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DECISION RECORD

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|--------------------------|-----------------------|
| AGENT | Marzena Siedlecka |
| COMPLAINT NUMBER | CAS-10992-N7C3 |
| DECISION | Suspension – 6 months |
| DATE OF DECISION | 12 September 2023 |
| TERMS USED FOR REFERENCE | Refer Appendix A |

JURISDICTION

1. The Authority performs the functions prescribed under section 316 of the *Migration Act 1958* (the Act).
2. The functions and powers of the Authority under Part 3 of the Act and *Migration Agents Regulations 1998* (the Agents Regulations) may only be exercised by the Minister or by a delegate of the Minister. The Minister has delegated the powers under Part 3 of the Act and the Agents Regulations to officers of the Authority. I am delegated under the relevant Instrument to make this decision.

Relevant Legislation

3. 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)).
4. 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

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- 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)).
5. Subsection 314(2) of the Act provides that a registered migration agent must conduct himself or herself in accordance with the Code. The *Migration (Migration Agents Code of Conduct) Regulations 2021* made under the Act prescribes the Code.
 6. The Code of Conduct for registered migration agents in force at the time of the conduct that is the subject of this decision was the Code of Conduct current from 18 April 2017 (former Code) and Code of Conduct current from 1 March 2022 (Code). See Attachment A.
 7. A copy of the relevant legislation is set out in Attachment B.

AGENT BACKGROUND

Agent Registration

8. The Agent was first registered as a migration agent on 20 November 2007 and was allocated the MARN 0701955. The Agent's registration had been renewed annually to date, with the most recent registration commencing on 20 February 2022.
9. The Agent made an application to renew her registration on 20 February 2023, which remains under consideration, pending the finalisation of the complaint which is subject of this decision.
10. The Register lists the Agent's business name as Education Aware with the ABN XXXXXXXXXXXX. Education Aware is owned and operated by [AD] under a sole trader structure.

Prior disciplinary action

11. No disciplinary action has previously been taken against the Agent.

ALLEGATIONS – THE AUTHORITY'S INVESTIGATION

12. On 6 June 2022, the Authority received a complaint about the Agent's conduct as a migration agent from Mr [RA], on behalf of Mr [BT].
13. Following an investigation into the Agent's conduct, it was alleged that the Agent:
 - failed to deal with her client professionally, competently, diligently and fairly contrary to clause 2.1 of the former Code;
 - failed to demonstrate a sound working knowledge of the Migration Act and Migration Regulations and other legislation relating to migration procedure contrary to clause 2.3 of the former Code;
 - provided futile immigration assistance contrary to clauses 2.7 and 2.17 of the former Code;
 - failed to provide their client with an Agreement for Services and Fees contrary to clause 5.2 of the former Code;

- carried out work in a manner that unnecessarily increases the cost to the client contrary to clause 5.3 of the former Code;
 - failed to provide their client a statement of services contrary to clause 5.5 of the former Code;
 - failed to give written notice to the Authority within 14 days after becoming aware of a material change in a matter that is shown in the Register of Migration Agents (the Register) in respect of the Agent's employment details, contrary to section 28 of the Code;
 - failed to respond to requests from the Authority for information or documents, contrary to section 32 of the Code;
 - failed to maintain client files and provide them to the Authority upon request, contrary to clauses 6.1 of the former Code and section 56 of the Code.
14. Further, it was alleged that the Agent's actions demonstrated the Agent was not a person of integrity or fit and proper person to provide immigration assistance as per paragraph 303(1) of the Act.

Allegations - CAS-10992-N7C3

15. On 6 June 2022, the Authority received a complaint about the Agent's conduct as a registered migration Agent from Mr [RA], on behalf of Mr [BT].
16. It was alleged that:
- (a) The Agent lodged an Employer Nomination Scheme (ENS) (subclass 186) visa application for Mr [T] on 30 October 2020 without the required evidence to demonstrate that Mr [T] met the English language requirement.
 - (b) Mr [T] would not have agreed to lodge the subclass 186 visa application if the Agent had informed Mr [T] that he must have undertaken an English language test within the three years immediately before the application was made.
 - (c) On or around 20 August 2021, Mr [T] became aware that his subclass 186 visa application could not succeed. At the time, the Agent allegedly advised Mr [T] to withdraw his subclass 186 visa application, seek a refund and commence the process again.
 - (d) The Agent's actions resulted in additional costs to both Mr [T] and to Mr [A], who nominated Mr [T] through his business, [AG] Pty Ltd.
 - (e) The Agent did not issue a Service agreement, cost estimate for professional services or a copy of the Code of Conduct to Mr [T].
17. In addition, the Authority alleged that the Agent failed to provide it with written notification within 14 days that she changed employers through which she provided immigration assistance.

Departmental records

18. Departmental records confirm the Agent lodged a subclass 186 visa application for Mr [T] on 30 October 2020.
19. On 30 October 2020, the Agent also lodged an Employer Nomination application on behalf of Mr [T]'s nominator, [AG] Pty Ltd, a company of which Mr [A] is the Director.

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20. At the time of making both of these applications, the Agent provided the name of her employer as [SI] Pty Ltd.
21. On 16 August 2021, Mr [T] was invited by the Department to comment on his inability to satisfy the subclass 186 visa requirements as his IELTS English test was not undertaken in the three years immediately before the day the visa application was lodged. The invitation was sent to the Agent's email address, xxxxxxx@xxxxxx.com.au.
22. On 13 September 2021, the Department received notification that the Agent was no longer representing either Mr [T] or [AG] Pty Ltd in relation to the above applications because a new representative had been appointed to receive communication on their behalf.

Notice under section 308 of the Act

23. On 2 August 2022, the Authority published the complaint to the Agent (Attachment C).
24. Pursuant to section 308 of the Act, the Authority requested the Agent to provide specified documents and answers to questions in writing.
25. The Agent did not respond to the Authority's section 308 notice by the due date.
26. On 24 August 2022, the Authority advised the Agent that her response was overdue.
27. On 1 September 2022, the Agent requested an additional two weeks to respond to the section 308 notice on the basis of her contention that she was receiving medical treatment. An extension was provided until 1 October 2022, however no response was received within the extended response period.

Notice under section 309 of the Act

28. On 23 May 2023, the Authority sent to the Agent a Notice pursuant to section 309(2) of the Act, advising the Agent that it was considering cautioning her, or suspending or cancelling the Agent's registration under section 303(1) of the Act (Attachment D).
29. The Agent was notified that having regard to the information before the Authority, it was open to the delegate to be satisfied that the Agent had engaged in conduct that breached the Agent's obligations under clauses 2.1, 2.3, 2.7, 2.17, 5.2, 5.3, 5.5 and 6.1 of the former Code and sections 28, 32 and 56 of the Code. Further, that the Agent was not a person of integrity or otherwise a fit and proper person to provide immigration assistance as per paragraph 303(1)(f) of the Act.
30. Pursuant to section 309(2) of the Act, the Authority invited the Agent to provide written submissions on the matter by 20 June 2023
31. On 27 June 2023, the Agent provided a response by written argument (Attachment E). In summary, the Agent advised as follows:
 - During her initial consultation with Mr [T], she outlined the visa requirements for the subclass 186 visa, including the English language requirement.
 - Mr [T] booked an IELTS test, however his exam was rescheduled due to COVID. Consequently, he did not undergo an English test before his subclass 186 visa application was lodged.

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- She spoke with Mr [T] a few times to express her concerns about the lodgement of the subclass 186 visa application and all the conversations were recorded in an internal system called Hubspot.
- She was under pressure to lodge the subclass 186 visa application before Mr [T]'s existing substantive visa ceased and in hindsight, she regrets her actions as she could have lodged a subclass 408 visa application instead.
- She was not personally responsible for issuing Mr [T] with an Agreement for Services and Fees, an estimate of Costs or a Statement of Services. Instead, [SI] Pty Ltd and their Accounts Department took care of the Agreement for Service and invoicing.
- She did not charge Mr [T] for her professional fees.
- She no longer works for [SI] and does not hold information that should be kept in Mr [T]'s client file.
- She has asked [SI] to provide copies of emails between her and Mr [T] however her former employer has not been responsive.
- Her health issues have prevented her from addressing the complaint until now.
- She is willing to contact her indemnity insurance and provide a refund for visa fees paid by Mr [T].

DECISION: FINDINGS ON MATERIAL QUESTIONS OF FACT

32. In reaching the findings of fact discussed in this decision record, the Authority considered the following evidence:
- Documentation contained in the Authority's complaints files for CAS-10992-N7C3;
 - Information held by the Authority in relation to the Agent;
 - Information held on the Department's databases in relation to the matters raised in the complaint which are the subject of this decision; and
 - The supporting documentation provided by the Agent in response to the section 309 notice dated 27 June 2023 and 10 July 2023.
33. Having considered the information before me, I am satisfied the Agent:
- has engaged in conduct in breach of the Agent's obligations under clauses **2.1, 2.3, 2.17, 5.2, 5.3, 5.5 and 6.1** of the **former Code**; and
 - has engaged in conduct in breach of the Agent's obligations under sections **28, 32 and 56** of the **Code**; and
 - is not a person of integrity or otherwise a fit and proper person to provide immigration assistance as per paragraph **303(1)(f) of the Act**.
34. My findings and full reasons for the decision are set out below.

Futile immigration assistance

35. On 30 October 2020, the Agent lodged a subclass 186 visa application in the Direct Entry stream¹ for Mr [T]. It should have been apparent to the Agent that Mr [T] would be unable to satisfy clause 186.232 of Schedule 2 to the Regulations. Under clause 186.232, at time of application, the applicant must have had competent English or be a person in a class of persons specified by the Minister in a legislative instrument.
36. At the time of application, Mr [T] did not hold a passport² that would exempt him from the requirement to undergo an English language test. He was therefore required to provide evidence at the time of application that he had undertaken a specified language test and achieved the required Competent English test scores within the three years immediately before the subclass 186 visa application was lodged.
37. A review of Mr [T]'s subclass 186 visa application reveals that a "no" response was provided to the question 'Has the applicant undertaken an English test in the last 36 months? The Agent was therefore aware that Mr [T] had not undertaken an English language test within the three years immediately before the subclass 186 visa application was lodged.
38. Mr [A] has alleged that Mr [T] would not have agreed to lodge the subclass 186 visa application if the Agent had informed him that it would be futile to lodge the application without having undertaken an English language test. However, the Agent contended that she outlined the English language requirements for the subclass 186 visa to Mr [T] during her initial consultation with him. According to the Agent, Mr [T] was unable to take a test before his visa application was lodged on 30 October 2020. She stated that Mr [T] had booked an IELTS test however the exam had to be rescheduled due to COVID.
39. As to whether Mr [T] was discouraged from lodging the subclass 186 visa application, the Agent claimed that she spoke with Mr [T] to express her concerns about lodging the application. The Agent recorded the conversations in an internal system called Hubspot. Copies of Hubspot entries were provided as evidence of the Agent's interactions with Mr [T]. However, there is no evidence of a call taking place before Mr [T]'s subclass 186 visa application was lodged on 30 October 2020. Based on the evidence provided by the Agent, the earliest entry in Hubspot is dated 4 January 2021 which records that Mr [T] opened his Bridging visa grant notification letter.
40. The Agent provided a Hubspot entry, dated 8 November 2021, indicating she provided a response to an email to both Mr [A] and Mr [T]. The content of the email was not provided by the Agent. However the title of the email (*Email – Re: TSS visa nomination Chef II BT from Migration Team STUDYIN*) strongly supports the proposition that the Agent had discussed the requirements of the TSS visa, with different requirements to that of a subclass 186 visa.
41. The evidence from Mr [T] included a copy of an email which the Agent sent to Mr [A] on 27 August 2020. In this email, the Agent outlined the requirements for the TSS visa, which included the lodgement of a TSS nomination by Mr [A]'s business. The Agent also outlined that Mr [T] would need to achieve "equivalent to a minimum of 5 in each band of IELTS, an

¹ Permission RID: 2035642440

² for paragraph 1.15C(2), a valid passport issued by the United Kingdom, the United States of America, Canada, New Zealand or Republic of Ireland, to a citizen of that country.

average of 5 is not sufficient”, in order to meet the English language requirements for the TSS visa in the medium term stream.

42. There is no evidence before me that any of the Agent’s discussions with Mr [T] were in relation to the Subclass 186 visa application. The evidence provided by both Mr [T] and the Agent supports the view that they were in discussion about lodging an application for a different visa, namely the Temporary Skill Shortage (TSS) (subclass 482) visa.
43. It follows that contrary to the Agent’s claim, I find that the evidence shows that both Mr [T] and Mr [A] were provided with information about the TSS visa requirements and not about the subclass 186 visa. As each visa has its own unique requirements, I do not accept the Agent’s claim that Mr [T] was appropriately informed about the consequences of lodging a subclass 186 visa application before he had undertaken a mandatory English language test.
44. There is no evidence to show that the Agent advised Mr [T] in writing that he must have undertaken a specified language test and achieved the required Competent English test scores within the three years immediately before the subclass 186 visa application was lodged. Further, there is no evidence before me that Mr [T] provided his written acknowledgment to confirm that he had been informed about the consequences of lodging a subclass 186 visa application before he had undertaken an English language test.
45. I therefore find that the Agent provided immigration assistance that was futile, in breach of her obligations under **clause 2.17** of the former Code.

Sound working knowledge of the migration legislation and procedure

46. On 26 February 2021, the Agent uploaded a copy of Mr [T]’s IELTS test results to the subclass 186 visa application³. The test results were dated 30 November 2020, one month after the application was made. Given Mr [T]’s English language test was not undertaken in the prescribed period⁴, I am not satisfied that the Agent understood that the test results could not be used to satisfy the subclass 186 visa requirements.
47. On 16 August 2021, Mr [T] was invited by the Department to comment on his inability to satisfy the subclass 186 visa requirements because his IELTS English test was not undertaken in the three years immediately before the date of lodgement of the visa application. The invitation was sent to the Agent’s email address, xxxxxxx@xxxxxx.com.au.
48. According to Mr [A], on or around 20 August 2021, Mr [T] was made aware that his subclass 186 visa application could not succeed and he was advised by the Agent to withdraw his subclass 186 visa application and commence the process again. The Agent concurred that she provided this advice. In her submission dated 27 June 2023, the Agent stated as follows: ‘As Mr [T] received his test on 30 November 2020 and after receiving the Invitation to comment on information for a Employer Nomination Scheme (subclass 186), I suggested relodgement of visa his [sic] subclass 186’.
49. I accept that the Agent understood the reason why Mr [T] could not satisfy subclass 186 visa requirements after she had received the invitation to comment on 16 August 2021. However, the Agent has not provided me with any evidence that she understood the requirements before

³ CLD2021/6080433

⁴ Regulation 1.15C sets out the Competent English requirements

receiving the invitation to comment from the Department. As a consequence, the Agent lodged a subclass 186 visa application that did not meet the requirements without affording Mr [T] the opportunity to make an informed decision about how to proceed.

50. I therefore find that the Agent failed to maintain a sound working knowledge of migration legislation and procedure, in breach of her obligations under **clause 2.3** of the former Code. I also find that the Agent has not demonstrated the competence and diligence expected of a registered migration agent in breach of **clause 2.1(b)** of the former Code.

Agreement for Services and Fees and Statement of Services

51. Mr [A] alleged that the Agent failed to issue an Agreement for Services and Fees or any itemised invoices for the immigration assistance that was provided.
52. In response to this allegation, the Agent stated that she did not charge Mr [T] for her professional fees. She also stated that the Agreement for Services and invoicing was handled by her previous employer, [SI] and their Accounts Department.
53. The agent failed to provide copies of Service Agreements or invoices.
54. Accordingly, I am satisfied that the Agent breached her obligations under **clauses 5.2 and 5.5** of the former Code by failing to provide her client with the required documentation.

Carrying out work in a manner that unnecessarily increases the cost to the client

55. Mr [A] nominated Mr [T] through his business, [AG] Pty Ltd. The Agent lodged the nomination application for [AG] Pty Ltd on 30 October 2020. Departmental records verify that Mr [A]'s credit card was used to pay the nomination fee of \$3,540.
56. The Agent also lodged Mr [T]'s subclass 186 visa application on 30 October 2020. Mr [T]'s de-facto partner was included in the application and departmental records verify that Mr [A]'s credit card was also used to pay the visa application charge (VAC) of \$6,070.
57. The Agent assisted both Mr [A] and Mr [T] with their nomination and visa applications, however the total nomination and visa application costs of \$9,610 were paid by Mr [A].
58. When it became apparent that Mr [T] could not satisfy the subclass 186 visa applications, the Agent advised Mr [T] that he should withdraw his application and commence the process again.
59. However, any subsequent applications lodged with the Department would incur further costs. Thus, while Mr [T] could consider the option of withdrawing his visa application and lodging a new application, Mr [A] had already paid \$6,070 for the lodgement of the current visa application and these costs were not refunded.⁵
60. In response to the section 309 notice, the Agent stated that she was willing to contact her indemnity insurance and provide a refund for the VAC. To date, there is no evidence that such action has occurred. This means that Mr [A] suffered a financial loss because he paid the VAC for a visa application that had no hope of success and he was not counselled about the consequences of proceeding with the application.

⁵ Regulation 2.12F provides the various circumstances in which the first instalment of the VAC can be refunded.

61. I therefore find that the Agent breached her obligations under **clause 5.3** of the **former Code** by unnecessarily increasing costs for Mr [A].

Dealing with a client competently, diligently and fairly

62. The Agent conceded that she should not have lodged Mr [T]'s subclass 186 visa application. She has stated that her judgement was affected because Mr [T]'s visa was about to expire and she acted under pressure.
63. I accept that the Agent would have felt some pressure to lodge Mr [T]'s visa application before his substantive visa expired on 30 October 2020. However, she had an obligation to discourage Mr [T] from lodging the application until he had undertaken an English language test. The Agent's failure to provide this advice led to a financial loss to Mr [A], by way of lost visa application charges.
64. Further, a competent and diligent Agent would have ensured her clients were issued with an agreement for services or fees, invoices and statements of service. The Agent was unable to demonstrate that either Mr [A] or Mr [T] were issued with these documents.
65. Accordingly, I find that the Agent breached her obligations under obligations under **clause 2.1** of the **former Code** because she failed to deal with either Mr [A] or Mr [T] competently, diligently or fairly.

Notification obligations

66. Agents are obligated under section 28 of the Code to give written notice to the Authority and all their current clients of material changes in a matter that is shown in the Register of Migration Agents in respect of the Agent. Such changes are to be reported within 14 days.
67. On 25 January 2023, the Agent's former employer, [MD] Pty Ltd, notified the Authority that the Agent had ceased employment with them six months earlier but had failed to update her details in the Register of Migration Agents. The Agent's former employer also expressed concern that they had made attempts to contact the Agent by email (xxxxxxx@xxx.com.au) and phone (0000 000 000) to address this issue, however the Agent was unresponsive.
68. On 25 January 2023, the Authority provided this information to the Agent and requested updated details of any businesses through which she was providing immigration assistance.
69. On 10 February 2023, the Agent notified the Authority that her new employer was Education Aware. According to departmental records, the Agent has been working for Education Aware since at least 11 March 2022.⁶ While the Agent has now updated her details in the Register of Migration Agents to show that she works for Education Aware, she did not report this change within 14 days as it took 11 months to report her new employment details. The Agent also had to be prompted by both her former employer and the Authority to report these changes.
70. At the time of providing immigration assistance to Mr [T], the Agent provided the name of her employer as [SI]. The Agent has not previously advised the Authority that she provided immigration assistance through [SI].
71. The Agent was given the opportunity to comment on this information.

⁶ 956 form provided for RID: 1105648873

72. In emails dated 20 and 27 June 2023, the Agent confirmed that [SI] was a previous employer. While the Agent acknowledges that she once worked for [SI], she had not provided notification of this employment to the Authority while she was still an employee.
73. On 29 June 2023, the Agent was given a further opportunity to provide clarification in relation to her employment arrangements, noting that the ABN XXXXXXXXXXXX for her own sole trader business (trading as World Wide Visa) was cancelled on 31 July 2015. The Agent was asked to provide the names of all businesses from which she provided immigration assistance since 31 July 2015 and the dates of engagement with each employer. She was also asked to clarify whether the sole trader who owns and operates Education Aware (i.e. the Agent's current employer) is a current [removed for privacy] visa holder and the Agent's former client.⁷
74. On 10 July 2023, the Agent responded by stating that she was unaware that the ABN for World Wide visa had been cancelled eight years ago and she confirmed that she was currently working with Education Aware as an independent contractor and remunerated on a case to case basis. However, the Agent did not comment on whether Education Aware was owned and operated by a [removed for privacy] visa holder and former client. The Agent also failed to provide a clear outline of the names of all her employers and the dates of employment with each employer.
75. It is not in contention that the Agent worked for [SI] when she lodged Mr [T]'s subclass 186 visa application on 30 October 2020. However, the Agent's employment with [SI] has only come to light as a result of the investigation of this complaint. The Agent did not notify the Authority that she was an employee of [SI] when she worked for the business.
76. It is also evident that the Agent failed to provide written notice to the Authority within 14 days after commencing employment with her current employer, Education Aware.
77. The Agent has provided no real explanation for these failures, apart from providing a general statement about how [removed for privacy].
78. I therefore find that the Agent breached her notification obligations under **section 28** of the Code.

Duty to respond promptly to requests from Authority for information or documents

79. Agents are required to respond to requests for information or a document from the Authority promptly to enable the Authority to effectively investigate complaints in relation to the provision of immigration assistance by agents.
80. The Agent failed to respond to the section 308 notice in accordance with section 32 of the Code, despite two email reminders and one telephone reminder.
81. The Agent provided limited information following the publication of the section 309 notice. The Agent only provided very brief answers to the questions outlined the section 308 notice but did not provide the requested documents. Notably, the Agent did not provide:
 - Evidence of the advice she provided to Mr [T] about his ability to satisfy English language requirements;

⁷ Request ID: 625654182

- Evidence that Mr [T] agreed to proceed with the lodgement of the visa application after being counselled about lodging an application without the required English test result;
 - Copies of an Agreement for Services and Fees, an estimate of costs or a Statement of Services.
82. The Agent was requested to provide information and documents to address the allegations in Mr [T]'s complaint on 2 August 2022, however the answers to the Authority's questions were only provided on 27 June 2023, more than 10 months after the request was made. The Agent's delayed response was not comprehensive, since requested documents were omitted from the response.
83. The Agent cited health issues as the reason for her delay in responding to the section 308 notice, although no documentary evidence has been provided to support her claims.
84. I note that the Agent's health issues have not prevented her from lodging applications on behalf of her clients during the ten month period in which her response was pending. Given that the Agent was actively lodging applications with the Department during this time, I consider it would have been reasonable to expect her to also attend to the more pressing matter of responding to the section 308 notice, particularly as she had an obligation to do so.
85. Accordingly, I am satisfied that the Agent breached her obligations under **section 32** of the **Code** by failing to respond promptly to requests from the Authority.

Duty to maintain and keep client files

86. Migration Agents are expected to create and maintain a client file; and take all reasonable steps to keep the client file for a period of seven years after the last action on the client file was taken.
87. The obligation of an Agent to keep records in accordance with the Code, and the power of the Authority under section 308 of the Act to access those records, is fundamental to the exercise of the Authority's regulatory and consumer protection functions. Having access to records held by migration agents is relevant to the Authority's consideration of a complaint as it allows an assessment of whether an agent has complied with their obligations under the Code.
88. Under clause 6.1 of the former Code, the Agent had an obligation to maintain proper client records that could be made available on request by the Authority. Even though the Agent may not have had control over the client records she created while employed with [SI], her obligations under the former Code could not be discharged or delegated to someone other than another registered migration agent. The onus therefore remained with the Agent to take reasonable steps to ensure her employer was able to maintain her client records in a way that was compliant with the former Code, regardless of whether she remained employed by them. There is no evidence before me that the Agent endeavoured to do so.
89. As a result, the Agent has been unable to provide the Authority with the requested client records she was required to maintain for Mr [T] and Mr [A]. In fact, Mr [R] from [SI] advised her on 14 November 2022 that it does not keep client data for longer than six months and that Mr [T]'s data "was archived and probably deleted".
90. Accordingly, I find that the Agent has breached **clauses 6.1** of the former Code and **section 56** of the Code by not adequately maintaining her clients' files or ensuring that they were able to be made available to the Authority when requested.

91. The Agent's reliance on [SI] to maintain and keep her client files also suggests that this failure was not limited to the client files of Mr [T] and Mr [A] while she worked for [SI]. As already discussed, the Agent does not appear to have access to these files herself and Mr [R] has stated that [SI] does not keep client data for more than six months. However, I make no findings in regard to these client records.

INTEGRITY, FITNESS AND PROPRIETY – SECTION 303(1)(F) OF THE ACT

92. Section 303(1)(f) of the Act provides that the Authority may take specified disciplinary action if it becomes satisfied that the agent is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance. The Authority's consideration of integrity, fitness and propriety in relation to the duties and obligations of a registered migration agent are set out below.

Integrity

93. There is a degree of overlap between "fit and proper" and "integrity" to the extent that fitness and propriety includes consideration of the honesty of the actions of an individual.
94. 'Integrity' means 'soundness of moral principle and character, uprightness and honesty'.⁸

Fitness and Propriety

95. 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. 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. 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.

96. 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.⁹
97. The context in which the reference to 'fit and proper' person occurs in section 303(1)(f) is the person's giving of immigration assistance. The context also includes:
- the Act, which creates offences for misleading statements and advertising, practicing when unregistered and misrepresenting a matter; and
 - section 290(2) of the Act, which provides that in considering whether it is satisfied that an applicant is not fit and proper or not a person of integrity, the Authority must take into

⁸ See *Re Peng and Department of Immigration and Multicultural Affairs* [1998] AATA 12 at paragraph [26].

⁹ See *Cunliffe v Commonwealth* (1994) 182 CLR 272

account specified matters, including the person's knowledge of migration procedure; and any other matter relevant to the person's fitness to give immigration assistance.

- the Code which refers to (among other matters) a registered migration agent acting diligently, ethically, honestly and with integrity, treating persons with appropriate respect, and properly managing and maintaining client records and maintaining client confidentiality.

98. Key elements of the fitness test are:

- the honesty of the person (Peng and Department of Immigration and Multicultural Affairs [1998] AATA 12); and
- 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).

99. The reference in section 303(1)(f) to a registered migration agent not being 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*).

100. 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, for example whether or not the Agent is an employee or owner of the business through which immigration assistance is provided;
- 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".

Findings in relation to integrity, fitness and propriety

101. Having regard for the totality of the matters discussed within this decision, I am satisfied that the Agent has:

- breached multiple clauses of the former Code and the Code showing an indifference to her professional obligations;
- failed to provide clients with an Agreement for Services or Fees, invoices or statements of service;
- attempted to distance herself from her professional responsibilities, as a registered migration agent, by failing to keep and maintain, proper client records which has prevented her from adequately responding to requests made by the Authority;

- failed to deal with her clients competently, diligently or fairly; resulting in financial loss to a client and the provision of futile immigration assistance;
- acted without regard for the adverse impact the conduct would have on the reputation and integrity of the migration advice profession;
- acted in a manner not consistent with the principles of integrity nor of a person who is fit and proper to provide immigration assistance.

102. In consideration of the discussion on the Agent's conduct in this decision and my findings above, I am satisfied that the Agent is not a person of integrity and is otherwise not a fit and proper person to give immigration assistance.

CONSIDERATION OF APPROPRIATE DISCIPLINARY ACTION

103. 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:

- Whether the Agent's behaviour is of a minor or serious nature. Conduct that the Authority considers to be adverse, extremely serious and therefore likely to result in discipline at the higher end of the scale includes but is not limited to:
 - criminal behaviour;
 - fraudulent behaviour;
 - behaviour that demonstrates fundamental lack of knowledge of the law; or
 - involves a blatant disregard for or a significant degree of indifference to the law;
 - repeated occurrences of the conduct described in subsection 303(1) (d)-(h) and/or;
 - agent behaviour that has resulted in significant harm or substantial loss to clients.
- Any aggravating factors that increase the Agent's culpability including but not limited to previous conduct.
- 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

104. 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 circumstances which may exist. I have also considered:

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

105. Having regard to the matters before me, I consider that the Agent's adverse behaviour is of a moderate nature because:

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- multiple breaches of the Code of Conduct have occurred;
- there are indications of systemic poor practices in relation to the Agent's financial management and record keeping obligations;
- the Agent has shown an indifference to her professional responsibilities by failing to maintain client files; respond promptly to requests from Authority for information or documents; or meet her notification obligations;
- the Agent's actions have resulted in some financial loss to a client;
- the Agent's conduct may cause some reputational damage to the migration advice profession.

Aggravating factors

106. The Agent failed to properly respond to the Authority's request for information which has hampered the investigation of the complaint and demonstrates a lack of regard for her obligations under the Code of Conduct.
107. The Agent has also attempted to distance herself from her professional responsibilities as a registered migration agent and her obligations under the Code of Conduct by diverting and apportioning responsibility onto others.
108. The Agent's reliance upon third parties to collect and disburse funds; manage client files; and create agreements and invoices has led to systemic failures in relation to her compliance with record-keeping and financial management obligations. The Agent has failed to acknowledge the issues with her record keeping and financial management practices or to implement measures to combat these issues. On that basis, there remains a real likelihood that she will continue to engage in similar conduct in the future.
109. I therefore consider the Agent's conduct falls well short of the standard expected of a registered migration agent.

Mitigating Factors

110. The Agent has provided the following submissions to be taken into account in making this decision:
- [removed for privacy];
 - [removed for privacy];
 - [removed for privacy];
 - [removed for privacy];
 - [removed for privacy]
 - She has practised Migration Law for 16 years and has never brought the profession to any disrepute;
 - She cares for her clients and would really like to resolve this issue.
111. I have considered the Agent's claims that her health issues have contributed to her failure to properly respond to the Authority's request for information and documents, however these claims are not supported by any documentary evidence. Therefore, I provide little weight to

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these claims. Further, as noted previously, the Agent's purported health issues did not prevent her from lodging visa applications during the ten month period in which her response was pending. Consequently, I do not consider that her health issues decrease her culpability.

112. I have considered that the majority of the Agent's breaches of the former Code occurred while she worked for [SI] and she now works for a sole trader business, Education Aware, owned and operated by AD. The Agent has failed to clarify whether [AD] is a [removed for privacy] visa holder and the Agent's former client. The Agent's unwillingness to address this question does not diminish concerns about her overall integrity and honesty; or reduce her culpability.
113. I do not consider it probable that the Agent's business practices are likely to improve under an employment arrangement with a [removed for privacy] visa holder and former client.
114. I have also considered that the Agent has not previously been subject to a sanction or disciplinary action by the Authority. However, I am of the view that this alone does not mitigate the conduct which is the subject of this decision.
115. I accept that any disciplinary decision will have an impact on the Agent's future livelihood. However, I am of the view that any loss in earnings from the provision of immigration assistance is significantly outweighed by the public interest given the seriousness of the Agent's conduct in relation to the applications and the information submitted to the Department. I consider that the nature of the conduct reflects adversely on the Agent's integrity and on the Agent's fitness to remain in the migration advice industry.

Consumer Protection

116. 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.
117. The behaviour demonstrated by the Agent falls short of the standards expected of registered migration agents. I consider that the Agent poses a 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 expected of a registered migration agent. I therefore consider that a disciplinary decision is warranted to address the conduct that is the subject of this decision, in the interests of consumer protection, and in maintaining confidence the integrity of the Australian migration program.
118. 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 industry is maintained.

DECISION

119. I have turned my mind to the appropriate sanction action to impose on the Agent. I consider that the Agent requires a period of separation from the industry and have not imposed a caution for this reason. I am of the view that a suspension with conditions imposed on the Agent would maintain the interests of consumer protection and the migration program in general.
120. Following consideration of the information before me, I have decided to suspend the Agent from being registered as a migration agent from the date of this decision for a period of six months, and until the Agent has met the below conditions. The conditions are to be completed within the period of suspension or no more than four (4) years from the date of suspension.

Conditions

121. Evidence that the Agent has completed a total of 1 Continuing Professional Development (CPD) point for every 1 month that the suspension is in force. The CPD activities are to be completed throughout each year that the suspension is in force and must include file management, accounts management and service agreements.
122. Evidence that the Agent has successfully completed the following private tuition sessions which are conducted by an individual or individuals approved by the Authority and who are accredited immigration law specialists:
 - 3 hours of private tuition in relation to compliance with the Code of Conduct and with specific attention to Ethics and Professional Practice
 - The Agent is not to accrue CPD points from this private tuition.
123. Evidence by way of a report from the Accredited Immigration Law Specialist or Specialists who provided the private tuition sessions indicating that:
 - they were provided with a copy of this decision before the sessions were conducted; and
 - the Agent has successfully completed the relevant sessions.
124. A statutory declaration in Commonwealth form stating that the Agent has not made immigration representations for a fee, has not advertised the provision of immigration assistance and has not given immigration assistance whilst suspended.

Position Number: 60155944

Senior Professional Standards Officer

Office of the Migration Agents Registration Authority
Department of Home Affairs

Date of Decision: 12 September 2023

APPENDIX A: TERMS USED FOR REFERENCE

1. The following abbreviations may have been used in this decision:

| | |
|--------------------|---|
| ABN | Australian Business Number |
| AAT | The Administrative Appeals Tribunal |
| BVA/B/E | Bridging Visa A, B or E |
| MARN | Migration Agent Registration Number |
| Section 308 Notice | Notice issued by the Authority under section 308 of the Act |
| Section 309 Notice | Notice issued by the Authority under section 309 of the Act |
| The Act | The <i>Migration Act 1958</i> |
| The Regulations | <i>Migration Agents Regulations 1998</i> |
| The Agent | Marzena Siedlecka |
| The Authority | The Office of the Migration Agents Registration Authority |
| The Code | The <i>Migration (Migration Agents Code of Conduct) Regulations 2021</i> prescribed for the purposes of subsection 314(1) of the <i>Migration Act 1958</i> |
| The former Code | Code of Conduct prescribed for the purposes of subsection 314(1) of the <i>Migration Act 1958</i> by regulation 8 and Schedule 2 of the <i>Migration Agents Regulations 1998 – repealed on 1 March 2022</i> |
| The Department | The Department of Home Affairs |
| The Register | Register of migration agents kept under section 287 of the Act |
| VEVO | Visa Entitlement Verification Online |