Department.
85. The Agent is heavily involved in the community and with humanitarian projects, some of which have received extensive support and endorsement from the highest levels of government, both in Australia and Vietnam. The Agent's significant contribution to community affairs is reflected by the numerous committees where he is an officeholder, else stakeholder, and includes the provision of free legal advice either directly or through regular contributions to SBS radio.

#### *Compensation*

86. The Agent has endeavoured to compensate clients of his firm who were adversely affected by Ms [QN]'s behaviour. The Agent indicated that he had made compensation payments to the clients for their loss of income, hardship, and stress following the sponsorship withdrawals, specifically:
- a. \$17,000 to Mr [QDN] made on 7 September 2013
  - b. \$33,000 to Mr [CH] in about April 2013

#### *Employment of Ms [QN]*

87. The details surrounding Ms [QN]'s employment with East West Lawyers were provided within the Agent's statutory declaration.<sup>34</sup> The Agent asserted that Ms [QN] commenced her employment with East West Lawyers in late 2010 while a law student and that she was admitted to practice in March 2011 and '*became a registered migration agent about that time also.*' The Agent did not enter into a written employment contract with her.

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<sup>34</sup> Dated 26 July 2016.

88. Ms [QN] was to commence maternity leave on the 7 February 2013 but effectively did not return to work after the 31 January 2013. After numerous attempts to contact Ms [QN], the Agent asserted that he had not been able to contact her since that time.
89. Within the statutory declaration the Agent stated that Ms [QN] was a good worker, fast learner and *'...quickly earned [his] confidence and trust. [The Agent] allowed her handle money, do banking, and generally work under her own supervision. For immigration work she had her own Immiaccount login and password (sic).'*

The Agent also indicated that:

*When [he] came back from Vietnam at the end of January 2013, [he] conducted a full review all the files done by [his] employees, and the review was satisfactory excepts for some files handled by Ms [QN] (sic).*

90. Additionally, the Agent put forward information, concerning his former employee Ms [QN], and the assistance and exchange he had with the LSC, Australian Federal Police (AFP) and Lawcover in relation to matters associated with fraud and of personal undertakings.<sup>35</sup>

#### *Practice and Quality Assurance*

91. The Agent put forward arguments of his understanding on the importance of ethical practice and the need to comply with the Code and uphold professional standards at all times. He stated that since early 2013 he has incorporated Code obligations into his everyday practice and has *'...systematically applied and combined...'* the below listed process and considerations into his practice to ensure that *'...these mistakes never happen again.'*

Specifically stating:

- a. *Quality Assurance Checklist System for each type of migration matter. For example, I have a "Quality Assurance Checklist for 457 Sponsorship, Nomination and visa application" and a different "Quality Assurance Checklist for Visa 186 Direct Entry". I enclose the sample of my practice Quality Assurance Checklists for visa 457 annexed and marked "I".*
- b. *I use the "Ethical Toolkit" as my reference to guide me when I am facing an ethical decision.*
- c. *I have applied the 9 "Occupational Competency Standards for Migration Agents" into my practice and use them as the benchmarks that I must aim to exceed.*
- d. *I read and re-read the Code of Conduct regularly and make sure my practice and myself comply with the Code at all times.*
- e. *I attend regular Professional CPD courses to keep myself up-to-date with the law and the latest developments in Ethics & Professional Responsibility, Practice Management & Business Skills and Professional Skills.*
- f. *I attend seminar and workshop on topics like "Ethics, Practice Management, Risk Management and Manage Client Relationship" organised by Lawcover and the NSW Law Society.*
- g. *I know I can get help and guidance from the mentoring network who are experienced and ethical migration agents and accredited migration law specialists and especially "Free Ethics Helpline: Ethi-call" run by The Ethics Centre if I am not sure of anything.*

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<sup>35</sup> Providing some documentation to the Authority.

### *Lessons Learnt*

92. Within the Agent's statutory declaration he put forward a number of lessons which he has learnt since the incidents were highlighted. These are replicated below:

- a. *It may takes a lifetime of hard work to build a good reputation, but it only takes a few seconds or few mistakes to destroy it.*
- b. *Always strictly apply the Quality Assurance Checklist for every matter and conduct regular audits of the file to make sure it is up-do-date, accurate, and leaves no room for mistake or excuses.*
- c. *My choice of actions may affect not only myself and my family, but also affect other people's lives and the community. I must act and represent my client legally, ethically and professionally at all times.*
- d. *Never take client's oral instructions, always confirm it in writing and have the client acknowledge and sign.*
- e. *Always send draft documents and draft applications and forms to clients for their checking, approval and signature before lodgement.*
- f. *Make sure the clients fully understand their rights and responsibilities and obligations before doing any works for them.*
- g. *Never accept work without having a written Costs Agreement for Fees and Services signed by the client.*
- h. *Managing a professional and trustworthy relationship with clients is crucial for any practice.*
- i. *Always follow the guidance of the 9 'occupational competency Standards for migration agents.'*
- j. *Everything must fully be documented and confirmed in writing*
- k. *Professional reputation is the currency for any good practice.*
- l. *Always act within the ethical framework, in accordance with the Code of Conduct and professional standards set by the Authority, the Law Society and act in accordance with the law.*
- m. *If I do anything wrong, it is not only my own reputation and practice and my family that are put on the line, but also the reputation of the migration advice profession.*
- n. *Supervise and mentor employees effectively.*
- o. *Always maintain effective control of my practice.*
- p. *Never allow any employed RMA to lodge applications without checking first.*

### *General Comments*

93. The Agent indicated he was embarrassed and regretted the incidents highlighted in these matters. He is of the view that he has not acted dishonestly and that the conduct the subject of this notice stemmed from his failure to supervise his employee adequately. He is aware of his obligations, as outlined in Part 8 of the Code, and accepts that he has not acted in line with these obligations, particularly during 2012. He has learnt from the experience and since Ms [QN]'s departure he has undertaken an audit of all the matters within his practice and has reviewed his internal procedures and strengthened his quality control checklist<sup>36</sup> so as to ensure that such conduct could not reoccur.

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<sup>36</sup> Samples of which were presented to the Authority.

94. The Agent asserted that he has gained further insight into the deficiencies by reviewing the Code, Practice Guides, Toolkits, Occupational Competency Standards, and by attending a number of continuing professional development activities.

Submission by Legal Representative

*Classification of the complaints*

95. Mr [MJ], the Agent's legal representative, referred the Authority to the Complaint Classification Matrix and argued that the conduct, even when taken cumulatively, does not raise the matters above the 'minor' classification in the Matrix, contained within the Policy and Procedures Manual (PPM).
96. Further, that the Agent freely admits that his conduct as a migration agent, during the period covered by the complaints, was not up to the standard required by Part 8 of the Code, in that he failed to exercise effective control over an employee and to properly supervise her work.
97. Mr [MJ] highlights factors which may have adversely influenced the Agent's ability to supervise Ms [QN] at the time. Specifically highlighting marital problems, heavy involvement in charity events and the fact that Ms [QN] had shown herself to be competent and trustworthy. The legal representative goes on to state:

*He does not admit, and the evidence does not support, any allegation of having being knowingly involved in any dishonest, deceptive, reckless or unlawful conduct.*

98. Mr [MJ] highlighted the below matters for the Authority to consider.
- i. The Agent has not had a complaint raised against him which was upheld since the time he was first registered;
  - ii. The Agent has acknowledged some faults and has taken steps to ensure that the problem does not reoccur;
  - iii. The Agent's then employee left the practice at the end of January 2013;
  - iv. The Agent has resolved all of the issues with the various sponsors involved in the complaints and has voluntarily offered financial compensation in two matters;
  - v. The Agent has taken steps to ensure that he is fully aware of the requirements of the Code and Professional Standards in all aspects of his practice as a migration agent; and
  - vi. The Agent now operates his business as a sole practitioner and has strict guidelines and procedures in place to ensure compliance with the Code and the Professional Standards and where all instructions from clients are received or confirmed in writing. If he was to employ other agents in the future he would ensure the same rigorous compliance is followed by them.

### *Aggravating and mitigating factors*

99. The legal representative submits that none of the aggravating factors referenced at 4.4.6.1 of the PPM apply in this case and that the Agent's failure to supervise an employee during the relevant period was not systemic and has been rectified by introducing changes to his client management practices and office procedures.

100. Mr [MJ] listed a number of mitigating factors which he argues work strongly in the Agent's favour. The factors are replicated below in totality.

- a. *The circumstances leading to the breaches were largely beyond Mr Nguyen's control, and even though he was constructively responsible he nevertheless acted at all times in good faith.*
- b. *Mr Nguyen willingly accepts that breaches of Part 8 did occur, and has taken steps to ensure that such breaches will not occur again in the future.*
- c. *Wherever possible he has taken steps to mitigate the effects of the breaches, including by offering financial compensation. In the case of Dr [T], he himself brought the issue to the client's attention. In all cases he has acted in accordance with the clients' instructions once the issues became known.*
- d. *Evidence provided with the statutory declaration shows that Mr Nguyen has a positive reputation in the community and in the profession.*
- e. *The Authority has not had any previous concerns with Mr Nguyen's conduct.*
- f. *Mr Nguyen has clearly taken steps towards full rehabilitation.*
- g. *The level of personal hardship to Mr Nguyen and his family if he were not able to continue to work as a migration agent would be significant. Immigration assistance is a major part of his work as a solicitor. He has three small children and a spouse whose livelihood and welfare are dependent on him.*

### *Disposition of the complaints*

101. The legal representative puts forward arguments that given the Agent's complaint and registration history, and for the reasons discussed above and within the Agent's statutory declaration, the complaints should be treated as falling within the 'minor' classification and that no formal action should be taken against the Agent at this time.

### **Evidence provided in response to section 308 notice**

102. As part of the section 308 notice the Agent was requested to provide a copy of his employment contract for Ms [QN] and his *complete client files* for numerous sponsors and visa applicants, pursuant to paragraph 308(1)(c) of the Act. Specifically in relation to:

	<b>Complaint no.</b>	<b>Client</b>	<b>File requested</b>
1	CMP-17086	[AIA]	Sponsorship application
2	CMP-17086	[AIA]	Nomination application for Mr [CH]
3	CMP-17086	Mr [CH]	Subclass 457 visa application

4	CMP-9446	[HI]	Nomination application for Ms [HBN]
5	CMP-9446	Ms [HB]	Subclass 457 visa application
6	CMP-17085	[TMIX]	Nomination application for Mr [HS]
7	CMP-17085	[TMIX]	Nomination application for Ms [TNDH]
8	CMP-17085	[TMIX]	Nomination application for Mr [HT]
9	CMP-17085	[TMIX]	Nomination application for Ms [TMVH]
10	CMP-17085	[TMIX]	Nomination application for Mr [MAK]
11	CMP-17085	[TMIX]	Nomination application for Mr [GP]
12	CMP-17085	[TMIX]	Nomination application for Mr [QDN]
13	CMP-17085	[TMIX]	Nomination application for Mr [THT]
14	CMP-17085	[TMIX]	Nomination application for Ms [MTL]
15	CMP-17085	[TMIX]	Nomination application for Ms [KVT]
16	CMP-17085	[TMIX]	Nomination application for Mr [VTKT]
17	CMP-17085	Mr [HS]	Subclass 457 visa application
18	CMP-17085	Ms [TNDH]	Subclass 457 visa application
19	CMP-17085	Mr [HT]	Subclass 457 visa application
20	CMP-17085	Ms [TMVH]	Subclass 457 visa application
21	CMP-17085	Mr [MAK]	Subclass 457 visa application
22	CMP-17085	Mr [GP]	Subclass 457 visa application
23	CMP-17085	Mr [QDN]	Subclass 457 visa application
24	CMP-17085	Mr [THT]	Subclass 457 visa application
25	CMP-17085	Ms [MTL]	Subclass 457 visa application
26	CMP-17085	Ms [KVT]	Subclass 457 visa application
27	CMP-17085	Mr [VTKT]	Subclass 457 visa application
28	CMP-17084	[RC]	Sponsorship application
29	CMP-17084	[RC]	Nomination application for Ms [TLD]
30	CMP-17084	Ms [TLD]	Subclass 457 visa application

103. A significant number of documents were provided in response to the section 308 request which went some way to addressing the files requested from items 6 to 30 in the above table. Documentation in respect of files numbered 1 to 5 appeared selective and incomplete and primarily related to the monitoring activities. Most client files consisted of correspondence with the Department and did not contain Agreements of Services and Fees, Statements of Services, client instructions or files notes.

### **Notice under section 309 of the Act (the section 309 notice)**

104. On 13 April 2017, the Authority sent to the Agent a notice pursuant to subsection 309(2) of the Act, advising the Agent that it was considering cautioning him, or suspending or cancelling his registration under subsection 303(1) of the Act.
105. The Agent was notified that having regard to the information before the Authority, it was open for the delegate to be satisfied that the Agent had engaged in conduct that breached the Agent's obligations under clauses 2.1, 2.4, 2.8, 2.9, 2.9A 2.10, 2.19, 2.23, 5.2, 5.5, 6.1, 8.1, 8.2, 8.5 and 9.3 of the Code and that the Agent was not a person of integrity or otherwise not a fit and proper person to provide immigration assistance.
106. Pursuant to subsection 309(2) of the Act, the Authority invited the Agent to provide written submissions on the matter by 19 May 2017. An extension of time within which to respond to this notice was requested on 16 May 2017 and granted in line with the request until 5 June 2017.

### **The Agent's response to the section 309 notice**

107. On 5 June 2017, the Authority received the Agent's written submission in response to the section 309 notice through Mr [MJ] his legal representative, and the associated attachments,<sup>37</sup> by way of email correspondence.
108. The legal representative, on behalf of the Agent, submitted the below outlined matters (adopting my own headings) as relevant. Throughout the submission the representative argued that a considerable number of the assumptions made by the Authority were unwarranted. For completeness, and as a point of reference, these can be identified within the section 309 response, a copy of which is annexed to this decision at Annexure A. As many of the matters were already addressed with the response provided to the section 308 notice, and given the submission refers to the Agent's statutory declaration, a copy of the declaration is likewise provided at Annexure B to this decision.

### ***Former client and correspondence with LSC (former complaint CMP-9061)***

109. These allegations were the subject of a complaint to the LSC and no response was provided by the complainant after she was invited to do so. The LSC found that there was no evidence of statutory misconduct on the part of the Agent, a copy of which was provided to the Authority with the section 309 response.<sup>38</sup> The complainant's subsequent complaint the Authority was withdrawn by her and the Authority has since taken it upon itself to re-instate the complaint.

### ***Newspaper advertisements***

110. The Authority's translation of the advertisements is in part incomplete and in part incorrect and the English requirement has to be seen in context. The Migration Regulations in force before July 2013 did not require evidence of English language for any but a few occupations.

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<sup>37</sup> Four attachments (Marked A to D)

<sup>38</sup> Attachment A to the Agent's section 309 response.



111. The Authority's translation of the 03/08/2012 advertisement contains an important inaccuracy where the phrase *100 ngành nghề khác nhau* means "over 100 different occupations", not "over 100 countries". The translations reflects what was in force at the time and the suggestion that the advertisements were misleading is not supportable.
112. The occupation under which the complainant applied, Café and Restaurant Manager, did not require evidence of English at the time and the Agent's response to the LSC did not contain any false statement. At paragraph eleven of the Agent's response to the LSC he denied ever having advertised using the wording *"NO English and no qualification for applying for Business (Long Stay) PR any kind of skill visa"*. The Authority has not provided any evidence that such claim was made. The Agent's response to the LSC was correct.

*Bogus document*

113. The Agent strenuously denies the allegation that he was aware that the documents in question were not genuine. The Authority's suggestions to the effect that "any reasonable person" would have questioned the documents, or that a "prudent migration agent" would have undertaken checks are an insufficient basis for the serious inferences of criminality. It is not conceded that the documents are so obviously counterfeit that any reasonable person would have questioned them. The words "Diploma of Management" are prominently displayed on the page, whereas the words "degree of" appear in much smaller type on a different line. The second document does not display any obvious errors. The Authority's inference of criminal intent on the Agents part falls far short of the standard required under the well-established *Briginshaw* principle.<sup>39</sup>

*Complaint CMP-9446 – [HI]*

114. The allegations in relation to this complaint arise from a statement made by Dr [CVT] during a DIBP site visit on 6 August 2013 and a witness statement made by him 25 October 2013. The Agent has not been provided with copies of these documents.
115. The Agent relies on paragraphs 25 to 38 of his statutory declaration filed in response to the section 308 request and incorporates those paragraphs in this submission.
116. It is impossible for the Agent to provide evidence of a negative proposition in relation to the argument that he did not provide any substantive evidence that he had no knowledge of the applications under discussion. The Agent contends that he only became aware of the applications regarding Ms [HB] when he read an email sent to Ms [QN] in March 2013 advising of the grant of the visa. As he has stated at paragraph 29<sup>40</sup> of his statutory declaration, he became "suspicious" which does not mean that he immediately formed a view that there was anything wrong with the case. His first response was to attempt to contact Ms [QN], without success, and then spoke to Dr [CVT] about it in early June.

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<sup>39</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336. See also *Tarasovki v MILGEA* (1993) 45 FCR 570.

<sup>40</sup> For correctness, this is contained in paragraph 30, not 29 as indicated

117. While it may be argued that the Agent should have raised the matter with Dr [CVT] earlier than he did, it is understandable that he wanted to first obtain Ms [QN]'s explanation of the event. When he could not do so he explained the situation to Dr [CVT] and took steps to have the fraudulent application reversed.
118. The Agent had previously advised Ms [HB] that she would need to find a sponsor and there was no reason for him to be concerned when he later saw her meeting with Ms [QN]. As explained in his statutory declaration he was occupied with matters outside the office including the charity activities in Vietnam and problems with his marriage. He has already made it clear that he admits to a general failure to properly supervise Ms [QN].
119. The Agent stands by his claim that he raised the matter with Dr [CVT] in early June. He then lodged a withdrawal using a 956 form that Dr [CVT] had signed in relation to the previous sponsorship of his niece in 2012. While it is arguable that he should have obtained a fresh authority, it is significant that, the signatures on the documents filed by Ms [QN] without authorisation were "exact replicas" of the signature on the earlier 956. It is submitted that it was Ms [QN], not the Agent, who fabricated those documents.
120. The statement that [HI] had only previously sponsored one applicant, Dr [CVT]'s niece, was correct. There is no justification for assuming that the draft sent to Dr [CVT] was not the one provided in response to the section 308 request.
121. While it may have been open for the Agent to give the Department further details of what had happened, it is not apparent that he was under any strict obligation to do so. His first duty was to his client, Dr [CVT]. There was no intention to mislead the Department further, as neither Mr Nguyen nor Dr [CVT] were directly responsible for the fraud.

*CMP-17084 – [RC]*

122. The allegations in relation to this complaint arise at least in part from a report of a site visit by DIBP on 27 August 2013. Mr Nguyen has not been provided with a copy of this report. The Authority also draws certain inferences from hearing recordings and decision records of two MRT cases involving [RC] and Ms [TLD] copies of which have not been provided.
123. The Agent relies on paragraph 47 to 55 of his statutory declaration filed in response to the section 308 request and incorporates those paragraphs in this submission for this matter.

*Manufactured letter of appointment*

124. The Agent accepts that the Letter of Appointment submitted to the Department by Ms [QN] was fraudulent. He admits to inadequate supervision of his employee, but denies any involvement in or knowledge of the fraudulent conduct. The assertion that it appears highly improbable Ms [DB] would deny any knowledge of the fraudulent Letter of Appointment is a statement of the obvious. The Agent had already advised that the original letter was inadequate. The subsequent amendments would have been made by Ms [QN] without his or Ms [DB]'s knowledge. Refer to Paragraph 51 of the statutory declaration on the breach of Migration Regulation 2.87.

*Complaint CMP-17085 – [TMIX]*

In respect of this matter the Agent provided a response by paragraph commentary in relation to the section 309 notice issued to him, provided at Annexure A to this decision. Some are outlined below.

125. The sponsor instructed the Agent to request several extensions within which to provide information to the Department to enable the sponsor and their accountant to prepare the documents in relation to employee payment records, payslips etc. [in reference to paragraph 42 of the section 309 notice].
126. The Agent was requested to be present with the sponsor for a site visit undertaken by the Department. The Agent did not know that Mr [MS] was unaware of the employer's obligations, as he had had 457 sponsorship application approvals undertaken by his previous migration agent, before he became the Agent's client. Mr [MS] would have been advised by his previous agent about the employer's obligations [in reference to paragraph 43 of the section 309 notice].
127. From the outset, Mr [MS] and the Agent had agreed on the following work procedure:
- [Sponsor] Mr [MS] directed and assigned Mr [RL] (his Operations Manager) as the authorised person to make all the decisions: which candidates he would decide to employ and sponsor, the visa applications process, approval for lodgement of applications, and all correspondence was to go directly to Mr [RL].
  - [East West Lawyers ] The Agent directed and assigned Ms [QN] as the key person to take care of all communication, work with Mr [RL] directly, receive instructions, obtain supporting documents and obtain approval for lodgement of applications. Ms [QN] was the person who would handle and have full responsibility for all the applications as directed by Mr [RL] [in reference to paragraph 44 of the section 309 notice].
128. During the meeting on 9 October 2012, Mr [MS] asked for a list of all the applications that had been lodged and pending decisions, which the Agent's company provided. Mr [MS] then demanded an immediate withdrawal of the mentioned visa and nomination applications which he said he had not personally approved. The Agent telephoned and instructed Ms [QN] and Mr [TKL] (employee solicitor and migration

agent) to take action as instructed by Mr [MS] [in reference to paragraph 45 of the section 309 notice].

129. All the approvals for the applications came directly from Mr [RL] (the Operations Manager). The Agent assumes that Mr [MS] would have known about them and been aware of them. However, when the 457 sponsorship monitoring occurred and underpayments by the sponsor were discovered, all the blame shifted to the Agent's company. The job title for the applicant in the 457 application was "*Assistant Restaurant Manager*", and the ANZSCO occupation was "*Restaurant Manager*" [in reference to paragraph 46 of the section 309 notice].
130. Mr [RL] was the authorised person (having the same authority as the sponsor). All correspondence and the whole process was handled directly between Ms [QN] and Mr [RL]. The Agent is not sure whether Mr [RL] had informed Mr [MS] of all the approvals that he had made, but it was not his role to do so. When the sponsor's 'troubles happened' Mr [RL] did not get involved. Mr [MS] stepped in and laid all the blame on the Agent's company [in reference to paragraph 47 of the section 309 notice].
131. From February 2012, the sponsor and Mr [RL] were clearly aware and had approved all workers/employees selected by Mr [RL] to be sponsored on 457 visas. It was in October 2012, after the 457 monitoring process identified the sponsor's underpayment of employees that Mr [MS] stated he had not approved them for 457 visas and wanted them to be on 442 visas. The sponsor laid the blame on the Agent for any misunderstanding or lack of awareness [in reference to paragraph 49 of the section 309 notice].
132. Mr [RL] was the authorised person who approved the application and the nominated position. Ms [QN] worked and received instructions directly from Mr [RL]. In all the correspondence and drafting Ms [QN] dealt directly with Mr [RL]. Mr [MS] was not involved in any process until the sponsorship monitoring commenced [in reference to paragraph 50 of the section 309 notice].
133. The reason for the delay in responding to the NOITTA was on account that the sponsor had not provided all the requested documentation within the specified time. From around 9/10/2012, Mr [MS] instructed the Agent that all draft emails, replies, and responses had to be sent to him for prior review and approval before sending them to the Department [in reference to paragraph 51 of the section 309 notice].
134. Around late November/early December 2012, the sponsor ceased the Agent's engagement in relation to the monitoring process and he is unaware and unable to comment on any events after this time [in reference to paragraph 56 of the section 309 notice].
135. The Agent did not have a copy of the communication from Mr [RL]. He advised the sponsor and Mr [RL] that during the 'on-job training' [sic] they could pay the employees at trainee rates whilst waiting for the 457 visa approval, but after the 457 visa was granted the 457 full time employment contract would come into effect and the sponsor would have to pay at the correct salary pursuant to the employment contract [in reference to paragraphs 61, 223 and 224 of the section 309 notice].

136. The Agent denies providing the Department with false and misleading information and documentation as part of his submission of 25 October 2012<sup>41</sup> as it was reviewed and approved by the sponsor who instructed him to send it [in reference to paragraphs 67-68 of the section 309 notice].
137. The Agent refers to his statutory declaration [42] which explains his understanding that only the staff that were to progress to the higher positions were to be nominated for 457 visas. They could be employed as trainees until the 457 visas were approved, after which they would have to be shifted to the contracts for the nominated positions. The staff who were not intended to be given higher positions were to be nominated for 442 visas. It was Ms [QN], however, who lodged the 457 nominations for all of the staff [in reference to paragraph 166-167 of the section 309 notice].
138. The Agent contends that they had acted on authority from the sponsor and while the actual instruction may have been oral, the email clearly implies that this was the arrangement [in reference to paragraph 168 of the section 309 notice].
139. The Agent refers to his statutory declaration [2-3] where he accepts that he may not have been reading all of the copied correspondence as closely as he should have [in reference to paragraph 225 of the section 309 notice].
140. The Agent refers to his statutory declaration [43-46] in reference to paragraph 244-248 of the section 309 notice].

*CMP-17086 – [AIA]*

141. The Agent relies on paras 9 to 24 of the statutory declaration and incorporates those paragraphs in these submissions [in reference to paragraph 75 of the section 309 notice].
142. Regarding the authority to lodge the sponsorship and nomination of Mr [CH], the Agent contends that he did have Mr [ET]'s verbal instructions to do so.
143. The suggestion concerning the Agent's motivation in accompanying Mr [CH] to see Mr [ET] in February 2013 is highly implausible. Why would the Agent fabricate an entire sponsorship, nomination and visa application in the hope that the employer would agree to employ the visa holder after the visa was granted? The more reasonable explanation is that there was some misunderstanding between the Agent and Mr [ET] as to what the instructions were. At worst, it could be argued that the Agent was insufficiently diligent in ensuring that the arrangement was properly documented and confirmed in writing [in reference to paragraph 174 of the section 309 notice].

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<sup>41</sup> Agent's communication in respect of three employees on 457 visas who purportedly had their employment terminated on account that they required further training and with a view to sponsoring them on 442 visas.

144. The paragraph from the Agent's statutory declaration that is quoted at [177]<sup>42</sup> and referred to at [178]<sup>43</sup> is clearly intended to be a reconstruction of the conversation between him and Mr [ET], not a verbatim transcript. It is acknowledged that the usual formula "words to the effect" should have been used.
145. Concerning the withdrawal of the sponsorship, the Agent contends that he was acting on Mr [ET]'s instructions which were provided after Mr [ET] decided that he did not wish to employ Mr [CH], whether he accepted that he had originally agreed to do so or not.
146. Concerning the false documentation, the Agent is unable to answer for Ms [QN] as to why she felt it necessary to provide it. The Agent's agreement to compensate Mr [CH] reflects his sense of moral responsibility for his admitted failure to properly supervise his practice at that time. The suggestion that it was only done because Mr [CH] discovered that he had been misled is implausible, since it depends on the absurd proposition that the Agent, an experienced lawyer with a successful practice that was his sole livelihood, would take the risk of running such a case on a wing and a prayer, hoping it would all work out in the end.

#### *General Conduct*

147. Concerning the matter listed under the heading of "General Conduct" and the attached printout from an ABC news blog, although it does not appear to be part of any complaint, the Agent makes the following observations:
- i. The article is primarily about abuse of the 457 visa by employers, and largely concentrates on applications involving Indian visa applicants. The headline reference to "King of visas" gives a wrong impression that the advertisements placed by the Agent were in some way connected with Mr [DN], who was one of the employees of [TMIX]. There is in fact no evidence that the employee responded to or even saw these advertisements.
  - ii. The article also suggests that the employee contacted the Transport Workers Union (TWU). The Agent contends that it was he who referred the employee to the union because he had been taken on by [TMIX] as a trainee [49]<sup>44</sup> but was in fact being made to work as a cleaner [53].<sup>45</sup> Out of concern for his treatment, the Agent voluntarily refunded \$17,000. Any suggestion that the union obtained the refund for him is rejected.
  - iii. Following the appearance of this blog post, the Agent contacted both the ABC and the TWU to complain about the imputations in the post, which has since been withdrawn.<sup>46</sup>

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<sup>42</sup> To the section 309 notice

<sup>43</sup> To the section 309 notice

<sup>44</sup> To the section 309 notice.

<sup>45</sup> To the section 309 notice.

<sup>46</sup> Attachment B to the Agent's section 309 response

148. It is obvious that Ms [QN] would not have kept file notes that would have exposed her fraudulent conduct [in reference to paragraph 268 of the section 309 notice]. Other shortcomings in the file management generally are acknowledged by the Agent and have been rectified – see paragraphs 56 to 66 of the statutory declaration.

#### *Decision making process*

149. The submissions made in response to the section 308 notice are incorporated into these submissions in respect paragraphs [289] to [292] to the section 309 notice. In particular, we repeat the submissions made under the headings of "Classification of the complaints" and "Aggravating and mitigating factors. We also incorporate in these submissions paras 56 to 69 of the Agent's statutory declaration. In addition we refer to the new character reference at attachment C.<sup>47</sup>

#### *Findings open to the delegate*

150. Refer to the following paragraph from our response to the section 308 notice:

*"Mr Nguyen freely admits that his conduct of his business as a migration agent during the period covered by the complaints was not up to the standard required by Part 8 of the Code of Conduct, in that he failed to exercise effective control over an employee in his office in the giving of immigration advice and assistance, and to properly supervise her work. He does not admit, and the evidence does not support, any allegation of having being knowingly involved in any dishonest, deceptive, reckless or unlawful conduct."*

We submit that there is no basis for any of the suggested findings contained within paragraphs [279] to [288] to the section 309 notice.

#### *DIBP monitoring*

151. The Agent estimates that since 2012 he has had at least 80 successful employer sponsored visas application (457, ENS, RSMS) granted by the Department. During 2013, after Ms [QN] left the firm, almost all of his 457 sponsor clients with pending applications received site visits or telephone interviews by the Department, and the Department conducted thorough checks on the details and genuineness of the sponsorships and employment offers and also asked questions about the Agent and his handling of their case as the sponsor's appointed RMA. All the site visits and telephone interviews were satisfactory and most of the applications were approved.

152. It is significant that all of the complaints relate to the period of Ms [QN]'s employment with the firm. There has not been a single complaint from the Department or a client either since Ms [QN] left in January 2013 or, with one exception, before she commenced work there in 2011. The Authority refers to monitoring conducted by the Department in 2012. The Agent's firm was again monitored in 2014 and was found to be in compliance with program requirements (attachment D to the Agent's section 309 response).

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<sup>47</sup> To the Agent's section 309 response.

### **Evidence provided in response to section 309 Notice**

153. In response to the section 309 notice the Agent provided four attachments which are listed below: (adopting the Agent's titles):

1. OLSC determination of complaint from Ms [TTTT].
2. Correspondence re withdrawal of blog article "King of Visas".
3. Character reference from (XXX) Most Venerable [TQBA] of the [SB] Centre.
4. Report of DIBP monitoring in 2014.

### **Request for further documentation by the Legal Representative**

154. As part of the response to the section 309 notice the Agent's legal representative argued that there were instances where documents and information referred to in the notice on which the Authority appeared to rely had not been provided to the Agent. Further, that unless the Authority was prepared to dismiss the complaints on the basis of submissions made to date, and in the interests of natural justice, he requested the following be provided so that supplementary submissions may be made if appropriate:

1. Statement of Dr [CVT] made during site visit on 6 August 2013.
2. Witness statement of Dr [CVT] dated 25 October 2013.
3. Report of DIBP site visit to [RC] on 27 August 2013.
4. Hearing recordings and MRT decision records in relation to [RC] and Ms [TLD].
5. Full details of advice from Mr [ET] of [AIA] dated 14 February 2013.

155. Moreover, the legal representative requested that the Agent be given an opportunity to appear before the Authority in the event that the Authority was not prepared to dismiss the complaints.

156. The Authority responded to the legal representative on 14 June 2017 in relation to the requests he had put forward on 5 June 2017. Specifically indicating that it was unlikely that the Authority would dismiss the complaints or invite the Agent to appear before the Authority. In respect of the request for the above specified documentation, the Authority highlighted, that consistent with the principles of natural justice and procedural fairness, the details (substance and reasons) which formed part of the Authority's consideration had been specifically outlined within the body of the notice and that the Agent had been invited to respond on the same.

157. Nevertheless, in the interests of completeness, the legal representative was provided with:

- Dr [CVT]'s witness statement (No 2)
- The MRT decision record in relation to [RC] (No 4).
- Mr [ET]'s e-mail correspondence to the Department, dated 14 Feb 2013, with personal identifiers of third parties redacted (No 5)



158. The Authority advised the legal representative that the MRT decision record in relation to Ms [TLD] was a publically available document (Decision record: 1400936 [2014] MRTA 1743 (8 August 2014) – where paragraph 12 contains the relevant excerpt. Further, that the Authority did not have the *Hearing recordings* nor were they considered as part of the investigation or notice.
159. The legal representative was further advised that statements made during the site visits undertaken on 6 August 2013 and 27 August 2013 formed part of internal working documents of the Department. The details contained within these documents which were relevant to the consideration in respect of the Agent's conduct had, however, had been disclosed within the notice. The Agent had, therefore, been afforded natural justice and procedural fairness in respect of the same. The legal representative was invited to make further *supplementary* submissions, on the basis of the documents numbered 2, 4 and 5 and provided until 30 June 2017 to do so.
160. On the 29 June 2017 the legal representative contacted the Authority indicating that there were delays in providing further evidence on account of the Agent's overseas travel. Further, that he hoped to have evidence, in respect of at least one complaint by the following week. The legal representative went on to state:

*With reference to your statement that some of the documents requested are "internal working documents", I am not aware of that classification being an exception to natural justice. Given the seriousness of this matter, I believe that it is essential that [the Agent] be provided with all of the evidence against him in its original form, not as a summary prepared by other parties.*

161. The Authority responded to the legal representative the same day reiterating that the only relevant details contained within these documents, and which went to the consideration in respect of the Agent's conduct, had been disclosed within the body of the notice and put to his client for comment. The Agent was, therefore, afforded natural justice and procedural fairness in respect of the information the Authority was taking into account on any decision. The Authority provided the legal representative a further extension until 14 July 2017 within which to provide any supplementary response he may have.

#### **Supplementary response and evidence provided by the legal representative**

162. The Authority received the supplementary response on 14 July 2017 which consisted of a covering email from the legal representative and eleven attachments. The covering email reiterated the Agent's community activities particularly the Vietnam Marathon Run, in which he was heavily involved during the relevant period and was to provide background on the Agent's failure to properly supervise his practice at that time. This was submitted by way of both explanation for the past failure and as a mitigating factor in relation to any disciplinary action the Authority may be contemplating.

The legal representative went on to state:

*However we repeat our argument that the Tribunal should take into account that the shortcomings of that period have been rectified and there is no risk of them recurring in the future.*

163. Of the eleven attachments submitted, six were already provided to the Authority as part of the response to the section 308 notice, consisting of (adopting the Agent's titles):

1. Trinh promoted VIC Government Investment Conference in Vietnam 2016.
2. ARC Pole to Pole Vietnam Launch Invitation.
3. Asian Chamber [PF] A3 English Poster.
4. Asian Chamber Press release Pole to Pole Vietnam.
5. Support Letter from [GH] MP.
6. Support Letter from Senator The Hon [BC].

164. The five remaining attachments are listed below (adopting the Agent's titles):

1. East West Lawyer and Trinh fought for justice for local community in Hui.
2. Thank You letter from client to East West Lawyers.
3. Trinh involvement with Local community since 2010.
4. Trinh promoted NSW Government Vietnam Investment Roadshow
5. Work with DFAT

## **JURISDICTION**

165. The Authority performs the functions prescribed under section 316 of the Act.

166. The functions and powers under Part 3 of the Act and Regulations are functions and powers of the Minister for Immigration and Border Protection. The Minister has delegated his powers under Part 3 of the Act and Regulations to officers of the Authority. I am delegated under the relevant Instrument to make this decision.

## **RELEVANT LEGISLATION**

167. The functions of the Authority under the Act include:

- to investigate complaints in relation to the provision of immigration assistance by registered migration agents (paragraph 316(1)(c)); and
- to take appropriate disciplinary action against registered migration agents (paragraph 316(1)(d)).

168. The Authority may decide to cancel the registration of a registered migration agent by removing his or her name from the register, or suspend his or her registration, or caution him or her under subsection 303(1), if it is satisfied that:

- the agent's application for registration was known by the agent to be false or misleading in a material particular (paragraph 303(1)(d); or
- the agent becomes bankrupt (paragraph 303(1)(e); or
- the agent is not a person of integrity, or is otherwise not a fit and proper person to give immigration assistance (paragraph 303(1)(f); or

- an individual related by employment to the agent is not a person of integrity (paragraph 303(1)(g)); or
- the agent has not complied with the Code prescribed under subsection 314(1) of the Act (paragraph 303(1)(h)).

169. Subsection 314(2) of the Act provides that a registered migration agent must conduct himself or herself in accordance with the Code. Regulation 8 of the Migration Regulations made under the Act prescribes a Code.

170. Before making a decision under subsection 303(1) of the Act, the Authority must give the agent written notice under subsection 309(2) informing the agent of that fact and the reasons for it, and inviting the agent to make a submission on the matter.

## **Migration Act 1958 (Cth)**

### **Section 276 Immigration assistance**

- (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.
- (2) 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 document indicating that the other person nominates or sponsors a visa applicant for the purposes of the regulations; or
  - (b) advising the other person about nominating or sponsoring a visa applicant for the purposes of the regulations; or
  - (c) representing the other person in proceedings before a court or review authority that relate to the visa for which the other person was nominating or sponsoring a visa applicant (or seeking to nominate or sponsor a visa applicant) for the purposes of the regulations.

.....

### **The Code of Conduct, under section 314 of the Act**

1.10 The aims of the Code are:

- (a) to establish a proper standard for conduct of a registered migration agent;
- (b) to set out the minimum attributes and abilities that a person must demonstrate to perform as a registered migration agent under the Code, including:
  - (i) being of good character;
  - (ii) knowing the provisions of the Migration Act and Migration Regulations, and other legislation relating to migration

- procedure, in sufficient depth to offer sound and comprehensive advice to a client, including advice on completing and lodging application forms;*
- (iii) completing continuing professional development as required by the Migration Agents Regulations 1998;*
  - (iv) being able to perform diligently and honestly;*
  - (v) being able and willing to deal fairly with clients;*
  - (vi) having enough knowledge of business procedure to conduct business as a registered migration agent, including record keeping and file management;*
  - (vii) properly managing and maintaining client records;*
- (c) to set out the duties of a registered migration agent to a client, an employee of the agent, and the Commonwealth and its agencies;*
  - (d) to set out requirements for relations between registered migration agents;*
  - (e) to establish procedures for setting and charging fees by registered migration agents;*
  - (f) to establish a standard for a prudent system of office administration;*
  - (g) to require a registered migration agent to be accountable to the client;*
  - (h) to help resolve disputes between a registered migration agent and a client.*
- 1.11 *The Code does not list exhaustively the acts and omissions that may fall short of what is expected of a competent and responsible registered migration agent.*
- 1.12 *However, the Code imposes on a registered migration agent the overriding duty to act at all times in the lawful interests of the agent's client. Any conduct falling short of that requirement may make the agent liable to cancellation of registration.*

## **EVIDENCE AND OTHER MATERIAL**

171. In reaching the findings of fact I have considered the following:

1. Documents contained on the Authority's complaint files CMP-9446, CMP-17084, CMP-17085, CMP-17086 and CMP- 30483;
2. Information held by the Authority in relation to the Agent; and
3. Information held on the Department's databases in relation to the matters raised in the complaints which are the subject of this decision.

172. I have also had regard to the Agent's response to the section 308 and 309 notices, supplementary submissions and the supporting documentation provided with them.

## DECISION AND REASONS

### Finding on material questions of fact

173. Following consideration of the evidence before me, I am satisfied that the Agent has breached clauses 2.1, 2.4, 2.8, 2.9, 2.9A 2.10, 2.17, 2.19, 2.23, 5.2, 5.5, 6.1, 8.1, 8.2, 8.5 and 9.3 of the Code<sup>48</sup> and is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance.

174. I am satisfied that these breaches of the Code are of a serious nature and warrant a disciplinary decision.

175. My findings and full reasons for the decision are set out below.

### ***Provision of false and misleading information to the LSC***

#### *Former client and correspondence with LSC (former complaint CMP-9061)*

176. The Authority received information from a former client which included a statutory declaration, copy of a receipt for \$ 5000.00,<sup>49</sup> decision records from the Department and the MRT and copies of a number of newspaper advertisements associated with the services of East West Lawyers in the Vietnamese language. As mentioned elsewhere in this decision, while the former client withdrew her complaint on 19 November 2015, matters highlighted during the investigation gave rise for the Authority to consider the conduct of the Agent stemming from the information before it. Specifically, in respect of a subclass 457 visa application, the subsequent review before the then MRT, advertising associated with the migration agency, and the Agent's correspondence with the LSC. The information was discussed with the Agent on 9 July 2015, following which he submitted a number of documents to the Authority, including his correspondence with the LSC.

177. The former complainant indicated that the Agent had misled clients of immigration services through his advertising practices where he had indicated that he could assist with visas without the need to satisfy relevant requirements.

178. The complainant alleged that such was highlighted with statements made throughout the advertisements where it noted that '*no English and no qualification for applying for Business (Long Stay) or any kind of skill visa*' was required. Further, that the Agent informed her that she could be nominated and apply for a subclass 457 visa as a *Café and Restaurant Manager* even though she held qualifications in Chemistry. As a result of the advert she engaged his services and proceeded with a 457 visa application which was refused at primary stage and subsequently affirmed at review on 29 January 2014.

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<sup>48</sup> Relevant excerpts provided at Annexure C to this decision.

<sup>49</sup> Provided to the former complainant by the migration agency.

179. Moreover, an amount of \$5 000 (of the \$10 000 quoted) was allegedly paid for the service and is consistent with the receipt submitted to the Authority. Significantly, the MRT decision record contained a number of findings in respect of the fraudulent nature of the supporting documentation submitted at review. Specifically, the Diploma of Management and academic transcript, which were purportedly issued by TAFE NSW.

180. The former complainant provided the same information, in terms of the substance of the complaint, to the LSC in March 2014, essentially focussing on negligent advice, incompetence and false advertising. The LSC published the complaint to the Agent, including the complainant's statutory declaration,<sup>50</sup> and put forward a number of questions to which he was to respond. The Agent submitted a response to the LSC<sup>51</sup> on 9 May 2014.

181. The Authority discussed the details of the complaints, and the communication exchange with the LSC, with the Agent by way of telephone on 9 July 2015. On the same day and following the discussion, the Agent provided a number of documents to the Authority in relation to the correspondence between him and the LSC. Specifically, the complaint detail,<sup>52</sup> their request for a response, the Agent's response to the LSC and the dismissal of the complaint on 18 July 2014. Within his response of 9 May 2014 to the LSC the Agent stated that:

- i. The allegation is *'untrue, fabricated and malicious'*;
- ii. The *'vexatious accusation'* is *'strongly'* denied;
- iii. He has *'never advertised [his] firm's service in the alleged misleading, false and deceptive manner...'*
- iv. He has never used the wording *'NO English and no qualification for applying for Business (Long Stay) PR any kind of skill visa (sic)'*;
- v. The claim *'is totally untrue, false and malicious made up by the complainant'*; and
- vi. He *'did not advertise that way'* and *'cannot provide [the LSC] copy of it, as it never existed.'*

182. The submission put forward by the legal representative, on behalf of the Agent, noted that the allegations were previously the subject of a complaint to LSC and that the Agent's response was provided to the complainant to which she did not respond. Further, that the LSC found that there was no evidence of statutory misconduct on the part of the Agent. Furthermore, that the subsequent complaint to the Authority was withdrawn by the complainant but that the Authority has since taken it upon itself to re-instate the complaint.

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<sup>50</sup> Dated 7 March 2014 a copy of which was also provided to the Authority.

<sup>51</sup> A copy of which the Agent provided to the Authority.

<sup>52</sup> Consisting of the same details and statutory declaration dated 7 March 2014 as that provided to the Authority.

183. While it is not in dispute that the LSC had dismissed the complaint before them and that the complainant did not seek to pursue her complaint with the Authority, neither such events prevent the Authority from investigating conduct of the Agent from the information before it. While the Authority pursued the investigation in respect of this matter, through an own motion complaint, rather than having re-instated the complaint,<sup>53</sup> such is consistent with the Regulations, pursuant to regulation 9, which specifies that any person or body may make a complaint, including the Department and an employee of the Authority.

184. On 19 November 2015 the Authority arranged to have the advertisements translated into English. The translations of three Vietnamese newspaper advertisements, in association with the agency, were received by the Authority on 24 November 2015, which included the below statements (my emphasis added):

*Vietnamese Business Owners should take note... Last Chance for Vietnamese Visiting Students. Only need to complete Certificate IV or Diploma in Australia. With Intelligent, Break-through Visa Solutions... Extend Working Visa 457 for 4 years. **No English requirement...** (Newspaper advertisement dated 11/05/2012);*

*BUSINESS 457 VISA'S Available Now! SPONSORED 457 PROGRAM... East West Lawyers can sponsor over 100 industries<sup>54</sup> and **we don't need English...** Enjoy the Privileges of Doing Business with East West Lawyers..." (Newspaper advertisement dated 03/08/2012); and*

*457 KING OF ALL VISAS... Employer sponsored + Real Work + Visa 457 = Permanent Visa... WE MAKE IT HAPPEN... East West can sponsor over 100 industries<sup>55</sup> and **we don't need English...** Enjoy the Privileges of Doing Business with East West Lawyers... (Newspaper advertisement dated 26/04/2013).*

185. The Authority put the translations to the Agent for comment as part of the section 308 notice<sup>56</sup> seeking his explanation on the advertisements which did appear to suggest that English was not required to meet the criteria for the grant of a subclass 457 visa. Further comment was sought in relation to his statements to the LSC where the Agent denied advertising in a misleading and deceptive manner and argued he was unable to provide them with copies of the advertisements as such did not exist. The Agent had not addressed this specific issue with his section 308 response but did so within the response to the section 309 notice.

186. The submission put forward by the legal representative, argued that the advertisements were in part incomplete and in part incorrect and that the claim in respect of the 'no English requirement' has to be seen in context. Specifically, that the regulations in force before July 2013 did not require evidence of English language for any but a few occupations and that the translation for the advertisement of the 03/08/2012 contained an inaccuracy.

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<sup>53</sup> As put forward by the Agent's legal representative.

<sup>54</sup> Not 'countries', as was transcribed within the s308 and subsequently the s309 notice.

<sup>55</sup> Ibid.

<sup>56</sup> Copies of the newspaper advertisements were provided to the Agent with the s308 notice.

187. It was argued that the phrase transcribed by the Authority with the word 'country' should have read 'industries' and that the correct translation reflected the regulations in force at the time and the advertisement was therefore not misleading. The relevant phrase being (my emphasis added):

*'...East West can sponsor over 100 industries<sup>57</sup> and **we don't need English...**'*

188. Further, the occupation under which the former complainant had applied, *Café and Restaurant Manager*, did not require evidence of English language proficiency at the relevant time and the Agent's response to the LSC did not contain any false statement.

189. Whether or not the actual occupation for which the former complainant was nominated required her to demonstrate her English language proficiency or was exempt from such is not the matter in question. The central issue turns on whether or not the advertisements did exist and whether they were misleading, or could be taken to be misleading, by those to whom they were directed, that is clients of migration services.

190. The Authority does not contend that the word 'industries' should have been reflected when transcribing excerpts from the translated text. This does not, however, diminish the suggestion within the advertisements that English was not a requirement to meet the criteria for the grant of a subclass 457 visa. While the requirement, as it applied at the time of the advertisements, did provide for a number of exemptions and a category where an applicant would not need to demonstrate their English language proficiency<sup>58</sup> through the provision of an IELTS test, this was highly dependent on the circumstances of the visa applicant, the nominated occupation, and the base salary that applied.

191. Even if I were to accept Mr [MJ]'s assertion that the inclusion of the word 'industries' within two of the three advertisements under discussion made them sufficiently clear to consumers of immigration services that exemptions to demonstrating English language proficiency applied to certain industries and under certain conditions, the argument is difficult to sustain with all the advertisements. Specifically, with the advertisement of 11 May 2012 wherein a single line broadly indicates (my emphasis added):

*'...Extended Working Visa 457 for 4 years. **No English requirement**'*

192. In light of the information before me I find that the manner in which the Agent had advertised his services was misleading to consumers on the requirements for visa applications, consistent with the statements put forward by the former complainant. Furthermore, that the statements made to the LSC, in his response of 9 May 2014, were likewise misleading and deceptive given his denial on the existence of the advertisements and on the content contained within them.

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<sup>57</sup> Not 'countries', as was transcribed within the s308 and subsequently the s309 notice.

<sup>58</sup> Where the base salary of the nominated occupation was above the base salary specified in a legislative instrument.



193. The Agent, in his response to the LSC, and his legal representative, in his response to the Authority, both asserted that the Agent has never advertised using the specific wording which was quoted by the complainant, and therefore the allegation was untrue. Further that given the Agent *'did not advertise that way'* he cannot provide a copy of it *'...as it never existed.'* Not unlike the legal representatives' argument that matters need to be considered in context, I am of the view that the former client had put forward her interpretation on the manner in which the agency had advertised their services. Specifically, that such served to mislead clients through the broad statements to which the clients were ultimately drawn and where they could form the view that they would achieve successful visa outcomes whatever the circumstances. I note that the former client had indicated that she too had engaged the services of the Agent as a result of the advertisement. She was ultimately unsuccessful in securing her 457 visa, as the delegate was not satisfied that the applicant had the skills at a commensurate level required for the approved nominated occupation, a situation she may not have found herself in if not for the advertisement.

194. In consideration of the matters discussed above I am satisfied that the Agent had engaged in advertising practices which likely misled clients of immigration services and had failed to respond to the Authority on this matter in a reasonable time when requested to do so through the section 308 notice issued in March 2016. Furthermore, that he provided misleading statements to the LSC when he suggested that he could not provide copies of such advertisement as they did not exist. While the exact words and format within which they were applied may have varied throughout the advertisements, I am satisfied that there were advertisements containing the words *'No English requirement'* which would have been available to the Agent and could have been provided to the LSC. It follows, therefore, that I find the Agent in breach of clauses 2.1, 2.10 and 9.3 of the Code.

### ***Lodging applications with no hope of success***

#### ***Former client (former complaint CMP-9061)***

195. From the information before the Authority, it is not in dispute that the Agent was the representative migration agent for a former client during which an application was submitted for subclass 457 visa on 9 September 2011. The visa application was in relation to a position nominated as a *Café and Restaurant Manager* at a time when the applicant did not have trade or professional qualifications relevant to the proposed activity and, according to the applicant, had not completed a skills assessment nor did she have on the job training.

196. As the representative migration agent, the Agent stated that the applicant held a Bachelor of Science (Chemistry) and was studying a Master of Business Management, in his communication of 5 September 2011 with the Department. In his subsequent communication of 13 October 2011 he argued that the applicant is the holder of a Bachelor Degree, which is higher than the skill level required by ANZSCO and has worked for the sponsor since April 2010, therefore has the skill to perform the position. On 20 October 2011 the delegate refused to grant the visa as the delegate was not satisfied that the applicant had the skills on a commensurate level required for the approved nominated occupation.

197. An application for a review of the decision was submitted to the MRT on 8 November 2011, where the Agent was again appointed as the representative agent. On 29 October 2013, in response to the MRT's request<sup>59</sup> the Agent provided information that the applicant had the skills necessary to perform the occupation, and submitted a certified copy of a *Degree of Diploma of Management in Public Policy*<sup>60</sup> and a certified copy of an Academic Transcript<sup>61</sup> for the applicant with a date of birth listed as 'XX/XX/XXXX' purportedly issued by Sydney TAFE. The MRT provided the Agent with an extension of time within which to provide the documentation on account of his request of 27 September 2013, where he had indicated that the applicant had been undertaking a Diploma of Hospitality Management and was awaiting the issue of the Diploma Certificate within 6 to 8 weeks. The extension was granted until 30 October 2013 in line with the request.

198. From the information before the Authority, I accept that applicant did not have skills on a commensurate level for the nominated occupation either at the time the application for the subclass 457 visa was lodged with the Department or at the time the review of the primary decision was submitted to the MRT. I am therefore satisfied that the Agent lodged applications with no prospect of success and find him in breach of clause 2.17 of the Code.

#### ***Provision of fraudulent documentation to the MRT***

##### ***Former client (former complaint CMP-9061)***

199. As already discussed above, the Agent provided a number of documents to the MRT on 29 October 2013, in response to their request<sup>62</sup> for information which would demonstrate that the applicant had the skills necessary to perform the nominated occupation. Specifically, the Agent had provided a certified copy of a *Degree of Diploma of Management in Public Policy*<sup>63</sup> and a certified copy of an Academic Transcript<sup>64</sup> for the applicant with a date of birth listed as 'XX/XX/XXX' both purportedly issued by Sydney TAFE.

200. Following an investigation by the MRT into the documentation submitted, the MRT was informed that:

- i. Sydney TAFE does not refer to Diplomas as Degrees;
- ii. The Certificates of Completion issued by Sydney TAFE do not contain features consistent with those submitted to the MRT;
- iii. Sydney TAFE does not offer a *Degree in the Diploma of Management*; and
- iv. Sydney TAFE has no record of the applicant having studied with them.

201. It is not in dispute that the Agent had contacted the MRT in September 2013 seeking an extension of time within which to submit documentation to evidence that the applicant had the skills necessary to perform the occupation for which she was nominated.

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<sup>59</sup> Dated 11 September 2013.

<sup>60</sup> Dated 17 July 2013 – at folio 44 of the MRT file.

<sup>61</sup> Folio 43 of the MRT file.

<sup>62</sup> Dated 11 September 2013.

<sup>63</sup> Dated 17 July 2013 – at folio 44 of the MRT file.

<sup>64</sup> Folio 43 of the MRT file.

202. The Agent had submitted two documents to the MRT, which were purported to have been issued by Sydney TAFE and were found to be fraudulent.

Namely:

1. *Degree of Diploma of Management in Public Policy*; and
2. *Academic Transcript* for the applicant with a date of birth listed as 'XX/XX/XXXX'.

203. It is an offence under the Act to present or cause to be presented a document which is forged or false to a person exercising powers or performing functions under the Act.<sup>65</sup> The MRT decision record details the process undertaken to establish that the two documents which the Agent had submitted to the MRT on 29 October 2013 were fraudulent.

I am of the view that even if the Agent were to put forward an argument that the documentation was provided to him by the applicant that there nevertheless existed sufficient indicators to prompt a prudent migration agent to undertake basic verification checks so as to confirm the provenance of the document.

204. The Agent strenuously denied that he was aware that the documentation was not genuine and has not conceded that the documents were so obviously counterfeit that '*...any reasonable person...*' would have questioned them. The Agent's legal representative argued that the Authority's suggestion that "any reasonable person" would have questioned the documents, or that a "prudent migration agent" would have undertaken checks are an insufficient basis for the serious inferences of criminality and falls short of the standard required under the well-established Briginshaw principle.<sup>66</sup> Furthermore, the words "Diploma of Management" are prominently displayed on the page, whereas the words "degree of" appear in much smaller type on a different line.

205. I accept that the rule in Briginshaw provides relevant guidance material for decision makers and that administrative decision makers must act according to substantial justice and the merits of the case. While every effort is made to meet the standard established in the rule of evidence derived from the Briginshaw proceedings, an administrative decision is not, however, bound by rules of evidence.<sup>67</sup>

206. As the holder of an Australian degree qualification and a legal practising certificate, it is not unreasonable to expect that the Agent should have been alerted and prompted into proactive action upon receipt of an award which was purportedly a *Degree of Diploma of Management in Public Policy*. It follows that any associated document would likewise be questionable. I am of the opinion that a reasonable person in a like position to that of the Agent, educated in Australia, would have questioned such a document as was the case with the members of the MRT.

It would have required no more than a conversation to ascertain with relative ease that no such course was offered and no such degree was in existence. A review of the Australian Qualifications Framework (AQF)

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<sup>65</sup> Refer to section 234 of the Act.

<sup>66</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336.

<sup>67</sup> Refer to section 311 of the Act.

would have provided further insight, if such were required, to ascertain that a Degree and a Diploma are separate and standalone qualifications in their own right. Further, that a Bachelor Degree sits at level 7 of the AQF, while a Diploma sits at level 5. Conversely, however, the Agent elected to accept the documents and present them to the MRT for consideration.

207. Consequently, I am satisfied that the Agent either knew or ought to have reasonably known, that the documentation he had submitted in support of the application under review was fraudulent. Further, that the information contained within the documentation was false and misleading in a material particular and was submitted with a view to securing a favourable outcome for his client. From the information before me I am satisfied that the Agent had not acted in accordance with the law or in the legitimate interests of his client and had acted in breach of clauses 2.1, 2.4, and 2.9 of the Code.

### ***Provision of false and misleading information to the Authority***

#### ***Employment of Ms [QN]***

208. The Authority requested a copy of Ms [QN]'s employment contract with East West Lawyers, as part of the section 308 request. A copy of such was not received and the Agent stated that he did not enter into a written employment contract with her.

209. Notwithstanding the unusual circumstance that two legally qualified persons would elect to refrain from entering into a written contract, accepting the Agent's statement that such was the case, the only details surrounding Ms [QN]'s employment with East West Lawyers available to the Authority is dependent upon the statements the Agent had made to the Authority within his statutory declaration<sup>68</sup> and elsewhere.

210. The Agent has asserted that Ms [QN] commenced her employment with East West Lawyers in late 2010 while a law student and that she was admitted to practice in around March 2011 and '*became a registered migration agent about that time also.*' The Authority's records indicate that Ms [QN] was first registered as a migration agent on 15 November 2011, some eight months later, and was therefore precluded from providing immigration assistance, lawfully, prior to this date.

211. According to the Agent's letter to the Authority, dated 16 December 2013, Ms [QN] resigned from East West Lawyers on 1 May 2013, following three months maternity leave, which commenced 28 January 2013. In the Agent's statutory declaration, dated 26 July 2016, some two and a half years later, he indicated that Ms [QN] was to commence maternity leave on the 7 February 2013 but effectively did not return to work after the 31 January 2013 and that after numerous attempts he was not able to contact her since that time.

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<sup>68</sup> Dated 26 July 2016

212. Within his communication to the LSC, dated 10 July 2014, the Agent advised that Ms [QN]'s last day with his firm was in late January 2013, following which she had three months paid maternity leave and that he had agreed to provide her a further two to three months of rest time post the birth of her first child. Further, the Agent stated that he had offered her '*...to come back and resume her employment with [his] firm either on full time or part-time basis, it was up to her choice (sic).*'

213. The Agent went on to state:

*Her last day of employment with my firm was 28 January 2013. After that date, she never contact me, did not return my call. I did ask her via email of her intention of coming back to resume her employment with my firm but she never replied or picked up her phone. She effectively abandoned her employment with us without notice and never came back since late January 2013. I haven't been able to contact her since late January 2014 till now July 2014.*

214. Given the conflicting statements it is difficult to conclude with certainty the exact date Ms [QN] had ceased her employment with East West Lawyers. Taking into account the different versions, Ms [QN]'s last day of employment appears to have been sometime between 28 and 31 January 2013.

215. Within the Agent's statutory declaration he stated (my emphasis added):

*When I came back from Vietnam at the end of January 2013, I conducted a full review all the files done by my employees, and the review was satisfactory **excepts for some files handled by Ms [QN]** (sic). I quickly noticed that there were some irregularities in the way the business had been running. I didn't really have a chance to go into things with [QN], since she was pregnant and was due to go on maternity leave from 7 February 2013. Actually she did not return to work after 31 January 2013. Despite numerous attempts, I have not been able to contact her since.*

216. Given the Agent's statement within his statutory declaration, dated 26 July 2016, that he had no contact with Ms [QN] since late January 2013 is it unclear how she had resigned from East West Lawyers on 1 May 2013 as indicated by the Agent to the Authority in a letter dated 16 December 2013.

217. According to information before the Authority, the Agent had returned from Vietnam on 22 January 2013. The Agent stated that upon his return from Vietnam he proceeded to review all the files for his employees which is when he identified issues with some of Ms [QN]'s files. It is unclear from his communication with the Authority what may have prompted the significant file review at this particular time and given his statement that Ms [QN] was a good worker, fast learner and '*...quickly earned [his] confidence and trust.*' Particularly, given that any adverse information from the Department, or other parties, does not appear to have been raised with the Agent until 12 July 2013, when he was contacted by the AFP and by the LSC on 6 June 2014 in relation to the same matter.

218. Nevertheless, according to the Agent's statutory declaration he was aware that '*irregularities*'<sup>69</sup> had occurred in Ms [QN]'s caseload prior to her maternity leave yet elected not to raise these issues with her before her departure in January 2013. Moreover, during March 2013 the Agent became '*...very worried that something unlawful had been done...*'<sup>70</sup> when a visa approval for Ms [HB] was emailed to Ms [QN], which was re-directed to him on account of her maternity leave. Despite these concerns the Agent provided a statement to the LSC in July 2014 which indicated that Ms [QN] was provided an option to return to his firm on either a full-time or part-time basis. Such an arrangement would appear inconsistent with an employer who had identified irregularities within the caseload which were of significant concern, prior to the employees' departure.
219. Within his response to the section 309 notice, the Agent's legal representative argued that the Agent '*...became "suspicious" which does not mean that he immediately formed a view that there was anything wrong with the case. His first response was to attempt to contact Ms [QN], without success, and then spoke to Dr [CVT] about it in early June*'. Furthermore, that it is understandable that the Agent wanted Ms [QN]'s explanation in the first instance and when such could not be obtained he explained the situation to Dr [CVT] and '*...took steps to have the fraudulent application reversed*'. I do not accept that the Agent could have contemplated that there could be any reasonable or plausible explanation in this circumstance, particularly where he had already expressed the view that he was worried something unlawful had been done.
220. Moreover, the Agent's assertion that he approached Dr [CVT] in June 2013, conflicts with Dr [CVT]'s statement where he stated that he was not aware of the matter until it was raised with him by the Department during a site visit on 6 August 2013. Given that the Agent contacted the Department on 17 June 2013<sup>71</sup> indicating that the sponsor had requested to withdraw the nomination in association with Ms [HB], as she had failed to commence her employment, there would appear no logical reason for the sponsor to deny any knowledge of the very same application some two months later. Had the events transpired as claimed, the sponsor would likely have confirmed such during the site visit.
221. Within the section 309 response, the Agent's legal representative advanced the argument that while it may have been open for the Agent to give the Department further details of what had happened, it is not apparent that he was under any strict obligation to do so. His first duty was to his client and there was no intention to mislead the Department further, as neither the Agent nor the sponsor were directly responsible for the fraud. I am of the opinion that where the Agent could form the view that it was an acceptable practice to request the withdrawal of an application which he concedes he knew was fraudulent, without disclosing such to the Department, is a reflection upon his judgement, integrity, and his fitness and propriety to perform the functions of a registered migration agent.

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<sup>69</sup> Paragraph 7 to the Agent's statutory declaration.

<sup>70</sup> Paragraph 31 to the Agent's statutory declaration.

<sup>71</sup> Two months before the site visit.

222. As already mentioned, a number of files requested by the Authority appeared to be scant and incomplete. One such file related to Ms [HB]'s subclass 457 visa application. According to departmental records there was an exchange of communication between Ms [QN] and the departmental case officer, which did not form part of the Agent's submission to the Authority. Departmental records reveal that Ms [QN], else someone purporting to be Ms [QN], contacted the Department on the 18 February 2013 by way of email<sup>72</sup> seeking an update on the progress of Ms [HB]'s visa application. A response was sent to the same email address by the case officer on 19 February 2013. According to the Agent's statement, Ms [QN]'s maternity leave had commenced some weeks prior to this exchange and he was already aware of issues within her caseload. It would therefore appear inconceivable that given these concerns, Ms [QN] would have retained access to the agency email account.

223. Moreover, within the Agent's response to the section 308 notice, by way of statutory declaration, he stated that he was first made aware of the applications in association with Ms [HB] when the visa grant approval was received in Ms [QN]'s email account during March 2013, as her emails were redirected to him on account of her maternity leave. According to the Agent's own admission, therefore, it was him and not Ms [QN] who had access to her e-mail account post her maternity leave. It follows, that it was the Agent who likely engaged in a communication exchange with the Department in February 2013 and was therefore aware of the applications in association with Ms [HB] prior to the period he had disclosed to the Authority.

*Knowledge of fraudulent conduct in association with the migration agency caseload*

224. In his statutory declaration, the Agent asserted that he had no knowledge that a number of applications which were lodged with the Department were done so without the authority of the sponsor, until after Ms [QN]'s departure, and that fraudulent documentation was submitted in support of them.

225. According to the records before the Authority, however, the Agent had contact with one sponsor on 9 October 2012 and follow on correspondence of 15 and 22 October 2012 which reveal that concerns in relation to subclass 457 lodgements were highlighted with the Agent on a number of occasions. Throughout that correspondence the Agent was explicitly made aware that the sponsor had no knowledge of a significant number of subclass 457 nomination and visa applications. The information included a list of persons affected and the fraudulent nature of the employment documentation which was submitted. In light of the fact that Ms [QN] effectively ceased her employment with the agency at the end of January 2013, according to the Agent's own account, this would indicate that he was aware of the fraudulent conduct prior to Ms [QN]'s departure, in contradiction to the statements made to the Authority.

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<sup>72</sup> Sent from address: quyen@eastwestlawyers.com.au

226. In light of the matters discussed above, and the inconsistencies identified, I consider that the statements the Agent has made to the Authority, and the information he has elected to omit, were a deliberate attempt to mislead the Authority. Further, that such was done with a view to distance himself from the serious misconduct involving significant and overt systemic fraud and deception, by apportioning the blame for such onto a junior former employee. Consequently, I find that the Agent had acted in breach of clauses 2.1 and 2.9A of the Code.

***Acting without the authority to bind a sponsor***

***Applications on behalf of [HI] and Ms [HB]***

227. Departmental records reveal that a nomination on behalf of business sponsor [HI] and a subclass 457 visa application on behalf of Ms [HB] were lodged with the Department on 5 December 2012. Ms [HB] was purportedly nominated for a Customer Service Manager position by [HI]. The form 956, dated 25 August 2012, submitted with the visa application indicated that the Agent was appointed as the primary migration agent and that Ms [QN], his former employee, was listed as the secondary migration agent.<sup>73</sup> The nomination and associated visa application were granted on 10 December 2012 and 13 March 2013 respectively.

228. The Agent, through his legal representative, had indicated that he sought to rely on the response provided within his statutory declaration<sup>74</sup> in respect of this matter and had put forward supplementary arguments within his section 309 response. Matters in relation to accessing the documentation under discussion, and the associated natural justice provisions, have already been addressed elsewhere within this decision and I do not propose to revisit them here.

229. In his response to the section 308 notice the Agent advised that he had assisted Dr [CVT] with a previous application around middle of 2012, at which time he was provided with documentation, including his letterhead and business information in electronic form. Furthermore, he argues that Ms [HB] was a client of Ms [QN] and that during an appointment with Ms [QN] in August or September of 2012, Ms [HB] had consulted with the Agent in relation to issues with her student visa and her options for residency in Australia. At that time she had provided the Agent with employment and education background for herself and her spouse and he had informed her that her only option was to locate a sponsor who would be willing to employ her. The Agent recalled that she had a background in medical secretarial work and that he saw [them]<sup>75</sup> with Ms [QN] on subsequent occasions but he was not consulted further.

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<sup>73</sup> Attachment 2 of the s 308 notice - CMP-9446 Form 956 Mr Hoan NGUYEN primary migration agent.

<sup>74</sup> Provided with his section 308 response

<sup>75</sup> Presumably Ms [HB] and her spouse.



230. The Agent asserted that he had no knowledge of the sponsorship or nomination submitted by Ms [QN] on 5 December 2012 as he had departed Australia on the same day in order to spend two months in Vietnam working on a Red Cross Charity Run project. The Agent did not contend that the applications were lodged without the knowledge or authority on part of Dr [CVT], using information and documents that were already held on his agency records, given previous business dealings he had had with Dr [CVT]. Moreover, according to his response to the section 308 notice, it does not appear in dispute that the applications contained false and misleading information and fraudulent documentation, and what remains in dispute is the Agent's role with the applications and his knowledge of the same.
231. According to the Agent's statutory declaration, he alleged that the matter first came to his attention at the time the visa approval was received in Ms [QN]'s email account during March 2013, as her emails were redirected to him on account of her maternity leave. Further, that a review of the file aroused his suspicion as he did not recall [HI] seeking to sponsor Ms [HB] prior to the Agent's departure from Australia. The Agent stated that while he had attempted to contact Ms [QN] in relation to the matter she refused to have a discussion with him.
232. The Agent went to state that he was concerned that '*...something unlawful had been done by [QN]...*' and '*... [he] probably should have acted earlier, but [he] still hoped to be able to sort it out if [QN] gave [him] an explanation.*' Why the Agent had failed to act immediately upon having concerns that an '*unlawful act*' had likely transpired within his agency and was then of the view that such might be '*sorted out*' following an '*explanation*' remains unknown.
233. As already discussed above within this decision, the Agent has had direct interactions with the Department in relation to the applications associated with [HI] and Ms [HB], which transpired between 17 June 2013 and 6 September 2013, a period before and after the Department undertook a routine site visit to the [HI] business premises. Particularly, where during the course of the visit the Director, Dr [CVT] had advised Departmental officers that he did not know a person by the name of Ms [HB], nor did he sponsor her in relation to a subclass 457 visa. Moreover, the communication with the Department transpired at a time well after the Agent's then employee had left his agency.
234. While the Agent asserts that he no knowledge of the applications under discussion, he has failed to address why he had not alerted the Department, or the sponsor, of any concerns, when he had received the notification of the visa approval in March of 2013. More significantly, why some three months had passed before he advised the Department, on 17 June 2013, that the sponsor had instructed him to withdraw the sponsorship and nomination associated with Ms [HB]<sup>76</sup> as she had failed to commence her employment. Dr [CVT]'s statement asserts that he provided no such instruction nor did he appear to have any knowledge of the communication.

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<sup>76</sup> Attachment 3 of the s 308 notice - CMP-9446 Email from Agent - Withdrawal of sponsorship - Ms [HB].

235. Notwithstanding that the Agent claims to have advised Dr [CVT] of the error, on the second or third of June 2013, Dr [CVT] provided a witness statement indicating that he had no knowledge of the applications prior to the 6 August 2013, when the site visit was conducted. From the statements made by Dr [CVT] during the site visit on 6 August 2013 and his formal witness statement made on 25 October 2013, I am satisfied that Dr [CVT] had no knowledge of the applications submitted and subsequently approved in relation to Ms [HB]. Further, that he neither instructed nor provided the documentation in relation to the same.
236. Furthermore, it appears highly unlikely, that a person seeking the Agent's guidance on immigration assistance and on her options to remain in Australia, as was the case with Ms [HB], would then suddenly cease to have any further involvement with the Agent, the principal of the agency, and elect to only engage with an employee of his agency. It is just as unlikely, that a junior employee would engage with a client, who consulted with the Agent on immigration options, and continue to provide immigration assistance to her without the Agent's direction, knowledge, or agreement.
237. Particularly, given the Agent's comment that he had seen Ms [HB] in the office on a number of occasions when consulting with Ms [QN]. Given such, I reject the Agent's assertion that he did not have knowledge of Ms [HB]'s application and am satisfied that he was a party to the arrangement from the outset and that his employee likely worked under his direction in relation to the matter.
238. In light of the above discussion I find that the Agent, and any staff member in his employ involved with the relevant applications, had acted without authority when submitting the nomination and visa applications to the Department.

*Applications associated with [TMIX] and a number of visa applicants*

239. From February to September of 2012, the Agent's employee Ms [QN] submitted fourteen subclass 457 nomination applications on behalf of [TMIX] and the respective visa applications. The Department referred information to the Authority, following concerns raised during a business monitoring activity in respect of the business sponsor which resulted in a site visit, interview, and ongoing interactions with company representatives in relation to a number of visa applicants.
240. The sponsor was informed of the routine monitoring activity in September 2012 and the Agent was appointed as the representative migration agent for the purpose of the monitoring activity the same month. A site visit was undertaken to one of the business premises on 4 October 2012 during which sponsorship obligations, including return travel arrangements and migration agent costs, were discussed. Records indicate that the Agent was present during the site visit, as was the Director Mr [MS] and a company employee.

241. Subsequent to the site visit, the sponsor had provided a number of documents to the Department when he was made aware that some applications for subclass 457 visas were lodged without his consent, in respect of a number of Vietnamese employees, and where the documentation submitted in support of certain applications did not reflect that which was held on file. Furthermore, they advised that while they had placed their trust in the Agent for professional assistance, he had not returned their calls and they intended to cease his services given their dissatisfaction with that provided.
242. The sponsor presented a letter he had sent to the Agent, dated 15 October 2012, which discusses a conference the Agent had with the sponsor on 9 October 2012, five days following the site visit, and where the nominations were purportedly discussed. Most relevantly, the business nominations and subclass 457 visa applications which were lodged, and in some cases granted, of which he was not aware and which transpired without his approval. The letter reveals that during this meeting the Agent advised the sponsor that he would '*sort out the applications and withdrawals.*'
243. Contact from East West Layers and the Department on the 9 October 2012 reveals that two nominations and visa applications in respect of Mr [VTKT] and Ms [MTL] were withdrawn on the day, and that such was undertaken by two different employees of the agency, Mr [TKL] and Ms [QN]. The letter of the 15 October 2012 also specifies that approval for subclass 457 visas only extended to six employees, namely [RH], [TW], [HS], [MC], [JJ] and [GP]. Furthermore, that all others not authorised, must have their subclass 457 visa applications withdrawn and/or removed.
244. On the same day the letter was dated, 15 October 2012, two nominations in respect of Ms [KVT] and Mr [HT] were withdrawn by Ms [QN]. From the information before the Authority, the Agent appears to have held a conference with the employer on 9 October 2012, which was followed by two letters sent from the employer to the Agent, dated 15 and 22 October 2012.
245. Given that the primary information in respect of the issues was provided to the Agent, in some form, it may be reasonable to conclude that the employees' subsequent actions in relation to the applications and withdrawals were likely done on the Agent's direction.
246. It is not in contention, that within ten days of the site visit no less than four nominations, lodged on behalf of [TMIX] were withdrawn, followed by a further five on 26 October 2012. The actions are, therefore, indicative that the applications were not endorsed from the outset, consistent with the sponsor's assertions. Moreover, the genuine contractual arrangements and rates of pay would not have satisfied the requirements for a subclass 457 visa.

247. In the Agent's response to the Authority, he indicated that he first established contact with [TMIX] through a colleague who informed him that the company was in search of a *'...good lawyer and new staff.'* The Agent stated that he first met Mr [MS] in or around January 2012 at his [XX] business premises in [XX]. According to the Agent's account the business was in rapid expansion and in need of a lot of staff and he had advised the Director that he *'...knew of a number of Vietnamese students who had completed their study in Hospitality, had some experience in commercial cookery and hospitality management who might be looking for work, and maybe he could look them over.'* The Agent stated that he also recalled Mr [MS] informing him that they had sponsored staff on 457s in the past and prior to engaging his services.

248. Within his statutory declaration the Agent also stated that he had discussed the difference between the salary of a trainee to that for a 457 employee and that he recalled informing Mr [MS] and Mr [RL] (the Operations Manager) that:

*'...during the training period, they could pay the staff on a trainee salary whilst waiting for their 457 visa approval, but after the visa 457 granted (sic) and the full-time employment contract became effective, they would have to pay the 457 sponsored workers at the full salary as per the employment contract...'*

249. The Agent reiterated in several responses that 2012 was a difficult year for him on account of his private life and his involvement with the Red Cross Vietnam Charity Run, and that he:

*'...basically handed day to day carriage of this matter over to [QN]. At Mr [MS]'s suggestion, [QN] worked directly with Mr [RL].'*

250. The Agent asserted that it was his understanding that only the staff that were to be paid at full rates would be nominated for 457 visas, and the others would apply for 442 visas and that it *'...only became clear to [him] after [QN] left that 457 nominations were lodged under the company's name for the trainees as well. I understand it to be alleged that this was done without management's knowledge. As I was not involved in discussions between [QN] and Mr [RL], I cannot say what took place, or what she explained to him about the nomination process.'*

251. While the Agent alleges, in his statutory declaration, that it only became clear to him that 457 nominations were lodged for the trainee employees after Ms [QN]'s departure, and that he was not privy to the discussions between Ms [QN] and Mr [RL], the records before the Authority appear to indicate otherwise.

252. Specifically, in light of the fact that the Agent was copied in on the correspondence between Ms [QN] and Mr [RL] when matters of payment and employment positions were under discussion in early March 2012. The correspondence reveals that Mr [RL] had made it clear that offering trainees the same amount as the managers did not fall in line with their structure and requested Ms [QN] to confirm the details with the Agent. Ms [QN] subsequently responded to Mr [RL] that it was fine *'... the new trainees will work 35 hours a week on the trainee rate in line with you (sic) company structure and not as a manger'* and requested a basic contract so as to organise the trainees to sign them. As the Agent was copied in on this e-mail, it is reasonable to conclude that he were aware of the discussion and the circumstances surrounding the payments.

While the Agent accepted that he should have been more diligent in reading his email correspondence he maintained that Ms [QN] was responsible for all the applications as directed by Mr [RL]. The Agent failed to address the matter where Mr [RL] specifically requested Ms [QN] to confirm the details of hours and payments with him.

253. Moreover, the Agent's contact with the sponsor on 9 October 2012 and correspondence from the sponsor of 15 and 22 October 2012 indicate that concerns in relation to the subclass 457 lodgements were highlighted with the Agent on a number of occasions, prior to Ms [QN]'s departure, in contradiction to his statements. At each point the Agent was explicitly made aware that the sponsor had no knowledge of a significant number of subclass 457 nomination and visa applications. With each subsequent correspondence more information came to light, including a list of persons affected, the fraudulent nature of the employment documentation, as well as the specific details of the inconsistencies identified within the employment documentation, including position descriptions and rates of pay.

254. In contrast to the statements made by the employer the Agent has asserted that the sponsor was aware of the status of the 457 applications as Mr [RL] was informed, on 30 May 2012,<sup>77</sup> that a 457 visa was granted to Ms [TMVH] and Ms [TNDH]. A review of the correspondence indicates that it was instigated by Mr [RL], following a request by Ms [NS] for a detailed report. Furthermore, the Agent has indicated that the employer had '*...previously sponsored workers on 457 visas using another migration agent, and so [was] fairly familiar with the process.*' What knowledge and employer has on migration matters is not a matter the Authority.

255. What is relevant, however, is that employers generally engage migration agents for the purpose of immigration assistance and are therefore dependent on that advice, as was the case with this employer. Any knowledge the employer may have had on visa requirements and the associated obligations for the different subclasses, does not absolve a migration agent from providing the appropriate advice for which they were engaged. From the information before the Authority, it appears that East West Lawyers were engaged to provide a range of legal and immigration services and had assisted with the recruitment of employees for the company.

256. The Agent contends that while he had no knowledge of the details, he believed that all the documentation submitted to the Department was approved by Mr [RL] and that Mr [MS] '*...had instructed that all dealings go through the Operations Manager, Mr [RL].*' The Agent directed the Authority to an annexure provided with the section 308 response, marked F, which according to the Agent confirmed the arrangement. The procedure was further explained within the section 309 response as one where the sponsor, Mr [MS], appointed Mr [RL] as the authorised person to make all the relevant decisions while the Agent assigned all the work from the migration agency end to Ms [QN].

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<sup>77</sup> Annexure E to the section 308 response.

257. A review of the annexure by the Authority has failed to identify email correspondence confirming this arrangement, albeit it does show that there was ongoing contact in relation to employee recruitment and migration matters between Mr [RL] and Ms [QN]. While this correspondence confirms that the visa grants may have been communicated to the company at that time, it does not evidence that Mr [RL] had any authority to bind the entity, or that he was aware that the applications for subclass 457 visas were submitted for the trainees in the first instance. Nor does it explain why the sponsor, Mr [MS], would then subsequently request that all the applications which he had not personally approved be withdrawn.<sup>78</sup>

258. The Agent, in his section 309 response, maintained that they had acted on authority from the sponsor and that while the actual instruction may have been oral the email clearly implies that this was the arrangement. Further, that the sponsor diverted all the blame on the Agent and his company only when issues arose from the Department's monitoring process. In light of the fact that the sponsor indicates otherwise, and in the absence of evidence to the contrary, I cannot be satisfied that the Agent had received such an instruction as claimed.

259. On the information before the Authority, I am satisfied that the Agent and any staff member in his employ involved with the relevant applications working under his direction, had acted without authority when submitting a number of nomination and visa applications to the Department, on behalf of [TMIX].

*Applications associated with [AIA] and Mr [CH]*

260. Departmental records reveal that a nomination on behalf of business sponsor [AIA] was submitted on 12 July 2012 and a subclass 457 visa application on behalf of Mr [CH] on 30 July 2012. The applications included an unsigned '*Letter of Offer of Employment*' dated 23 May 2012, from the Director of [AIA], Mr [ET]. The letter indicated that Mr [CH] was nominated for the position of '*Sales and Marketing Manager*' with a salary of \$55,000 per annum. On 14 July 2012, the Department approved the nomination application and on 18 September 2012 Mr [CH]'s subclass 457 visa was granted, following which he arrived in Australia on 12 January 2013.

261. According to Departmental records, on 12 February 2013 the Agent had advised the Department, by email, that the sponsor had instructed him to withdraw the sponsorship for Mr [CH]<sup>79</sup> on account that he did not commence his employment and '*...was found not suitable for the job nominated*'. Further, the Agent stated that '*the sponsor now wishes to withdraw their sponsorship effectively from today.*'

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<sup>78</sup> During a meeting with the Agent on 9 October 2012.

<sup>2</sup> Attachment 1 of the s 308 notice - CMP-17086 Email from agent - WD of sponsorship - Mr [CH].

262. The statements the Agent had made to the Department in February 2013 were in stark contrast to the statements made by the purported sponsor, Mr [ET], on 14 February 2013 when he expressed concern that an application was lodged with the Department without his authorisation. Mr [ET] advised that the Agent had accompanied Mr [CH] to his office on 7 February [2013] in order to secure a job placement for him which the employer declined to do. Further, that he was subsequently contacted directly by Mr [CH] who indicated that he was '*under the impression*' that he was sponsored for a 457 visa by Mr [ET]'s business.

263. Given the circumstances I am of the view that the Agent's communication to the Department on 12 February 2013 was likely prompted by Mr [ET]'s refusal to employ Mr [CH], following the Agent's visit on 7 Feb 2013. Further, the communication was not a true reflection on the circumstances of the withdrawal as presented by the Agent. While I accept that Mr [ET] may have wanted to ensure that he was not associated with an application, which according to him, he did not authorise, I am not convinced however that he had agreed to the nomination in the first instance and was now seeking to withdraw it on account that the sponsored employee did not commence work and was found unsuitable for the nominated position.

264. Accepting Mr [ET]'s statement that the Agent had visited him in February 2013 with Mr [CH], seeking employment on his behalf, would indicate that the Agent was aware from the outset that the visa was acquired without the sponsor's knowledge and authorisation. Likewise, that the Agent had proactively sought to secure Mr [CH]'s employment after the visa grant to ensure the fraud committed was not identified. When Mr [ET] refused to agree to the arrangement the Agent contacted the Department indicating that the sponsor had withdrawn his nomination, a statement which was not only misleading but also served to conceal the fact that the visa was acquired by fraudulent means and without authority, when the Agent was advised otherwise.

265. In the Agent's response to the section 308 notice he asserted that he has had a long and productive relationship with Mr [ET], since February of 2010, from whom he received a monthly retainer of \$3000 '*...to provided ongoing legal consulting services...(sic)*'. Furthermore, that given how busy Mr [ET] was, he would provide all his instructions orally. Such was purportedly the case in early 2012 when the discussion centred on the benefit of employing a sales person with knowledge of Mandarin and Cantonese to assist Mr [ET] with his wealthy clientele. According to the Agent, he informed Mr [ET] that he '*...had a friend who knew a person<sup>80</sup> in China...*' who was a former Sales and Marketing Manager for Toyota with more than ten years' experience and then presented Mr [ET] with Mr [CH]'s resume.

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<sup>80</sup> Mr [CH].

266. Within his statutory declaration the Agent stated that the matter resurfaced in the middle of 2012, during a subsequent meeting with Mr [ET], when he agreed to sponsor Mr [CH] on the provision that he could terminate the position if the employee was found unsuitable. According to the Agent's account, Mr [ET] '*...looked at the resume and said, "Ok, do it, sponsor this guy to come and work for me".*' It was on the basis of this oral instruction that the Agent informed Ms [QN] that Mr [ET] had agreed to sponsor Mr [CH] and that the business documentation in relation to [AIA] was already on the agency file.<sup>81</sup>

267. The Agent also purportedly advised Ms [QN] to deal directly with Mr [ET] following which she subsequently attended to all the paperwork. Upon the Agent's return from Vietnam he had a chance meeting with Mr [ET] on a Cabramatta Street at which time he informed him that Mr [CH] had arrived in Australia and they agreed to a meeting which was scheduled for 7 February 2013 at the business premises where Mr [CH] was interviewed.

268. It remains unclear as to how the Agent knew that Mr [CH] had arrived in Australia and why, if sponsored by [AIA] as alleged, he did not proceed directly to his place of employment, in line with the actions of most sponsored employees, as opposed to relying on the Agent to accompany him to the premises for the purpose of an interview. Further, why the purported sponsor failed to undertake a telephone interview prior to agreeing to any sponsorship arrangement, which would have provided relevant insight into Mr [CH]'s English language capability. According to the Agent's statement, it is not in contention that Mr [ET] denies any knowledge of the arrangement to sponsor Mr [CH] albeit he maintains that he was instructed to withdraw the sponsorship immediately, stating:

*On 12 February 2013, [ET] rang me. He said to me "I can't remember when I instructed you to employ this guy." I said "You saw his resume. I advised that you would sell more cars to Chinese people if you employed someone who spoke Mandarin." At the end of the conversation [ET] instructed me to withdraw the sponsorship "immediately", because the guy was not good for the job.*

269. It is significant that the sponsor denies any knowledge or involvement in sponsoring the employee and had approached the Department of his own accord expressing his concern. Further, it appears improbable that the Agent could recall the events with such clarity so as to quote Mr [ET]'s words some four years after the events. Particularly given that the Authority was not provided with any files notes, confirmation of client instructions, a completed 956 form, an Agreement of Services and Fees or Statement of Services which are not only obligations required by the Code but would serve as corroborative evidence on the circumstances of the events. While the Agent has subsequently indicated,<sup>82</sup> that he should have used '*words to the effect*' when recapping his interaction with Mr [CH] and that it was clearly intended to be a reconstruction of the conversation between him and Mr [ET], not a verbatim transcript,<sup>83</sup> he nevertheless maintains that the events transpired as described.

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<sup>81</sup> Given the Agent had an ongoing working relationship with Mr [ET] since 2010.

<sup>82</sup> Within his section 309 response.

<sup>83</sup> Despite using quotation marks when conveying such to the Authority.



270. The Agent's legal representative argued, within the section 309 response, that the suggestion concerning the Agent's motivation in accompanying Mr [CH] to visit Mr [ET] in February 2013 is highly implausible. Specifically mentioning:

*Why would the Agent fabricate an entire sponsorship, nomination and visa application in the hope that the employer would agree to employ the visa holder after the visa was granted? The more reasonable explanation is that there was some misunderstanding between the Agent and Mr [ET] as to what the instructions were. At worst, it could be argued that the Agent was insufficiently diligent in ensuring that the arrangement was properly documented and confirmed in writing.*

271. While I have not turned my mind as to the Agent's motivation on certain conduct which is the subject of this decision, I am not convinced that the conduct could be reasonably explained as a misunderstanding on the instructions provided. Had Mr [ET] been party to the arrangement and had changed his mind at some point, or where a misunderstanding was subsequently identified, there would be no need for Mr [ET] to contact the Department directly to raise his concerns. Particularly where, according to the Agent, he had already instructed the Agent to withdraw the nomination.

272. On the information before me, and in the absence of evidence to the contrary, I reject the Agent's assertions that Mr [ET] had agreed to sponsor Mr [CH] and find that the Agent and any staff member in his employ involved with the relevant applications had acted without authority when submitting the nomination and visa applications to the Department. I am also satisfied that such conduct extended after the visa grant and subsequent to the departure of the Agent's former employee.

273. In light of the matters discussed above, and more generally throughout this decision, I am satisfied that the Agent was aware of the nominations, and visa applications lodged with the Department without the sponsor's knowledge, consent, or authority and was an active participant in the fraudulent and deceitful conduct. Furthermore, that the conduct which may have been undertaken by his former employee, was likely undertaken under his direction and with his knowledge and consent.

274. On this basis, I also find that the Agent failed to exercise due diligence in his handling of the applications in association with the three sponsors discussed. Further, that such conduct falls well short of the professionalism that would normally be expected of a registered migration agent seeking to maintain the reputation and integrity of the profession, and in their obligations to the client, the Authority, and the Department.

***Provision of false and misleading information to the Department***

*Applications associated with [HI] and Ms [HB]*

275. As already discussed elsewhere within this decision, according to the sponsor, the nomination and visa applications associated with [HI] and Ms [HB], were submitted without his knowledge or authority. It follows that the information contained within the applications and supporting documentation submitted to the Department consisted of information which was false and misleading in a material particular.

276. Dr [CVT] provided a witness statement to the Department on 25 October 2013, where amongst other matters he maintains that he was first made aware that Ms [HB] was granted a visa, on the basis of [HI]'s nomination, through Departmental officers during a monitoring site visit conducted on 6 August 2013.

Further, that he:

- i. Did not instruct East West Lawyers to lodge a subclass 457 visa nomination application for Ms [HB];*
- ii. Had no knowledge of the notice sent to the Department advising that Ms [HB] had failed to commence her employment; and*
- iii. Did not instruct East West Lawyers to send such a notice on his behalf.*

277. Even if I were to accept that a person other than the Agent had submitted the applications, and that such was done without his knowledge, the Agent's actions subsequent to the lodgements support a proposition that he not only knew of the deception, but was an active participant in such conduct. Specifically, given his communication with the Department on 17 June 2013, when he advised the Department that the sponsor had instructed him to withdraw the sponsorship and nomination in association with Ms [HB]<sup>84</sup> as she had failed to commence her employment with the sponsor. Dr [CVT]'s statement asserts that he provided no such instruction nor did he appear to have any knowledge of the communication.

278. Within the Agent's statutory declaration he maintained that he did not provide false information to the Department when he stated that he was instructed to withdraw the nomination for Ms [HB] and that it was '*...correct to say that Ms [HB] failed to commence her employment with the sponsor.*' The Agent described his wording as '*clumsy*' and that it was not intended to mislead. Furthermore, that Dr [CVT] '*disengaged*' his services post 30 August 2013 and appointed a new migration law firm to assist him further and that it was for this reason that he could no longer respond to the Department's request.

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<sup>84</sup> Attachment 3 of the s 308 notice - Email from Agent - Withdrawal of sponsorship - Ms [HB].

279. I reject the Agent's assertion that the statements made to the Department were merely clumsy and not intended to mislead, particularly given his statement that he was instructed by the sponsor to withdraw the nomination, which is in direct contradiction to that provided by Dr [CVT] in his witness statement. Moreover, a completed 956 form, purportedly signed by Dr [CVT] on 8 August 2012, was submitted with his communication<sup>85</sup> as evidence of his authorisation to act on Dr [CVT]'s behalf. Significantly, the signature on this 956 form purporting to be that of Dr [CVT] appears to be an exact replica, and contains the very same features, to those contained within the signatures on the *Letter of Offer of Employment* and *Letter of Inclusion*, which were submitted with Ms [HB]'s application.
280. Dr [CVT] has stated, within his witness statement of 25 October 2013, that he was not the author of the letters and that they do not bear his signature. Furthermore, the response to question 16, contained within the 956 form, indicated that the specific matter for which the Agent was appointed related to a '*457 Sponsorship and Monitoring Process*.' Significantly, the 956 form was purportedly signed by both parties on 08 August 2012, while according to Dr [CVT]'s statement he was first made aware of the monitoring activity, associated with [HI], on 6 August 2013, one year later. It therefore appears highly unlikely that the form was signed by Dr [CVT] or that it was completed at the time it purports to represent. The Agent, within his section 309 response, maintained that he had discussed the matter with Dr [CVT] in early June (presumably 2013) and then lodged the withdrawal using a 956 form that Dr [CVT] had signed in relation to the previous sponsorship of his niece in 2012. Further, that the signatures on the documents filed by Ms [QN] were 'exact replicas' of the signature on the earlier 956 and that it was Ms [QN], not the Agent, who fabricated '*those documents*'.
281. The Agent contends that the 956 form submitted with the request for withdrawing Ms [HB]'s nomination was that signed in relation to Dr [CVT]'s sponsorship of his niece in 2012. As already discussed, the 956 form dated 08 August 2012 bears the same signature as that contained within letters, which he does not dispute were fabricated. It follows that a 956 containing the same signature is likewise fabricated. In light of the fact that Dr [CVT] did support his niece's application it does not appear logical that there would be any need to fabricate a 956 form in association with her applications in August 2012.
282. Moreover, following the site visit to [HI] on 6 August 2013, Dr [CVT] was requested to provide further information for the purpose of the monitoring activity. The Agent was appointed to assist with the response and a 956 form was signed by both parties on 20 August 2013. The signature within this particular 956 form, on the part of Dr [CVT], displays distinctly different characteristics to those submitted with the supporting documentation for the purpose of the applications associated with Ms [HB]. I am therefore satisfied that the signature on the 956 form the Agent had submitted to the Department on 17 June 2013, when advising that Dr [CVT] had instructed him to withdraw the nomination associated with Ms [HB], was not that of Dr [CVT] and that the 956 form, dated 8 August 2012, was a fraudulent document that had no association with the sponsors niece as indicated by the Agent.

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<sup>85</sup> Of 17 June 2013.

283. In response to the Department's monitoring request the Agent submitted documentation on 20 August 2013. Amongst other matters, he indicated that [HI] had only sponsored one individual for the purpose of a subclass 457 visa, namely Ms [BAL]. Further, in response to the request for *'Details of Any Primary Sponsored Subclass 457 visa holders who have ceased employment'* he had indicated *'Not applicable'* thereby not specifying details associated with Ms [HB]. Within his response to the Authority's section 308 notice the Agent provided an attachment in pdf format, as *Attachment C*, which was to forward his argument that his draft response had initially included the relevant details in relation to Ms [HB] but that they were subsequently removed on Dr [CVT]'s instructions.
284. In support of the Agent's argument that the details were omitted on account of Dr [CVT]'s instructions, he had provided a pdf copy of e-mail correspondence he had sent to Dr [CVT] on 20 August 2013 at 4:29 pm which contained a version of the submission as an attachment. Notwithstanding the fact that this communication could have transpired, it would, nevertheless, be difficult to ascertain which version of the attachment may have been sent to Dr [CVT] at any relevant period and what amendments may have ensued with each version.
285. Even if the Authority were to accept that Dr [CVT] had requested the removal of Ms [HB]'s details from the response to the monitoring request, such a request may not have been unreasonable given the circumstances. Especially, given that as far as Dr [CVT] was concerned, he had at no time endorsed, approved, or supported any applications on behalf of Ms [HB] through his business, namely [HI]. Therefore, he may have been of the view that any reference to Ms [HB] should not be reflected in his documentation and/or response.
286. It was, however, open for the Agent to provide further information to the Department in respect of Ms [HB], and put forward an explanation in respect of the same, at any given time. Particularly, in light of the fact that the application was submitted through his migration agency. Instead, however, he elected to mislead the Department further, when it became apparent that both the Department and the sponsoring employer had become aware of the applications and that they were lodged without authority and contained misleading information and fraudulent documentation. The Agent's subsequent actions, therefore, in withholding information in relation to the fraud committed further compounded the adverse conduct. While the Agent's legal representative argued that the Agent was not under any strict obligation to do so, I am of the view that an agent of good repute and character with sound judgement, and no apparent involvement in the conduct, would have disclosed the information to the Department.
287. In light of all the matters discussed above, I am satisfied that the Agent not only had knowledge of the false and misleading information but that he played an active role in the provision of such information to the Department.

*Applications associated with [RC] and Ms [TLD]*

288. According to Departmental records, Ms [TLD] was granted a subclass 457 visa on 15 May 2012, in association with a nomination from [RC] approved on 26 March 2012. The applications submitted by Ms [QN], included a Letter of Appointment for the position of '*Customer Service Manager*' with a salary of \$50,000.<sup>86</sup>
289. During a routine site visit undertaken by the Department to the sponsor's business premises on 27 August 2013, Departmental officers engaged with the visa holder, Ms [TLD], and the Director of [RC], Ms [DB]. Departmental officers informed Ms [DB] that Ms [TLD] was nominated by [RC] as a Customer Service Manager. Furthermore, they presented Ms [DB] with a copy of the *Letter of Appointment* submitted to the Department in support of the application. Ms [DB] advised that she had never seen the *Letter of Appointment* that was submitted to the Department and expressed surprise that the nomination was lodged for a *Customer Service Manager* and not for a *Childcare Worker* which was consistent with Ms [TLD]'s employment.
290. Ms [DB] went on to state that she had not incurred any cost in association with the sponsorship and nomination applications and was not informed of any obligations on her part as the relevant sponsor. Further, that she agreed to the arrangement upon receiving a call from the employee's '*solicitor*' with whom she did not have much further association. During the site visit Ms [TLD] appeared to corroborate Ms [DB]'s statement indicating that she had paid around \$3 000 for the sponsorship and nomination and \$10 000 for the lawyer's service fee.
291. The Authority made contact with Ms [DB] on 1 March 2016 seeking clarification as to whom she had spoken with from the migration agency. Ms [DB] stated that she spoke to a person named '*P*' who requested that she fax through her business documentation. Ms [DB] also advised that she had not received an Agreement for Services and Fees from the agency for the assistance provided in sponsoring Ms [TLD] for the subclass 457 visa.
292. In respect of the *Letter of Appointment*,<sup>87</sup> presented to the Department, Ms [TLD] maintained that while she had signed the letter, she had not noticed the role which was specified within it. It is unclear from the information before the Authority, why Ms [TLD] would have agreed to sign a second *Letter of Appointment*, if one was already entered into and available from the employer. Furthermore, on 24 September 2013, Ms [TLD] e-mailed a tax receipt<sup>88</sup> to the Department, dated 26 May 2012, purportedly prepared by Ms [QN]<sup>89</sup> for an amount of \$835 in relation to disbursements associated with the visa application. Ms [TLD] stated that she '*thought [DB]*' had paid for the sponsorship agreement and nomination cost and that she only paid the amount invoiced, in contradiction to the statement she had made one month earlier in relation to the same payments.

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<sup>86</sup> Refer to Attachment 13 of the s 308 notice - CMP-17084 Letter of Appointment lodged with appln's - Ms [TLD].

<sup>87</sup> Dated 1 March 2012 and signed by Ms [TLD] in 10 March 2012.

<sup>88</sup> Not numbered.

<sup>89</sup> Refer to Attachment 14 of the s 308 notice - CMP-17084 Email from Ms [TLD] - Receipt from agent.

293. The *Letter of Appointment*<sup>90</sup> from Ms [DB] indicated that Ms [TLD]'s position was for a 'Toddler Room Leader' with a pay rate of \$23.09 per hour, a copy<sup>91</sup> of which was provided to the Department on 28 April 2014. The two distinct versions of the *Letter of Appointment* support a finding that a fraudulent document was submitted to the Department in support of the applications and consequently all the information provided to the Department was likewise misleading. Significantly, had the original *Letter of Appointment* been presented with the application, Ms [TLD] would not have been granted a subclass 457 visa, given that a *Toddler Room Leader* or childcare worker were not eligible occupations for the purpose of this visa subclass.

294. As a direct consequence of presenting fraudulent documentation and misleading information to the Department, Ms [TLD] was found to have worked in breach of her visa conditions, as she was employed in a position other than that for which she was nominated. Ms [TLD]'s visa was consequently cancelled on 15 January 2014. The cancellation decision was upheld by the MRT on 8 August 2014 following the lodgement of a review application. The sponsor was likewise found to be in breach of her sponsorship obligations resulting in the cancellation of the sponsorship approval, a decision affirmed by the MRT on 9 July 2014.

295. I have considered comments made within the MRTs decision record in relation to Ms [TLD]'s visa cancellation and have accorded them significant weight. Specifically, where the Tribunal had accepted that neither the applicant nor the sponsor sought to mislead the Department and went to note that:

*'...East West Lawyers (the applicant's former representative) misled both the Department and the applicant (whom they charged \$23 000) in nominating Customer Services Manager as the nominated position.'*

296. Documentation which the Agent had submitted to the Authority on 15 August 2016 included e-mail correspondence from Ms [QN] to Ms [TLD] on 23 February 2012, communication into which he was copied. The e-mail served as a request for documentation and as an introduction of Ms [QN] where she stated that she was '*...assisting L/S Hoan Tranh with [her] visa application.*' Further, that Ms [TLD] should bring the documentation with her for the '*...meeting with L/S Tranh.*' This lends support to a finding that the Agent was involved with the client and her application and that Ms [QN] was serving to assist with the matter and working under his instruction.

297. In his response to the section 308 notice, the Agent confirmed that he had a number of telephone conversations with Ms [TLD] in relation to her situation and sponsorship by her employer. He went on to state that he held a number of conversations with Ms [DB], following which Ms [QN] '*ran the case*'.

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<sup>90</sup> According to sponsor this letter was signed and dated by Ms [TLD] on 22 December 2011.

<sup>91</sup> Refer to Attachment 15 of the s 308 notice - CMP-17084 Email from SP - Letter of Appointment - Ms [TLD].

Moreover, he stated:

*'...employer sent us an offer of employment, but it was not satisfactory. It was a very simple document stating only that they wanted to offer Ms [TLD] employment as a Room Leader.'*

*'The first problem was that the occupation as described was not on the Consolidated Skilled Occupations List. Also the document was not the type of employment contract that is required by Immigration to comply with the nomination requirements.'*

298. From the statements the Agent has put forward to the Authority, it is evident that he was of the view that the document received from the sponsor was unlikely to satisfy the nomination requirements. The Agent had provided the Authority with a copy of the document he alleged he had received from Ms [DB], as annexure H to the section 308 response. The document did reflect the original version Ms [DB] had sent to the Department, albeit the date it was signed<sup>92</sup> did not correspond with Ms [DB]'s statement.

299. According to the Agent's statutory declaration, he believed that Ms [QN] had explained the issues to Ms [DB] after which she had agreed to employ Ms [TLD] as a *Client Services Manager* and was informed of her sponsorship obligations and the associated fees, pursuant to his internal procedures and guidelines.

300. Further, that Ms [DB] then requested Ms [QN] to draw up the contract in the correct form and stated that he:

*'...deny the allegation that I had any knowledge of any alterations made without the sponsor's approval.'*

301. From the statement the Agent had made with his section 308 response, it is unclear how he would have knowledge of what transpired if Ms [QN] *'ran the case'*, as asserted. More significantly, it is unlikely that Ms [DB] would subsequently deny any knowledge of her agreement to a second version of the *Letter of Appointment* or that fact that the nominated position was not consistent with the position she had offered Ms [TLD] and the one she was employed to undertake. It would have been relatively easy for the sponsor to simply confirm that Ms [TLD] was employed in the nominated position for which she was visaed. Ms [DB] did not stand to benefit, and appeared to have no reason to volunteer information to the Department, unless she was unaware of what had actually transpired and had a genuine concern in relation to the matter.

302. The Agent's legal representative argued<sup>93</sup> that the assertion that Ms [DB] would deny any knowledge of the fraudulent *Letter of Appointment* is a statement of the obvious. Furthermore, that the Agent had already advised that the original letter was inadequate and the subsequent amendments would have been made by Ms [QN] without the Agent's or Ms [DB]'s knowledge.

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<sup>92</sup> 7 March 2012.

<sup>93</sup> Within the response to section 309 notice.

303. I note, however, that the Agent's comments in respect of the letters inadequacy within his section 308 response did not indicate that the letter was fraudulent, it merely outlined that the original letter was not fit for purpose and that he requested Ms [QN] to explain the issues to Ms [DB] and discuss any proposed alterations. It was within his section 309 response that the Agent accepted that the *Letter of Appointment* was fraudulent and conceded that he failed to adequately supervise his former employee but denied any involvement in, or knowledge of, the fraudulent conduct.

304. In light of the matters discussed above, I accept that the sponsor had no knowledge of the *Letter of Appointment* which was submitted to the Department. Furthermore, that as the principal migration agent the Agent likely had knowledge of the fraudulent document and the false and misleading information, particularly given that he was well aware that the application could not proceed successfully on the basis of the sponsor's *Letter of Appointment*. Moreover, that his former employee Ms [QN], onto whom he has diverted full accountability, acted to assist with the application and had worked under his instruction.

*Applications associated with sponsor [TMIX]*

305. As already discussed throughout this decision, on 26 October 2012 the Agent sent correspondence to the Department, dated 25 October 2012, where he submitted that Ms [TNDH], Ms [TMVH], Mr [QDN] and Mr [MAK] had all ceased employment with the sponsor on 9 October 2012.

306. Furthermore, he stated that employees:

*'...[TNDH], [TMVH] and [QDN], have been employed by the Sponsor as Assistant Restaurant Managers on the Subclass 457 visa.' and 'After a review of the Employees skills the Sponsor has found the employees required further training to uplift their skills. As a result, the Sponsor has terminated the employment of the three employees, with the view of sponsoring them at a later date on the Subclass 442 Occupational Trainee in the very near future (sic).'*

307. In his response to the Authority, the Agent stated that his submission to the Department was consistent with the instructions provided by Mr [MS] at his meeting with him on 9 October 2012. Further, that Mr [MS] instructed that all visa related communication was to be directed to him and should be cleared before it is sent. In line with these instructions the Agent asserts that the sponsoring employer had cleared all the information and documentation he had sent to the Department on 26 October 2012.

308. Mr [MS]'s instructions on the clearance procedure would appear to support his argument that certain transactions had transpired without his knowledge and authority. It is also consistent with his communication to the Agent on the 22 October 2012 where he mentions the need for draft documents and clearance procedures, which would have averted the lodgement of the applications which were in dispute.



309. The Agent directed attention to annexure G<sup>94</sup> in the context of his response on receiving instructions from Mr [MS]. Annexure G contains a communication exchange between the Agent and Ms [NS] on 15 and 17 of October 2012. Furthermore, it relates to action undertaken in response to the letter from Mr [MS], dated 15 October 2012, where he instructs the withdrawal of applications that were not approved by them.
310. It is not in contention that the employer had requested the withdrawal of applications, but the reasons the Agent had put forward to the Department for the withdrawals, which were not reflective of the information provided by the sponsor. Specifically, given that the employer indicated that the employees should never have been sponsored under the 457 visa program as such was not approved and that they were trainees who are paid trainee wages. Conversely, the Agent advised the Department that *'...After a review of the Employees skills the Sponsor has found the employees required further training to uplift their skills. As a result, the Sponsor has terminated the employment of the three employees...'*
311. Furthermore, the Agent's correspondence to the Department on 26 October 2012 indicated that 457 visa holders [TNDH], [TMVH], [QDN] and [MAK] had all ceased employment with the sponsor on 9 October 2012. Conversely, his correspondence to Ms [NS] on 15 October 2012 in relation to the same employees, stated that the Agent assumed that the notice of termination was given 15 October 2012 and the employment will effectively be terminated 29 October 2012. It therefore appears that the employees did not cease their employment on 9 October 2012 as disclosed to the Department.
312. Most significantly, this correspondence to the Department transpired after a number of relevant interactions and information exchanges the Agent had with the sponsor. Specifically, the site visit, the conference with the sponsor on 9 October 2012, and correspondence from the sponsor of 15 and 22 October 2012. As previously mentioned, at each point the Agent was made aware that the sponsor had no knowledge of a number of subclass 457 nomination and visa applications. The Agent was informed of the persons affected, the fraudulent nature of the employment documentation and the specific details of the inconsistencies identified within the employment documentation, including position descriptions and rates of pay.
313. On the 25 October 2012, the Agent had already been informed, by the sponsor, that he was not aware that [QDN], [TMVH], [TNDH] and [THT] were nominated for subclass 457 visas and that they should have been sponsored for subclass 442 Occupational trainee visas as they were in training and being paid training wages. Conversely, however, the Agent informed the Department that after a review of their skills, it was discovered that they required further training and that the sponsor had therefore terminated their employment with a view to sponsoring them on subclass 442 visas at a later time.

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<sup>94</sup> To the section 308 response.

314. On the 26 October 2012, the day the Agent sent through the submission to the Department, Ms [QN] sent a notice, on his behalf, to withdraw the sponsorship nominations in respect of [TMVH], [TNDH], [QDN], [THT]<sup>95</sup> and [MAK]. The action, therefore, appears consistent with a person working on direction. There appears to be a clear correlation with the Agent's interaction and communication with the sponsoring employer and subsequent action taken on the applications/visas. Notably, when the sponsoring employer informs the Agent of his discovery, in relation to improprieties undertaken on the part of the migration agency, the Agent's employees subsequently follow through with an action stemming from what was communicated to the Agent in the first instance.
315. The evidence suggests, therefore, that the Agent had likely directed the employees conduct and that he was made aware of fraudulent activity within his agency caseload, well before the time he had indicated to the Authority. Furthermore, that his subsequent actions, where the fraud is perpetuated, is not consistent with the conduct expected from an agent of good repute upon discovering problems with his agency caseload, much less one involving significant fraud.
316. The Agent has consistently denied that he had knowledge of the fraudulent nature of the applications submitted to the Department and the misleading information which inevitably forms part of the same and rejects the notion that such was done without authority in respect of [TMIX]. Further, that he had no active role in the conduct, but had discovered it subsequent to the events taking place and attributed the responsibility in totality onto a former employee. Particularly, in light of the fact that the applications were primarily submitted by Ms [QN], through his migration agency, whilst in his employ.
317. In light of all the matters discussed above, however, I am satisfied that the Agent not only had knowledge of the false and misleading information well before the time he alleged he had discovered employee impropriety, that is January 2013, but that he played an active role in the provision of misleading information and documentation to the Department. Particularly, where he was made aware that occupations were changed in the employment documentation and that the nominations were lodged for an incorrect subclass and done so without authority.
318. As with other business sponsors, discussed within this decision, the Agent appears to be the initial contact and primary driver in securing a working relationship with the sponsor yet subsequently has no knowledge or involvement in matters that are the subject of adverse conduct. Even if I was to accept that, at some point, he had no knowledge of the fraudulent activity, in respect of [TMIX], his subsequent actions and interaction with the Department, however, support a proposition that he actively and knowingly mislead the Department and provided documentation that he knew to be fraudulent in a number of matters.

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<sup>95</sup> I note that the Agent's submission dated 25 October 2012, failed to specify that Mr [THT] had also worked for the sponsor.

319. Furthermore, information before the Authority would support a finding that he was aware, or should have reasonably been aware, that a number of [TMIX] employees were to be paid the trainee rate of \$15 per hour and that such would relevantly preclude them from nomination under the subclass 457 program. Specifically, given that he was carbon copied in a communication exchange between Mr [RL] and Ms [QN] on 8 March 2012 in relation to Ms [TNDH], Ms [TMVH], Mr [THT] and Mr [HT].

320. In the exchange Ms [QN] seeks confirmation of contractual employment details including salary payments and whether lodgement of the visa applications could proceed. In response Mr [RL] indicates that the employees listed would be employed *'on an hourly basis at a trainee rate'* and that they were offered 35 hours a week. Mr [RL] further requests that Ms [QN] confirm the details with the Agent as they could not offer the employees the same salary as a manager as it would *'not fall in line with [their] company pay structure.'* In addition, Mr [RL] indicated that he had asked the Agent for clarification and was advised that *'they would be on an hourly base agreement and the rate would be \$15 per hour'*. Ms [QN] replied to Mr [RL] acknowledging the information from him and stating that the *'new trainees will work 35 hours a week on the trainee rate in line with you company structure and not as a manager (sic).'*

321. Ms [QN] also requested Mr [RL] to forward her a *'basic contract'* so that she could arrange the *'trainees'* to sign them. It is not insignificant that the Agent was not only mentioned throughout the communication, but was copied into all the exchanges. In light of such information, I am of the view that the Agent was aware of the applications and complicit in the fraud surrounding them. The Agent's subsequent and ongoing conduct appears to lend weight to this finding.

322. In light of all the matters discussed above, I am satisfied that the Agent not only had knowledge of the false and misleading information but that he played an active role in the provision of such information to the Department.

*Applications associated with [AIA] and Mr [CH]*

323. As already discussed elsewhere within this decision, according to the sponsor, the nomination and visa applications associated with [AIA] and Mr [CH], were submitted without his knowledge or authority. It follows that the information contained within the applications and supporting documentation submitted to the Department consisted of information which was false and misleading in a material particular. Most specifically, the *Letter of Offer of Employment*, which was not even signed by the purported employer and sponsor Mr [ET].

324. Mr [ET] 's communication to the Department is indicative that:

- i. A fraudulent document was submitted to the Department in the form of a *'Letter of Offer of Employment'*;
- ii. The Agent had misled Mr [CH] into thinking that he was sponsored by [AIA];
- iii. The Agent accompanied Mr [CH] to the premises of [AIA] in an attempt to have him employed with the company; and

- iv. The Agent submitted false and misleading information to the Department when he advised that he was instructed by the sponsor to withdraw the sponsorship of Mr [CH] on account that he was not found suitable for the job.
325. Within his statutory declaration the Agent maintained that he did not provide false and misleading information to the Department as he believed that he had '*...Mr [ET]'s oral consent to proceed to sponsor and nominate Mr [CH] to work in his car dealership.*' and was acting on his instruction of 12 February 2013 in respect of the withdrawal of the nomination.
326. The Agent also refutes the allegation that he had misled Mr [CH] and expected that he would be employed under the terms of the nomination, on account of the oral instructions he had received from Mr [ET]. The Agent has failed to produce any evidence to support his version of events, even though some such would have been required by the Code, and in the face of Mr [ET]'s statements which contradict his assertions that he acted on his instructions.
327. Further, even if I were to accept the Agent's assertion that he had no knowledge of the fraudulent documentation and misleading information submitted with the application, his actions subsequent to the lodgements support a finding that he had personally engaged in providing the Department with misleading information. Specifically, with his communication on 12 February 2013, when he advised the Department that the sponsor had instructed him to withdraw the sponsorship in association with Mr [CH]<sup>96</sup> as he was found unsuitable for the nominated position. Additionally, that such was done without the authority and not on instruction from Mr [ET].
328. I reject the Agent's assertion that the statements made to the Department were not intended to mislead, particularly given his statement that he was instructed by the sponsor to withdraw the nomination, which is in direct contradiction to the statements provided by Mr [ET]. Furthermore, he has failed to provide any evidence that Mr [ET] had engaged his services at any stage in respect of Mr [CH].
329. The Agent maintains that Mr [ET] provided oral instructions, at different times, that he was willing to employ and sponsor Mr [CH], which the Agent conveyed to Ms [QN], who was to progress the paperwork and communicate directly with Mr [ET]. The Agent did not contend that the documentation submitted to the Department in respect of the applications may have contained false or misleading information or claims. What the Agent failed to explain, however, is why it would have been necessary to submit false and misleading information if Mr [ET] was, as claimed, a willing participant to the arrangement. Furthermore, why he would have agreed to pay Mr [CH] \$33 000 for loss of income and hardship on account of Ms [QN]'s behaviour, if he had genuinely believed that Mr [ET] had agreed to sponsor Mr [CH], and subsequently denied any knowledge of the agreement.

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<sup>96</sup> Attachment 1 of the s 308 notice - CMP-17086 Email from agent - Withdrawal of sponsorship - Mr [CH].

330. Within the section 309 response the Agent's legal representative advanced the argument that the Agent is unable to answer for Ms [QN] and why she felt it necessary to provide the fraudulent documentation in association with Mr [CH]. He went on to state:

*The Agent's agreement to compensate Mr [CH] reflects his sense of moral responsibility for his admitted failure to properly supervise his practice at that time. The suggestion that it was only done because Mr [CH] discovered that he had been misled is implausible, since it depends on the absurd proposition that the Agent, an experienced lawyer with a successful practice that was his sole livelihood, would take the risk of running such a case on a wing and a prayer, hoping it would all work out in the end.*

331. In light of the above, and in the absence of evidence to the contrary, I reject the Agents claim that he had received authorisation and instruction from Mr [ET] in respect of Mr [CH]'s nomination and subsequent withdrawal. It follows that all the information and communication with the Department in respect of this matter also contained false and misleading information. Further, that such information was provided directly by the Agent, else an employee working on his instruction or direction. The Agent has argued that the payment made to Mr [CH] was a reflection of his sense of moral responsibility and that it would be an absurd proposition that person of his experience and standing would take such a risk. I am not convinced by the argument and am of the view that the Agent had compensated Mr [CH] as he had genuinely believed that he was sponsored by [AIA] and subsequently discovered this was not the case and that such occurred as a consequence of the Agent's actions and behaviour, not that of Ms [QN].

### ***Provision of fraudulent documentation to the Department***

#### ***Applications associated with [HI] and Ms [HB]***

332. According to the purported sponsor, Dr [CVT], he had no involvement in relation to Ms [HB] or the applications submitted to the Department in association with her. Furthermore, that the documentation submitted in support of the applications, including the *Letter of Offer of Employment* and *Letter of Inclusion*, were not provided by him, did not contain the correct company logo, nor did they bear his signature. In light of Dr [CVT]'s statements I am satisfied that the documentation submitted to the Department in association with Ms [HB] was fraudulent.
333. Moreover, according to the Agent's response to the section 308 notice, he did not dispute that the applications contained false and misleading information and fraudulent documentation. The Agent contends, however, that he had no knowledge or involvement with the applications and that responsibility for the adverse conduct, involving significant fraud, rests solely with his former employee.
334. As already discussed, I am satisfied that the Agent has misled the Authority in relation to his knowledge and involvement in Ms [HB]'s application, particularly given his access to Ms [QN]'s e-mail account and his correspondence with the Department following her leave. Moreover, where his credibility is again called into question given his actions subsequent to the lodgement of the applications, where he provided information and documentation to the Department in relation to the withdrawal of sponsorship, of which the sponsor had no

knowledge.<sup>97</sup>

335. On the information before me I find that the Agent was both complicit and proactive in the provision of fraudulent documentation to the Department and has denied his involvement and diverted blame onto a junior former employee so as to avoid sanction action by the Authority.

336. While the Agent has consistently maintained that he had no knowledge or active role in misleading the Department, given the inconsistencies identified in his statements, I do not find the Agent's assertions credible. Particularly in light of information before the Authority, indicating that he had provided immigration assistance to Ms [HB] from the outset, had likely communicated with the Department both before<sup>98</sup> and after<sup>99</sup> the visa was granted (both of which were undertaken after Ms [QN]'s departure) and that he had acted without the sponsors authority when so doing. I consider the statements the Agent has put forward within his response and statutory declaration as lacking credibility and therefore unreliable.

337. Dr [CVT] provided a witness statement to the Department where he maintains that he was first made aware that Ms [HB] was granted a visa on the basis of [HI]'s nomination by Departmental officers during a monitoring site visit conducted on 6 August 2013. In light of the fact that Ms [HB]'s visa had already been granted at the time, Dr [CVT] did not stand to benefit and had no incentive to mislead the Department, when he disclosed that he had no knowledge of Ms [HB] or of the documentation submitted in support of the applications.

*Applications associated with [RC] and Ms [TLD]*

338. According to the sponsor, Ms [DB], she had no involvement or knowledge of the *Letter of Appointment* which was submitted to the Department in support of the applications associated with [RC] in its nomination of Ms [TLD]. I place significant weight on Ms [DB]'s statements as there appears no evident incentive to provide the genuine *Letter of Appointment* for comparison, where such could potentially incriminate and/or implicate her in the conduct, unless she held a genuine concern that her business and the nomination of her employee were being misrepresented. Significantly, had she agreed to a new and altered version of the *Letter of Appointment* which, according to the Agent's account, was to have been drafted by an employee of East West Layers, she would likely have signed that version and retained it on file, removing the need to present the Department with a completely different one likely to attract attention.

339. In light of all the matters already discussed in the above paragraphs, in relation to the fraudulent nature of the documentation submitted to the Department, in respect of the nomination and visa applications for Ms [TLD], I am satisfied that, contrary to the Agent's assertions, he likely had knowledge of the fraudulent document and the misleading information and was an active participant in the conduct.

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<sup>97</sup> According to his witness statement of 25 October 2013.

<sup>98</sup> Correspondence from Ms [QN]'s e-mail account in February 2013.

<sup>99</sup> When withdrawing the nomination on 17 June 2013.

340. Particularly in light of the fact that he was aware that the listed occupation on the original *Letter of Appointment* was not specified within the *Consolidated Skilled Occupations List* and that any application nominating such could not result in a visa grant on the basis of the sponsor's version. I am of the view that the Agent's former employee Ms [QN], onto whom he has diverted full responsibility for the fraudulent conduct, had not worked in isolation, but rather worked under his direction in relation to the application resulting in the conduct the subject of this decision.

*Applications associated with [TMIX]*

341. The sponsor's letter to the Agent, dated 15 October 2012 highlighted inconsistencies identified with the employee documentation. Specifically, where the sponsors documentation did not match that which was submitted to the Department, and where the nominated occupations and visa subclasses were incorrect. A second letter sent to the Agent from the sponsor, dated 22 October 2012, provided more detail, indicating that a '*Training Kitchen Manager*' who should have been sponsored for a subclass 442 visa was nominated under the 457 program as a '*Restaurant Manager*', as was the case with Ms [TNDH].

342. Furthermore, the sponsor indicated that they were not aware of the nomination and subclass 457 visa applications lodged for employees: '[QDN], [TMVH], Ms [TNDH] and Mr [THT]'. In light of the fact that four nominations were already withdrawn, these additional four would appear to bring to no less than eight subclass 457 nominations submitted without the sponsor's approval. It follows that the documentation submitted to the Department, in respect of each of the applications was likely fraudulent, consistent with the sponsors assertions.

343. On 26 October 2012 the Agent responded to the Department's request for information required in relation to the monitoring activity. The Agent's submission to the Department, dated 25 October 2012, included the below listed documentation:

- i. Position descriptions, which he had provided as annexure A<sup>100</sup> indicated that Ms [TMVH], Ms [TNDH] and Mr [QDN] were all employed as Assistant Restaurant Managers;
- ii. Payslips provided at annexure B<sup>101</sup> for Ms [TMVH], Ms [TNDH] and Mr [QDN] revealed that they were paid \$15 per hour. Furthermore, Mr [QDN]'s payslip indicated that he worked as a cleaner;
- iii. Employment contracts at annexure D<sup>102</sup> for the following:
  - Mr [HS];
  - Ms [RH];
  - Ms [TNDH];
  - Ms [TMVH];
  - Mr [MC];
  - Mr [QDN]; and

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<sup>100</sup> To the Agent's submission to the Department, dated 25 October 2012.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

- Mr [JAJ].

- iv. Offers of employment for Ms [TMVH], Ms [TNDH] and Mr [QDN] indicated that they were all to be employed as an 'Assistant Restaurant Manager' with the 'potential earning' of \$54,500.

344. In the Agent's response to the Department, he made no mention of the information which was clearly communicated to him by the sponsor, on more than one occasion, before sending through the response. Specifically, his knowledge in relation to the lodgement of a number of subclass 457 visa applications which were not authorised, and where the documentation submitted with the applications was inconsistent with the employment documentation the sponsor held on file. While these significant matters were brought to his attention prior to his submission to the Department, he nevertheless proceeded to provide the information and documentation, which he knew, or ought to have reasonably known, to be misleading and fraudulent.

345. Within his response to the section 309 notice, the Agent denied providing the Department with false and misleading information, as part his submission<sup>103</sup> on account that it was reviewed and approved by the sponsor, who instructed him to send it. Aside from the fact that the Agent was engaged to provide immigration assistance and guidance to the employer on the appropriate action in the circumstance, the response appears to imply that an agent can undertake any action, lawful or otherwise, without any recourse or reflection upon his integrity, so long as such action was undertaken on direction. I find his a flawed argument and contend that where an agent has knowledge of false and misleading information and then plays an active role in the provision of such information and documentation to the Department then this reflects upon his fitness to perform the role of a migration agent. Particularly, given that an agent's duty extends beyond his client to include the Commonwealth and its agencies.

*Applications associated with [AIA] and Mr [CH]*

346. According to the purported sponsor and Director of [AIA], Mr [ET], he had no involvement or knowledge of the '*Letter of Offer of Employment*' dated 23 May 2012 which was submitted to the Department in support of the applications in the nomination of Mr [CH]. Mr [ET] asserted that all the correspondence and documentation in relation to the matter was done without his knowledge, endorsement or authorisation.

347. In the Agent's response to the Authority he maintained that while he was of the view that he had authorisation to proceed with the application, on account of Mr [ET]'s purported oral instruction, it was Ms [QN] who had progressed with the applications and documentation. Furthermore, that he was not aware that a fraudulent document was submitted to the Department '*...in the form of the "Letter of Offer of Employment"...*' but that he has since learnt that '*...the documentation put in by [his] employee [QN] may have contained false or misleading information.*'

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<sup>103</sup> Dated 25 October 2012.



The Agent has therefore conceded that a fraudulent document was submitted to the Department but argued that such was done by his former employee without his knowledge and that his responsibility extends only in so far as to his failure in supervising the employee.

348. I have placed significant weight on Mr [ET]'s statements that he did not authorise any applications in respect of Mr [CH] and that such had occurred without his endorsement or knowledge. Particularly in light of the fact that he had contacted the Department of his own accord expressing his concerns and had not signed the *Letter of Offer of Employment*. Significantly, had Mr [ET] not approached the Department, the fraud may not have come to the attention of the Department or the Authority. As with other like matters, the subject of this decision, there appears no evident incentive for the sponsor to provide the Department with adverse information unless he held a genuine concern that his business was being misrepresented and used by third parties to achieve visa outcomes by fraudulent means.

349. In light of all the matters already discussed within this decision in relation to the fraudulent nature of the documentation submitted to the Department in respect of the nomination and visa applications for Mr [CH], I am satisfied that, contrary to the Agent's assertions, he likely had knowledge of the fraudulent document and the misleading information. Further, that he was an active participant in the adverse conduct both at time of application lodgement and post the visa grant. Particularly, given his actions when he sought to secure employment for Mr [CH] and then proceeded with the withdrawal notice when he was unable procure the position. Moreover, I am of the opinion that his former employee, Ms [QN], onto whom the Agent has diverted full responsibility for the fraudulent conduct, likely worked on his instruction in relation to this and other applications the subject of this decision.

### ***Other Considerations***

#### ***Matters unrelated to immigration assistance***

350. The Agent's legal representative has put forward matters to be considered by the Authority as related to the Agent's personal circumstances which may have impacted on his conduct during the period under discussion. I have weight to these considerations, including the Agent's personal circumstances and his contribution to the community when making this decision.

351. The Agent has put forward information concerning his former employee Ms [QN] and the assistance and exchange he has had with the LSC, AFP, and Lawcover in relation to allegations of fraud and of personal undertakings<sup>104</sup> which do not relate to the provision of immigration assistance. These matters fall outside of the purview of immigration assistance and relate to his former employee who does not appear to have had an opportunity to respond to the same. On the information before the Authority the allegations do not appear to have been substantiated with adverse findings made against any party and have therefore not been addressed within this decision.

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<sup>104</sup> Documentation was provided to the Authority.

### **General Conduct**

352. It is not insignificant that the conduct the subject of this decision has resulted in significant detriment to a substantial number of clients, both visa applicants and sponsors alike. The adverse consequences extended to lost visa opportunities, limited immigration options, visa cancellations, sponsorship cancellations, financial hardship and significant emotional stress to all those impacted. Further, where the plight of one visa holder, discussed within this notice, was taken up by the Transport Workers Union the details of which were highlighted in the public domain. Numerous articles on the matter extended to overarching scrutiny of the subclass 457 visa regime which cited the Agent's advertisements where the visa is referred to as '*457 King of all Visas*' and resulted in substantial and adverse public scrutiny of the temporary visa program and the migration agent profession for a significant period.<sup>105</sup>

353. Within the section 309 response the Agent's legal representative indicated that the article is primarily about abuse of the 457 visa by employers, and largely concentrates on applications involving Indian visa applicants. Furthermore, that the headline reference to "King of visas" gives a wrong impression that the advertisements placed by the Agent were in some way connected with Mr [DN], who was one of the employees of [TMIX] and that there was no evidence that the employee responded to or even saw these advertisements. Whether or not Mr [DN] had engaged the Agent's services as a direct result of the advertisements does not alter the fact that he was a client of the Agent and one to whom he had provided a refund of \$17,000. The Agent rejected the inference that the union obtained the refund and argued that it was provided by him voluntarily out of concern for his treatment. I note, however, that the article appeared on 6 September 2013 and the payment made by the Agent occurred on 7 September 2013,<sup>106</sup> the day following the publication of the article. While the Agent has asserted that he had agreed to the refund before the article was published, this would not explain why he did not take this voluntary and proactive action some eleven months earlier, when his agency informed the Department that Mr [DN]'s sponsorship was withdrawn.<sup>107</sup>

354. Documentation submitted to the Authority, revealed a communication exchange the Agent had with a sponsor on 17 October 2012 where the Agent disclosed that while he will be overseas for a specified period that he nevertheless monitors his emails on a daily basis. Given such, it is reasonable to conclude that the Agent has had ongoing access to, and actively managed, his communication irrespective of his physical location. This would serve to evidence that the Agent was aware of the communication exchanges Ms [QN] had with a number of clients, and the content contained within them, throughout the relevant period.

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<sup>105</sup> Refer to Annexure D to this decision record.

<sup>106</sup> Paragraph [69] to the Agent's statutory declaration.

<sup>107</sup> Communicated to the Department on 26 October 2012.

355. Throughout his response to the Authority, the Agent has maintained that his responsibility for the conduct identified with the complaints, extends only insofar as his failure to supervise his former employee. It is not insignificant, that his former employee was very junior who, at the time of the events, was only recently admitted into practice and obtained her registration as a migration agent. I am of the opinion that it is highly unlikely that a person with little experience, who likely still required significant guidance, would either consider or have the know-how to engage in extensive fraudulent conduct in an overt and systemic manner and that such was done without the Agent's knowledge or consent.
356. Moreover, the Agent has consistently argued that he identified irregularities with some files, which were handled by Ms [QN], when he had conducted a file review upon his return from Vietnam at the end of January 2013 and imminently before Ms [QN]'s departure. While the Agent maintains that there appeared some contention in relation to a number of applications submitted on behalf of [TMIX] and whether the sponsor had provided instructions and approval to proceed with either subclass 457 or 442 visas, his communication with the Director of [TMIX] during October 2012 should nevertheless have alerted him to significant concerns and potential misconduct which, on the face of it, involved fraud. I am therefore satisfied that a person in a like position, who was not complicit in the conduct, as the Agent contends, would have been sufficiently concerned about the potential misconduct so as to immediately initiate a comprehensive review of the case files at that time.
357. Furthermore, that upon discovering the conduct of concern, would have addressed the matters with the employees, terminated their services, informed the relevant stakeholders<sup>108</sup> and immediately put in place measures to prevent any reoccurrence of the misconduct. Conversely, however, the Agent proceeded to travel overseas for a substantial period of time, without undertaking a client file audit, leaving the then staff members to continue practising at his agency without direct oversight or supervision. I am of the view that such conduct is not reflective of a person who is genuinely concerned about his staff, and any misconduct on their part, and where such was allegedly conducted without his knowledge or consent.
358. It is not in dispute that the Agent has had contact with all of the sponsors,<sup>109</sup> and some visa holders, from the outset and well before the visa applications were lodged and which progressed to grant in some instances. Furthermore, it is evident that the Agent had contact, and involvement, in a significant number of matters post visa application lodgement and visa grant. Given the Agent's contact with the clients, both pre and post visa lodgement, it appears implausible that he had no knowledge, involvement, or oversight in any of the matters during the time the fraudulent documentation and misleading information was provided to the Department and other authorities. Particularly in light of information before the Authority indicating that he had misled the Department in a number of instances and subsequent to the departure of his former employee, onto whom he has attributed all the responsibility for the conduct.

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<sup>108</sup> Including the Department and the Authority.

<sup>109</sup> Which were identified within this notice.

359. Following the matters discussed above, in relation to the Agent's general conduct and his communication with the Department in respect of a number of matters, particularly the numerous nomination withdrawals (and the reasons put forward for the same) I am satisfied that the actions are indicative that the Agent was acutely aware of the problems associated with the applications.
360. Further, that he was not only complicit in the adverse behaviour but was a significant and active participant in the fraudulent conduct which served to mislead the Department in association with a number of matters.
361. Moreover, in light of all the information before me I am satisfied that the Agent has been involved with a number of applications, submitted on behalf of sponsoring entities, where the person with authority to bind the sponsoring business had no knowledge of the matters or had not approved the applications and the associated documentation. In so doing, I find that the Agent was actively involved in undermining the integrity of a number of visa programs. Specifically, the subclass 457 visa program by partaking in the lodgement of applications and associated documentation to the Department which were both misleading and fraudulent.
362. Given the matters discussed within this decision I am satisfied that the Agent engaged in a practice of knowingly deceiving his clients, the Department, a review authority, and the Authority in respect of numerous and unrelated visa applicants and sponsors. Such conduct displays a blatant disregard for the rule of law and the privileged position that he holds as both a legal practitioner and registered migration agent. I am satisfied that the Agent has attempted to distance himself from his personal responsibilities as a registered migration agent, and the obligations under the Code, by diverting and apportioning blame onto Ms [QN], and some sponsors, with a view to avoiding disciplinary action.
363. A review of the client files submitted to the Authority revealed the absence of file notes and client instructions in relation to the applications, as well as records of any physical meetings, or meaningful records of communication that the Agent may have engaged in. Furthermore, no Agreements of Services and Fees or Statements of Services were evident. On this basis, and in the absence of any further evidence, I find that the Agent did not provide the clients with any acceptable documentation in relation to the immigration assistance. Furthermore, that the Agent failed to advise his client/s of his estimate of fees, obtain written acceptance from his client/s, or provide them with written confirmation on the terms of the service before commencing work on their matters. As such, I find that he has acted in breach of clauses 5.2, 5.5 and 6.1 of the Code.
364. The statutory scheme for the registration of migration agents and the regulation of their conduct is intended to protect persons seeking assistance with immigration matters. As a registered migration agent the Agent fulfils an important role in the implementation of the Act, where the Code recognises that as a migration agent he owes a duty to the Commonwealth and its agencies, and provides for a number of those duties. I find that the conduct discussed within this decision indicates a clear divergence from the duties and obligations the Agent was entrusted to perform and where such extends to proactively undermining the integrity of the programs the Department expressly seeks to uphold.

365. Finally, I am satisfied that the Agent's behaviour, discussed within this notice, exhibits a blatant disregard for his clients' best interests and that of the Department and the Authority and falls short of the standard expected of a registered migration agent. Particularly given that the conduct involved fraudulent documentation which was submitted to the Department in an attempt to mislead and secure visa outcomes in a significant number of matters.

366. For the reasons discussed above within this decision I am satisfied that the Agent had acted in breach of clauses 2.1, 2.4, 2.8, 2.9, 2.9A 2.10, 2.17, 2.19, 2.23, 5.2, 5.5, 6.1, 8.1, 8.2, 8.5 and 9.3 of the Code.

## **INTEGRITY, FITNESS AND PROPRIETY**

367. Pursuant to paragraph 303(1)(f) of the Act, the Authority may caution a registered migration agent, or suspend or cancel their registration, if the Authority becomes satisfied that the agent is not a person of integrity or otherwise not a fit and proper person to give immigration assistance.

368. Whether a person is a "fit and proper person to give immigration assistance" is an enquiry which looks broadly at three factors – honesty, knowledge and competency.

369. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, Toohey and Gaudron JJ indicated several factors that could be taken into account in determining whether a person was 'fit and proper.' These included, but were not limited to conduct, character and reputation.

370. At 380 their Honours stated:

*[D]epending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.*

371. The formula 'fit and proper' (and 'person of integrity') must be construed in light of the particular legislative context at the registration scheme underpinning the migration advice profession.

372. The context in which the reference to 'fit and proper' person occurs in section 290 is the applicant's giving of immigration assistance. The context also includes:

- (a) the Act, which creates offences for misleading statements and advertising, practicing when unregistered and misrepresenting a matter; and
- (b) the Code contained within the *Migration Agent Regulations 1998* (Cth) (the MA Regulations), which refers to the applicant being able to perform diligently and honestly, being able and willing to deal fairly with clients, having knowledge of business procedure and properly managing and maintaining client records and maintaining client confidentiality.

373. Key elements of the fitness test are:

- (a) the honesty of the person (*Peng and Department of Immigration and Multicultural Affairs* [1998] AATA 12); and
- (b) the person's knowledge of the migration scheme and ability to fulfill the position of a migration agent (*Mottaghi and Migration Agents Registration Authority* [2007] AATA 60).

374. The characteristics for whether a person is a "fit and proper person" in a professional context was stated in *Davies v Australian Securities Commission* (1995) 131 ALR 295 to vary "having regard to the office or vocation under consideration". In that case, *Re Stu and Tax Agent's Board, South Australia*, 82 ATC 4284 at 4286, was cited for the characteristics required to show fitness as a tax agent – these are listed below at (a) to (e). Similar criteria are applicable to the migration agent profession.

- (a) be of good reputation;
- (b) have proper knowledge of taxation laws;
- (c) be able to prepare income tax returns competently and deal competently with queries which may be raised by officers of the Taxation Department;
- (d) be a person of such competence and integrity that others may entrust their taxation affairs to his care; *and*
- (e) be a person of such reputation and ability that officers of the Taxation Department may proceed upon that footing that the taxation returns lodged by the agent have been prepared by him honestly and competently.

375. The requirement in section 290 that the applicant also be a 'person of integrity' is not concerned with the person's knowledge of the migration scheme or ability as a migration agent, but is primarily concerned with a person's reputation, moral principle and character, including their honesty (*Tejani and Migration Agents Registration Authority* [2009] AATA 240).

376. There is a degree of overlap between 'fit and proper' and 'integrity' to the extent that fitness and propriety include consideration of the honesty of the actions of an individual.

377. 'Integrity' means 'soundness of moral principle and character, uprightness and honesty'.<sup>110</sup>

378. Having regard to the body of case law cited above, a consideration of whether the Agent is a fit and proper person or a person of integrity to provide immigration assistance can legitimately include the following:

- that the Agent's past conduct can be an indicator of the likelihood of the improper conduct occurring in the future;
- the Agent's honesty and competency towards clients, the Department and the Authority;
- a consideration of the context in which the agent works, i.e. the provision of immigration assistance to migration clients;

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<sup>110</sup> See *Re Peng and Department of Immigration and Multicultural Affairs* [1998] AATA 12 at para [26].

- the Agent's knowledge and competency in immigration law and practice;
- the reputation of the Agent as a result of their conduct and the public perception of that conduct; and
- the perception of the conduct by the Agent's "professional colleagues of good repute and competency"<sup>111</sup>.

379. I am satisfied that the Agent lodged applications with the Department for which he knew, or ought to have reasonably known, he had no consent or authority from the respective sponsors. Consequently, he failed to consider or elected to ignore, the accuracy and authenticity of the documentation which he submitted to the Department and take reasonable steps that a competent and prudent agent, with a genuine understanding of his obligations, would have taken in the circumstances. In consideration, I am satisfied that this demonstrates that the Agent was likely aware that the information and the documentation which was submitted to the Department was false and misleading and was therefore a party to the fraud.

380. In consideration of the matters discussed within this decision, I find that the Agent intentionally submitted information and documents to the Department which were false and misleading in relation to a number of applications. It is of particular concern that the Agent continued to assert that he had not intended to mislead the Department, despite information before the Authority that he had contact with the Department, and where the evidence suggests that he had provided fraudulent documentation and misleading information on more than one occasion.

381. The Agent's responses to the Authority indicate a serious lack of awareness of his obligations as a registered migration agent. I am of the view that where a registered migration agent fails to take reasonable steps to ensure that applications and correspondence they submit to the Department are not false or misleading then they are not a fit and proper person to provide immigration assistance.

382. Furthermore, I consider that the Agent has attempted to distance himself from his personal responsibilities as a registered migration and the obligations under the Code, by diverting and apportioning blame onto others with a view to avoiding potential disciplinary action. Specifically, by diverting blame and responsibility onto his former junior employee, Ms [QN]. While the Agent asserted that he had not attempted to distance himself but was merely presenting what had transpired, on the evidence before me, I am not convinced that this was the case.

383. Having regard to the evidence set out in this decision, I am satisfied that the Agent repeatedly breached the Code in his dealings with the Department and a number of individuals (including Dr [CVT], Ms [DB], Mr and Mrs [MS] and Mr [ET]) and with respect to his general office and record-keeping practices.

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<sup>111</sup> *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750.

384. Furthermore, East West Lawyers, the Agent's primary migration business was subject to monitoring activity undertaken by the Department in association with its sponsorship of a number of employees. The monitoring audit resulted in an unsatisfactory outcome where the Agent was issued with a Warning Notice. An infringement notice was issued in December 2012 for a contravention of Regulation 2.82 (Obligation to keep records) associated with cash payments made to a visa holder.

385. I consider this very significant given that the Agent receives payment to advise clients of migration services on their sponsorship obligations, yet was found in breach of these obligations in his capacity as a sponsoring employer. Such behaviour is fundamentally inconsistent with persons who are registered to provide advice, guidance, and assistance on migration matters and programs associated with the same. While the Agent has argued that subsequent monitoring which was finalised in September of 2014 resulted in a satisfactory outcome, and I accept that this was the case, it does not diminish his responsibility for the breaches identified earlier.

386. I am therefore satisfied that the conduct described above falls well short of the professionalism normally expected by a client who has sought the expertise and experience of a registered migration agent. As such, I find that the Agent's actions are indicative of someone who is not a person of integrity or otherwise not fit and proper to provide immigration assistance. While the Agent, in his response to the Authority, argued that he is a person of integrity, and a fit and proper person to provide immigration assistance, his conduct in relation to the matters which are the subject of this decision appear to indicate otherwise.

387. Having regard to the totality of the Agent's conduct in relation to the complaints and my findings above, I am satisfied that the Agent is 'not a person of integrity or is otherwise not a fit and proper person to give immigration assistance'.

388. Based on the evidence before me, I am satisfied that the Agent has:

- i. Not acted in accordance with the law by being party to a fraud which resulted in the provision of false and misleading statements and documentation to the Department in relation to a number of applications;
- ii. Engaged in behavior that involved fraud which may attract criminal sanctions;
- iii. Acted in a dishonest and deceitful manner;
- iv. Failed to consider the serious adverse consequences for his clients;
- v. Failed to exercise or deliberately disregarded his professional obligations as a registered migration agent to his clients, the Department and the Authority;
- vi. Breached the Code with respect to multiple counts of serious conduct where the behaviour involves an element of fraud; and



- vii. Failed to consider the reputational damage to the profession and brought the migration agent profession into disrepute.

### **CONSIDERATION OF APPROPRIATE DISCIPLINARY ACTION**

389. In deciding to discipline the Agent under section 303 of the Act I have taken into account all of the circumstances of the case, including the following:

- a. Whether the Agent's behaviour is of a minor or serious nature. The Authority has identified the following behaviour as extremely serious and therefore likely to result in discipline at the higher end of the scale:
  - i. criminal behaviour;
  - ii. fraudulent behaviour;
  - iii. behaviour that demonstrates fundamental lack of knowledge of the law; or
  - iv. involves a blatant disregard for or a significant degree of indifference to the law;
  - v. repeated occurrences of the conduct described in subsection 303(1) (d)-(h) and/or;
  - vi. agent behaviour that has resulted in significant harm or substantial loss to clients.
- b. Any aggravating factors that increase the Agent's culpability including but not limited to previous conduct.
- c. Any mitigating factors that decrease the Agent's culpability including but not limited to evidence that the Agent's health has contributed to the Agent's culpability or where the Agent has undertaken steps to remedy the situation.

### **SERIOUSNESS OF BEHAVIOUR**

390. In deciding to discipline the Agent under section 303 of the Act, I have taken into account all of the circumstances of the case, including the severity of the Agent's behaviour and any mitigating or aggravating factors which may exist. I have also considered:

- a. whether the behaviour in question could be the subject of rehabilitation;
- b. the level of impact, if any, that a sanction would have on the Agent's livelihood;
- c. the circumstances of the complainant or client, including the complainant's or client's vulnerability; and
- d. any wider issues pertaining to consumer protection or the national interest.

391. Having regard to the matters before me, I consider that the Agent's conduct falls within the Major classification for the following reasons:

- i. It involves a blatant disregard for, or a significant degree of indifference, to the law and the visa programs in general;

- ii. The Agent had breached the Code with respect to multiple counts of serious conduct where the behaviour involves an element of fraud;
- iii. The conduct has had serious and adverse consequences for the impacted clients, including lost visa opportunities, visa cancellations, sponsorship cancellations, stress and financial loss;
- iv. The Agent acted without any concern as to whether his conduct would adversely impact on or undermine the reputation of the migration advice profession, particularly conduct which had the potential to jeopardise the integrity of the temporary and permanent visa programs; and
- v. I have found that the Agent is not a person of integrity, or a fit and proper person to provide immigration assistance.

### **AGGRAVATING FACTORS**

392. The Agent has demonstrated behaviour which exhibits a blatant disregard for the law and an indifference towards his obligations to his clients, the Tribunal, the Department and the Authority.

393. I find that the Agent's behaviour is particularly abhorrent, in light of the fact that it involved an element of fraud and was dishonest and deceitful. I consider the Agent's failure to take reasonable steps in ensuring that the applications he submitted to the Department were not false or misleading to be extremely serious. Such conduct has a direct and profound impact upon the integrity of Australia's visa and migration programs.

394. While expressing some remorse, the Agent nevertheless failed to acknowledge the serious impact his conduct played in undermining the integrity of the Department's temporary and permanent visa programs and the migration advice profession in general.

395. The Agent has consistently attempted to distance himself from his personal responsibilities as a registered migration agent and the obligations under the Code by diverting and apportioning blame onto others with a view to avoiding potential disciplinary action. I consider this indicates the Agent remains unwilling to accept direct responsibility for the fraudulent documentation and the associated breaches of his obligations under the Code. I am satisfied that this strongly suggests that the Agent has low prospects to rectify his conduct and there remains a real likelihood that he will engage in similar conduct in the future.

396. The conduct has had serious and adverse consequences for the impacted clients, including lost visa opportunities, visa cancellations, sponsorship cancellations, financial loss and emotion stress.

397. The Agent's deficient record management and record keeping practices served to further aggravate the breaches already identified and highlighted an adverse pattern of conduct over a number of applications concerning different entities where, for reasons unknown, the Agent thought it fit to forgo normal documentary requirements.

398. While I acknowledge that this is the Agent's first sanction, I find that his behaviour poses a serious risk to migration consumers and to the integrity of the Department's visa programs.

## **MITIGATING FACTORS**

399. The Agent has put forward an argument that lessons have been learnt from the experience associated with these matters, and that his role within such could only extend to his failure in supervising a former employee, in line with his obligations pursuant to Part 8 of the Code. Moreover, that he has put in place measures which will ensure that no such conduct could be repeated, that he has provided monetary restitution to a number of affected parties and has undertaken professional development which has provided him with further insight into what may have contributed to the failures in these cases.

400. Given a number of instances where the Agent's conduct could be interpreted as an attempt to conceal what had transpired, any effort he has made to provide his former clients with a refund and monetary compensation appears to be undertaken so as to minimise the adverse consequences to his practice, and potential disciplinary action on part of the Authority, and not by genuine remorse or obligation.

401. While any positive change is acknowledged by the Authority, the obligations, behaviours, and an expectation to comply with the Code have not undergone significant change since the Agent's registration as a migration agent. Increasing his knowledge and awareness through guidance, made available to migration agents, is a positive step but does little to diminish the serious adverse conduct the subject of this decision. Any undertaking to comply with obligations in the future, has limited value when the evidence supports a finding that the most significant of obligations were breached in the past, on more than one occasion, and where the credibility of the person making the undertaking is in question. Moreover, where past conduct is an indicator of future conduct.

402. While I accept the Agent has some remorse for what has transpired, I do not consider this, or the monetary compensation he has provided to a number of clients mitigates the severe impact the conduct has had on numerous clients discussed within this decision.

403. I acknowledge the Agents submission that the complaints relate to the period of Ms [QN]'s employment with the firm and have taken this into account in making my decision. This fact, in and of itself, however, does not absolve the Agent from the conduct or the serious matters discussed within this decision.

404. I have also taken into account that a disciplinary sanction decision would affect the Agent's financial earning capacity and his livelihood. I note, however, that the Agent continues to hold qualifications as a solicitor and barrister and will be in a position to engage in alternate forms of employment during any period he is unable to provide immigration assistance.

405. I have considered the Agent's submissions to the Authority and accept that he has expressed remorse and contrition for some aspects of his conduct, primarily in respect of his deficiency in exercising effective control of the office. In my view, however, the adverse conduct extended well beyond office oversight and is a reflection of his actions including repeated failures to exercise due diligence when providing immigration assistance and in submitting applications to the Department.

## **CONSUMER PROTECTION**

406. Consumers of professional services of registered migration agents are often vulnerable and place a high degree of trust in their registered migration agent. Consumers are therefore entitled to a high level of professional service from their registered migration agent.

407. The behaviour demonstrated by the Agent falls short of the reasonably expected standards of a registered migration agent. I consider that the Agent currently poses a serious risk to consumers. I am satisfied that if the Agent were to continue to practice as a registered migration agent, the Agent would not demonstrate the requisite skills, integrity or character expected of a registered migration agent. I consider that a disciplinary decision is warranted to address the conduct the subject of this decision, and in the interests of consumer protection.

408. I expect that a decision to sanction the Agent would more likely than not deter other registered migration agents from engaging in a similar practice and ensure that public confidence in the migration agent profession is maintained.

## **DECISION**

409. In all of the circumstances, and in the interests of consumer protection, I consider that it is appropriate to cancel the Agent's registration.

410. Based on the facts and evidence before me, and my findings as discussed in the decision, I have decided to cancel the Agent's registration as a migration agent under subparagraph 303(1)(a) of the Act. I am satisfied for the purpose of subparagraphs 303(1)(f) and (h) that:

- the Agent is not a person of integrity, or is otherwise not a fit and proper person to give immigration assistance; and
- the Agent has not complied with multiple clauses of the Code.

411. In accordance with section 292 of the Act, an agent who has had their registration cancelled must not be registered within 5 years of the cancellation.

412. Accordingly, this cancellation will be in effect for a period of 5 years from the date of this decision.