



DECISION RECORD

AGENT	Mr Sanat GUPTA
COMPLAINT NUMBER/S	CMP-31291
DECISION	Cancellation
DATE OF DECISION	23 October 2019

Terms used for reference

1. The following abbreviations are used in this decision:

<i>ABN</i>	Australian Business Number
<i>AAT</i>	The Administrative Appeals Tribunal
<i>BVA/B/E</i>	Bridging Visa A, B or E
<i>MARN</i>	Migration Agent Registration Number
<i>Section 308 notice</i>	Notice issued by the Authority under section 308 of the Act
<i>Section 309 notice</i>	Notice issued by the Authority under section 309 of the Act
<i>The Regulations</i>	<i>The Migration Regulations 1994</i>
<i>The Act</i>	<i>The Migration Act 1958</i>
<i>The Agent</i>	Mr Sanat GUPTA
<i>The Authority</i>	The Office of the Migration Agents Registration Authority
<i>The Code</i>	The Migration Agents Code of Conduct prescribed under Regulation 8 and Schedule 2 to the Agents Regulations
<i>The Department</i>	The Department of Home Affairs
<i>The Register</i>	Register of migration agents kept under section 287 of the Act
<i>The Agents Regulations</i>	<i>Migration Agents Regulations 1998</i>

STATEMENT OF REASONS

Background

2. The Agent was first registered as a migration agent on 24 October 2014 and was allocated the MARN 1466755. The Agent's registration had been renewed annually to date, with the most recent application, submitted on 24 October 2018, proceeding pursuant to section 300(5) of the Act.
3. The Register lists the Agent's business name as VMS Global trading as Visa and Migration Services Pty Ltd with the ABN 75 607 984 574. The Agent is also the sole trader of Gupta, Sanat with ABN 49 778 637 850 as well as the director of Uniq Turn Pty Ltd ABN 50 628 498 975.

Prior Disciplinary action

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

Complaint Matter

Allegations

5. The Authority received a complaint about the Agent's conduct as a registered migration agent from Mr [RS] (the complainant) on 31 May 2017.
6. The complainant alleged that:
 - He engaged the Agent's services to lodge a Standard Business Sponsorship (**SBS**) application for him in August 2016 on behalf of his business [TCR Pty Ltd].
 - The Agent contacted him in May 2017 to advise him that the Department had refused the SBS application. The Agent provided him with the SBS refusal letter from the Department. The application IDs and TRN's on the acknowledgement letter differed from those on the refusal notification.
 - The Agent failed to respond properly to his requests for progress updates and had attempted to deceive him by providing correspondence to him with different application IDs and TRN's.
 - The Agent also lodged two nominations for his business before the SBS application was approved, when in fact he only instructed the Agent to lodge the SBS application.

Departmental records

7. Departmental records showed that:

The first SBS Application

8. On 24 August 2016, a SBS application was lodged with the Department for [TCR Pty Ltd] with the Agent listed as the appointed migration agent for the SBS application. The delegate was not satisfied the business met the requirements under Regulation 2.59¹(e)² of the *Migration Regulations 1994* (the **Regulations**) and refused the application on 17 October 2016. The Agent was notified of the refusal decision via email on the same day.

The first set of nomination applications

9. On 24 August 2016, a nomination application listing Mr [SS]³ as the nominee, was lodged with the Department. [TCR Pty Ltd] was the sponsoring company. The Agent was the appointed migration agent for the application. On 17 October 2016, the nomination for Mr [SS] was administratively finalised by the Department, as there was no valid sponsorship.

10. On 26 August 2016, a nomination application listing Mr [BS]⁴ as the nominee, was lodged with the Department. [TCR Pty Ltd] was the sponsoring company. The Agent was the appointed migration agent for the application. On 17 October 2016, the nomination for Mr [BS] was administratively finalised by the Department, as there was no valid sponsorship.

11. On 18 October 2016, the Department received two Form 1350 'Migration Refunds and Payments' requesting refunds for the nominations. On 20 October 2016, the Department released the money for the nomination applications to the Agent.

The second SBS application

12. On 8 November 2016, a second SBS application was lodged with the Department for [TCR Pty Ltd] with the Agent listed as the appointed migration agent for the SBS application. The delegate was not satisfied the business met the requirements under Regulation 2.59(d)⁵ of the Regulations and refused the application on 18 May 2017. The Department notified the Agent of the refusal decision via email on the same day.

¹Criteria for approval as a standard business sponsor

²if the applicant is lawfully operating a business in Australia, and has traded in Australia for less than 12 months the applicant has an auditable plan to meet the benchmarks specified in the instrument made for paragraph (d); and...

³ CID: 3*****5

⁴ CID: 6*****0

⁵if the applicant is lawfully operating a business in Australia, and has traded in Australia for 12 months or more the applicant meets the benchmarks for the training of Australian citizens and Australian permanent residents specified in an instrument in writing made for this paragraph; and....

The second set of nomination applications

13. On 8 November 2016, a second nomination application listing Mr [SS] as the nominee, was lodged with the Department. [TCR Pty Ltd] was the sponsoring company. The Agent was the appointed migration agent for the application. On 24 July 2017, the nomination for Mr [SS] was administratively finalised by the Department, as there was no valid sponsorship.
14. On 8 November 2016, a second nomination application listing Mr [BS] as the nominee, was lodged with the Department. [TCR PTY LTD] was the sponsoring company. The Agent was the appointed migration agent for the application. On 24 July 2017, the nomination for Mr [BS] was administratively finalised by the Department, as there was no valid sponsorship.

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

15. On 14 November 2017, the Authority published the complaint to the Agent, advising the Agent that it raised concerns regarding the Agent's compliance with clauses 2.1, 2.3, 2.4, 2.5, 2.8 and 2.23 of the Code.
16. Pursuant to section 308 of the Act, the Authority requested the Agent to provide the following information:
 - All correspondence with the complainant in relation to his SBS application, copies of all correspondence the Agent received from the Department in relation to the same.

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

17. On 12 December 2017, the Authority received the Agent's statutory declaration in response to the Authority's section 308 notice. The Agent submitted the following:
 - In July 2016, one of his former clients, Mr [SS], advised him that he had found someone to sponsor him namely, Mr [BS]. Mr [SS] advised the Agent that the new employer, Mr [BS], held a 457 visa sponsored by another company and was also looking to be sponsored on a 457 visa.
 - Mr [SS] advised the Agent that Mr [BS] was the director of the company. The Agent told Mr [BS] that it was against his 457 visa conditions to work for another company while he was on a 457 visa. He also gave advice to Mr [BS] on other matters.
 - Initially, he tried not to take on this case as it was complex and his family commitments were taking too much of his time. However, during August 2016, he agreed to lodge the SBS and Nomination applications for them.
 - Mr [SS] and Mr [BS] wanted him to lodge the SBS and nomination applications as soon as possible. Mr [BS] told the Agent that he would provide him with the requested supporting documents within 10-15 days. On this advice, he lodged the SBS application trusting that Mr [BS] would give him the documents. After this, Mr [BS] kept calling him at odd hours requesting help with the supporting documents.

- The Agent submits that he should have warned the applicants that the Department may refuse the application, if he did not receive the necessary documents on time. However, he was busy with his family commitments.
- The Department refused the SBS application and the Agent contacted Mr [BS] by phone to discuss the refusal. He advised him to send the documents so he could lodge a new application. The Agent agreed to lodge the new SBS and nomination with his own money as the payments made for the prior nomination would be refunded into his account. He told Mr [BS] that he would use previously signed papers and lodge the new SBS and nominations.
- The Agent submits that he *“took a short cut, put their signatures on new documents by [himself] and lodged the new SBS and nomination”*. The Agent accepts that he should have asked them to come to his office or send him a signed copy.
- Initially when Mr [BS] was the director, he signed the papers for Mr [SS] and contacted the Agent via email. Later, they changed the director to the complainant.
- There was a time when he was receiving calls from Mr [BS] and constantly at odd hours. Initially he answered their enquiries however after some time he ceased to respond and requested that they contact him during his business hours. However, they contacted him from private numbers.
- He was required to stay home 2-3 days a week to look after his son. He uploaded documents on 3 February 2017 and after checking them, he had concerns regarding the genuineness of documents he was uploading.
- The Agent submits that he should have checked documents properly before submitting them to the Department. *“Once [he] realized that [he] may have given false documentation to the department, [he] should have raised this issue with them and said to them that [he had his] suspicions about the documents and [he] should not have provided it to the [D]epartment. [He] did not do any of this for fear that [he had] already provided it to the DIBP⁶ and [he] may be held responsible for not checking it properly. Therefore [he] did not upload the accountants letter to the application [sic]”*.
- He believed the SBS application would have been approved, had he uploaded the accountant’s letter. However, he decided that he did not want to be a part of the *“trouble”* anymore as he would be asked to lodge nominations for the sponsor in future. He did not upload the accountant letter despite receiving it from them.
- The second SBS application was refused and the subsequent nomination applications finalised. Soon after this time, Mr [BS] received an email regarding the cancellation of his current visa. The Agent cannot comment on the cancellation as he did not act for this matter. He learned the cancellation was revoked owing to the nomination application put in place by him.

⁶The Department of Home Affairs was previously the Department of Immigration and Border Protection.

- After receiving the refusal letters, Mr [BS] and the complainant told him that he had to buy their café and pay them \$50,000-60,000 AUD, otherwise they would complain to the MARA. He told them that this was blackmail for not sending them the refusal letter in writing. He continued to be harassed by Mr [BS] and the complainant. After meeting with the complainant, he came to learn that Mr [BS] and the complainant were related to each other, and further that the complainant was the holder of a student visa.
- The Agent does not know why Mr [BS] and the complainant have stated that they only advised him to lodge a SBS for the 457 visa application as email communication he has indicates that the complainant and Mr [BS] have specifically asked for Mr [BS]'s nomination file and receipts, which he had sent to them.
- The Agent discussed this matter with Mr [SS] who requested that he not be included in his response to the Department. *"On further enquiries on why [he] should not give his details as he was pertinent to this case, [the Agent] got a faint idea that he may have paid Mr [BS] for the sponsorship."* He does not have proof of this however, he is including it in his response to the Authority and it would have formed part of his client file if he *"had kept proper records"*.
- It is not clear to the Agent why the complainant and Mr [BS] are stating that they did not agree to the nomination applications when they received the acknowledgement of the nomination applications for Mr [BS] and Mr [SS]. He reiterated that if he was trying to deceive them he would not have sent them correspondence with the new application ID number.
- *"When [he] sent them the request for further documents in January [2017], [he] could have changed everything in the letters and subject line, if [he] was trying to deceive them"*.
- It is the Agent's contention that Mr [BS] and the complainant were trying to get an approval by changing the directors, advising him that they were not related to each other, and that the complainant was a Permanent resident of Australia. *"[He is] not trying to put the blame of [his] mistakes on any body else [sic]. But [he] feel[s] that [he has] let [him]self be used by Mr [SS], [the complainant] and Mr [BS]..."*.
- The Agent understands that as a registered migration agent, it is his *"professional duty to keep a detailed record of all communications between [him and his] client. [He] should also make proper enquiries before taking on any case or ask [his] clients to sign documents indicating that [he is] acting on limited information and that if the those information provided is false or misleading in any matter, the application may be refused and [his] client might have to face other consequences. [sic]"*.
- The Agent is aware that he may not have given the due diligence required for the application, and *"made a number of mistakes which [he] accept[s]"*. He would like to re-iterate that he made the mistakes *"during a time when [he was] not able to give good care to [his] work"*.
- The Agent advised that he took the case at *"a very difficult personal time and because [he] was a very lenient and emotional person"*.

- “[He] lodged the second SBS and Nominations out of good faith and good intention so that their visas would not come under cancellations”.
- The Agent “ma[d]e these mistakes at a time when [he] was juggling a lot of this at home. [removed for privacy reasons]. Further [his] wife stated work in Mid January 2017 as her employer could not find a replacement for her till May 2017. This also added to [his] personal problems” [sic].
- The Agent “took 2 months off from [his] work to improve [his] health after Mr [BS] and [the complainant] tried to make [him] buy their café citing [his] mistakes...”. The incident has “had a [removed for privacy reasons] who has advised [him] of improving [his] practice as well as taking on clients who are not very demanding for the time being”.
- His son now goes to childcare and he can devote more time to his clients. He would like to “mention again about [his] personal family matter which [he] know[s] should not have stopped [him] from doing [his] professional duty.”

18. In addition to the above response the Agent also provided detailed information addressing the potential breaches outlined in the section 308 notice; clauses he noted he may have breached previously; and his future plans with regards to his migration agency and practices⁷.

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

19. On 10 December 2018, the Authority sent to the Agent a notice pursuant to section 309(2) of the Act, advising the Agent that it was considering cautioning, or suspending or cancelling the Agent’s registration under section 303(1) of the Act.
20. 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, 2.4, 2.8, 2.19, 2.23, 5.5, 6.1, 6.1A, 7.2** and **7.4** of the Code.
21. Pursuant to section 309(2) of the Act, the Authority invited the Agent to provide written submissions on the matter by 22 January 2019.

⁷This additional information can be found in totality at [Annexure A](#).

Requests for extensions of time in which to provide a response to the section 309 notice

22. On 12 December 2018, the Agent emailed the Authority and advised that he was seeking legal representation and the earliest appointment he was able to obtain, from the legal representatives office, was that of 11 January 2019. The Agent requested more time in which to provide a response to the Section 309 Notice.
23. On 13 December 2018, the first extension to provide a response was granted to the Agent; a response was required by 8 February 2019.
24. On 8 February 2019, the Agent's legal representative sought a further extension of 28 days as it was identified that "*there [were] a significant number of matters*" that the legal representative's office was required to work through in order to provide a proper response to the notice.
25. On 8 February 2019, the second extension to provide a response was granted to the Agent; a response was required by 8 March 2019.
26. On 8 March 2019, the Agent's legal representative via email provided annexures, to the submission, to the Authority.
27. On 12 March 2019, the Agent's legal representative advised that they were awaiting further information which would not be able to be provided until the end of the week.
28. As neither the Agent nor his legal representative had not submitted any further information in response to the section 309 notice, the Authority contacted the Agent's legal representative on 12 April 2019, informing them that a decision would be made on the information before the Authority. Any further information they wanted to be taken into consideration would need to be provided by 3 May 2019.

The Agent's response to the Authority's section 309 notice

29. On 3 May 2019, the Authority received the Agent's submissions via email from his legal representative in the form of a statutory declaration. The Agent advised, as relevant that⁸
 - He accepts "*that the majority of [his] communications in these matters were directly with Mr [BS] (B)*". Mr [BS] at the time of the initial relationship was the director of the company.
 - The Agent was of the understanding that "*this was Mr [BS]'s business and as such [he] provided him with advice about the extra problems that the Department of Immigration would likely to have with the application if they [the Department] believed this was a case of self-sponsorship.*"

⁸ the Agent's full response to the section 309 notice can be found at [Annexure B](#)

- The company's records were changed to reflect that the complainant was therefore the director. However, the Agent was of the understanding that Mr [BS] remained "*in charge of the business and authorised to make decisions for the company*". This was the reason for the Agent's communication with Mr [BS]. Mr [BS] was included in email correspondence and often spoken with over the phone.
- "*At the time [the Agent] just had not real understanding of corporations law and did not realise that [he] was making any mistakes in communicating directly with Mr [BS]. [He] now understand[s] that [he] needed to have written instructions [from the] company directors if [he is] to take instructions from a different employee of the business*" [sic]
- The Agent "*accept[s] that by using old signatures from a form 956 on a new form 956 was wrong and should never have happened. There is not excuse of that and [he is] ashamed of what [he] did. There is no chance at all of this ever happening again.*"
- The Agent accepts that the first applications were lodged in August 2016 were incomplete and no supporting material was provided which was necessary for the Department to consider in respect to the application.
- He was at that time "*under enormous time pressure from [his] clients as Mr [BS] was not working for his first sponsor and unless new sponsorship and position nomination applications were lodged quickly with the Department of Immigration his existing subclass 457 visa was likely to be cancelled.*"
- Because of this, the Agent "*proceeded to lodge the application even though [he] did not hold the required evidence, with the plan to obtain and upload the evidence before a decision was made by the Department...*".
- He accepts that his actions were wrong and accepts that he should not have lodged the applications until he had all that was required by the Department.
- That he "*then worked with the clients to obtain additional material in late 2016 and early 2017 and uploaded further material in February 2017. [He] accept[s] that even then the material provided was unlikely to be sufficient for the Department to approve the applications and that [he] should have stopped work and openly and clearly advised [his] clients of that fact*".
- He accepts that his failure to stop work was wrong and he is regretful of his actions.
- He at the time was overwhelmed and did not know how to go about rectifying the problems. He is sorry that he allowed himself to end up in a situation such as this.
- He accepts that he also breached the Code of Conduct in the following ways
 - "*Failure to record and maintain proper records on file of advice given and communications with clients;*
 - *Failure to provide Statement of Account;*
 - *Failure to provide Tax invoice*".

- That he has taken steps to ensure that the situation can not arise again by changing his practice.
- That he “[f]irst and foremost... made mistakes by trying to take a shortcut so that [his] client was not disadvantaged. [He] did not talk enough to [his] clients, [he] did not keep them properly and fully informed of everything that [he was] doing”.
- He “failed to keep proper records, and not charging fair amount of fees in fear of not being able to get clients in the market that I work in as many other agents charged less money to get more client” [sic].
- He has learnt that he has to deal with clients professionally rather than being guided by his emotions.
- “The mistakes, errors and poor judgements that [he] displayed with these matters in 2016 and 2017 were serious ones. [He] accepts that [he] did not meet the legal and ethical obligations of a registered migration agent with [his] work on those files.”
- He “urge[s] the OMARA to accept that the mistakes and errors of judgement that [he] made in 2016 and 2017 were aberrations and not consistent with [his] real character...”.

JURISDICTION

30. The Authority performs the functions prescribed under section 316 of the Act.
31. The functions and powers of the Authority under Part 3 of the Act and Agents Regulations are the functions and powers 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

32. 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)).
33. 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)).
34. 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 Agents Regulations made under the Act prescribes a Code.
35. 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.
- (2A) For the purposes of this Part, a person also gives **immigration assistance** if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist another person by:
- (a) preparing, or helping to prepare, a request to the Minister to exercise his or her power under section 351, 391, 417, 454 or 501J in respect of a decision (whether or not the decision relates to the other person); or
 - (aa) preparing, or helping to prepare, a request to the Minister to exercise a power under section 195A, 197AB or 197AD (whether or not the exercise of the power would relate to the other person); or
 - (b) advising the other person about making a request referred to in paragraph (a) or (aa).

- (3) *Despite subsections (1), (2) and (2A), a person does not give immigration assistance if he or she merely:*
- (a) does clerical work to prepare (or help prepare) an application or other document; or*
 - (b) provides translation or interpretation services to help prepare an application or other document; or*
 - (c) advises another person that the other person must apply for a visa; or*
 - (d) passes on to another person information produced by a third person, without giving substantial comment on or explanation of the information.*
- (4) *A person also does not give immigration assistance in the circumstances prescribed by 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.*

Migration Agents Regulations 1998, regulation 9

Complaints

For paragraphs 316 (c) and (e) of the Act, any person or body may make a complaint, including:

- (a) a client of the registered migration agent or lawyer;
- (b) an official;
- (c) an employee or member of the Institute;
- (d) an employee of the Authority;
- (e) a parliamentarian;
- (f) a tribunal or court;
- (g) a community organisation;
- (h) the Department.

EVIDENCE AND OTHER MATERIAL

36. In reaching the following findings of fact the Authority considered the following evidence:

- Documentation contained in the Authority's complaint files for CMP-31291;
- Information held on Departmental records in relation to the matters raised in the complaint;
- Information held by the Authority in relation to the Agent; and
- The supporting documentation provided by the Agent and his legal representative in response to the section 308 and 309 notices.

DECISION AND REASONS

Finding on material questions of fact

37. Pursuant to paragraph 303(1)(h) of the Act, the Authority may caution a registered migration agent or suspend or cancel their registration if the agent has not complied with the Code.

38. Having regard to the findings I have made, I am satisfied that the Agent has engaged in conduct in breach of the Agents obligations under clauses **2.1, 2.4, 2.8, 2.9, 2.19, 2.21, 2.23, 5.2, 5.5, 6.1, 6.1A, 7.2 and 7.4** of the Code.

Client Agent relationship

39. The meaning of 'client' is set out in the *Migration Agents Regulations 1998* (Cth) (the **Agents Regulations**) as follows (as relevant):

'3(1) "client", of a registered migration agent, means a person to whom the agent agrees (whether or not in writing) to provide immigration assistance.

40. Section 276 of the Act defines immigration assistance as (as relevant):

'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 ...; and

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; ...'

41. Information available to the Authority indicates that the complainant, had sought assistance from the Agent in respect of a number of applications. The Agent was declared as the representative migration agent in association with the SBS and nomination applications on behalf of the complainant's business [TCR Pty Ltd]. It follows that the Agent was engaged to provide him with immigration assistance and the Agent had established a client agent relationship and owed him obligations specified under the Code.

42. For the purposes of this decision, I have outlined other pertinent relationships that will be discussed throughout this decision.

- [TCR Pty Ltd] is the sponsoring business for which the complainant is the current director.
- [TCR Pty Ltd] is the sponsoring business which had listed Mr [BS] and Mr [SS] as the nominees in the nomination applications. The Agent was noted as the agent on file for the nomination applications.
- Mr [SS] was the Agent's former client and he approached the Agent to engage him to provide Mr [BS] and the complainant with immigration assistance.

Not acting in the legitimate interest of the client/s

First SBS Application

43. Departmental records show the Agent lodged an SBS application on 24 August 2016 without any supporting documentation. In his response to the Authority's section 308 notice, the Agent stated that he had advised⁹ "them"¹⁰ to provide the relevant business documents and that Mr [BS] had informed him the business had not yet lodged a Business Activity Statement (BAS). The Agent claimed he subsequently advised the complainant and Mr [BS] that the Department does not make requests for such documents but rather refuses applications where supporting documents are not attached from the outset.

⁹ By way of mobile phone

¹⁰ Taken to be Mr [SS] and Mr [BS]

44. The Agent further stated that Mr [BS], and the complainant, had informed him that they would be able to compile the documents within 10 to 15 days and it was upon receipt of this information that he proceeded to lodge the SBS. Upon receiving the emailed refusal letter, the Agent stated that he contacted Mr [BS] by telephone to advise him about the decision. He also requested [TCR Pty Ltd] to send him the documents so that a new SBS application could be lodged. However, the Agent has not provided the Authority with any evidence to substantiate these claims, or that he obtained written instructions from the client to proceed.
45. Regardless of whether the Agent advised his client about the risk associated with lodging the SBS application without the requisite documents, the Agent by his own admissions has demonstrated he understood the risks but proceeded with the application lodgement nevertheless. The Agent has stated that the reason for doing so was that he was overwhelmed by events in his personal life and was unable to go into the office on a regular basis to work on the case.
46. While the Agent may have had personal matters to contend with at the relevant time, he was nevertheless accountable for his actions, and was clearly aware that the supporting documentation was essential for the applications to have any prospect of success.
47. In light of the above, I am satisfied that the Agent understood the risks associated with lodging the first SBS application without the requisite documents. Despite this, the Agent lodged the first SBS application without advising his clients about the risk and without written confirmation of their instructions. Such conduct demonstrates that the Agent did not have due regard for his clients' reliance on his knowledge and experience or an understanding of his obligation to ensure he was capable to deliver the services for which he was engaged.
48. Accordingly, I find the Agent failed to act in the legitimate interests of his clients and in breach of **clauses 2.1(b), 2.4, 2.8(a) and 2.21 of the Code**.

Not acting on instructions or consent from the client

Nomination Applications

49. The complainant alleged that the Agent's services were engaged solely for the lodgement of one SBS application with the Department on behalf of [TCR Pty Ltd]. However, as noted in the complaint background information, departmental records show that the Agent lodged two SBS applications and four nomination applications on behalf of [TCR Pty Ltd].
50. The Agent has not disputed that he provided immigration assistance to the complainant, however, he did dispute the services for which he was engaged. The Agent stated that he was engaged to provide immigration assistance for both the first SBS and first set of nomination applications and that the complainant had discussed with him, via email, lodgement of the nominations for Mr [BS] and Mr [SS].

51. The Agent has provided the Authority with the copies of the correspondence to substantiate his claim. The correspondence provided by the Agent, as part of his client files, shows that there was communication in relation to nomination applications between the Agent and the complainant.
52. The email correspondence provided by the Agent appears to have been in relation to the second set of nominations and second SBS application, given the correspondence transpired in February 2017, at a time when the first SBS and first set of nomination applications had already been finalised by the Department. More specifically, on 2 February 2017 the complainant emailed the Agent as follows: *“Dear Sanat, As I have emailed you all the documents as you required from me, I wanna confirm Please let me know have you lodged the documents for sbs and nominations because today was the last day. Regards [the complainant] [sic]”*.
53. In response, the Agent sends an email on 3 February 2017, stating that he had not received the accountant’s letter that was required to meet of the some criteria, and *“without that proof your SBS may be refused and accordingly the Nominations as well”*. However, the Agent also provided a copy of the service agreement with [TCR Pty Ltd], dated 23 August 2016, which only pertained to the provision of services in relation to a *“457 SBS Application”*. The agreed services did not include or mention the lodgement of any nomination applications.
54. Given the detail contained within the agreement, I accept that the Agent was primarily engaged to lodge an SBS application for the business. I note however, that the February 2017 email communication exchange between the complainant and the Agent, provided by the Agent to the Authority, reveals that further immigration assistance was discussed with the complainant in relation to the lodgement of the second set of nomination applications.
55. Similarly, communication during August 2016 also evidences that following the lodgement of the first set of nomination applications the Agent forwarded the nomination acknowledgment letters and receipts in respect of Mr [SS]¹¹ and Mr [BS]¹² to the complainant on 24 and 26 August 2016 respectively. As such, I am satisfied that the complainant knew that nomination applications in respect of Mr [SS] and Mr [BS] were submitted to the Department. Despite this however, and on the basis of the evidence before me, there is nothing to suggest that the Agent had received instructions from the complainant to lodge the nomination applications. It merely shows that the complainant was aware that they were submitted, not that the Agent had received instructions to do so or that his engagement extended beyond the initial SBS application. Therefore, based on the information before me, and in the absence of evidence to the contrary, I find that the Agent lodged a number of applications which did not form part of the agreement entered into with the complainant and without apparent instruction or consent from him to do so.

¹¹FW: BCC2016/2***** - 1*****3 - [TCR Pty Ltd]. - IMMI Acknowledgement of Application Received -- MDD2017/1*****

¹²FW: BCC2016/2***** - 1*****7 - [TCR Pty Ltd]. - IMMI Acknowledgement of Application Received - MDD2017/1*****

Misleading information and documentation

SBS Applications

56. In his response to the section 308 notice, the Agent claimed that during the telephone conversation with Mr [BS] where the refusal of the first SBS application was discussed, he advised Mr [BS] that he would lodge another SBS application (the second SBS) and the respective nominations. Furthermore, that he would use the money, which had been refunded for the first set of nominations to pay for the second set of nominations. Departmental records confirm that the money was refunded into the Agent's account on 20 October 2016.
57. However, there is no evidence before me to support the Agent's assertion that he contacted Mr [BS] by telephone and discussed the application outcomes or that he received instructions to lodge a further sponsorship (second SBS application) and the associated nomination applications. Moreover, even if I were to accept that this had transpired, it remains unclear as to why he would have held discussions with Mr [BS], the nominee, in relation to either an SBS application or the associated nomination applications.
58. A Form 956 dated 30 October 2016,¹³ signed by the complainant, was submitted to the Department confirming the Agent was appointed as the migration agent in relation to the second SBS application. Similarly, two additional Form 956s dated and signed by the complainant on 26 October 2016 were attached to the second set of nomination applications lodged on behalf of Mr [BS] and Mr [SS]. There is no evidence before the Authority to indicate that Mr [BS] and Mr [SS] signed their respective Form 956's prior to their lodgement to the Department via the ImmiAccount. The Department made a request for further information¹⁴ on 5 January 2017, in respect of the second SBS application, which was sent to the Agent by email. The Agent forwarded the email to the complainant on 19 January 2017, advising him of the request for information. The Agent has provided the Authority with copies of this email correspondence.
59. Departmental records show it was not until February 2017 that the required information was attached to the application via the ImmiAccount. Email communication, forming part of the Agent's client file, revealed that on 3 February 2017 the Agent requested a letter from [TCR Pty Ltd]'s accountant to be provided in support of the second SBS application. Departmental records confirm that the Agent attached some additional documentation via the ImmiAccount on the same day.¹⁵ The Agent asserted that on 11 February 2017 he was provided with photos of the business and was in the process of uploading the accountant's letter in the ImmiAccount on that same day¹⁶ but refrained from doing so on account of his review of the documentation where he had identified discrepancies.

¹³ CLD2016/*****

¹⁴ Requirement that the business meets the benchmarks for the training of Australian citizens and Australian permanent residents

¹⁵ 03 February 2017

¹⁶ 11 February 2017 Fw: BAS JUL TO SEP 2016

60. In the Agent's response to the section 308 notice, he stated that he failed to review the documentation properly prior to uploading it into the ImmiAccount due to his family commitments. Furthermore, that upon undertaking a thorough review of the documentation, after receipt of the accountant's letter, he had concerns regarding the genuineness of the documents he had already uploaded. The Agent stated that he *"had doubts about the bank statements which in turn raised doubts about the BAS and tax returns they sent"*.
61. The Agent's statement that he had failed to review the documentation properly, appears to be at odds with the comments he had made to the complainant in an email dated 6 October 2016, where after receiving the tax documentation he advised the complainant that he *"...checked the documents. This looks good"*. Evidence before the Authority shows that the Agent sent an email to the complainant on 19 January 2017, and carbon copied Mr [BS], with a request for information in relation to the second SBS application. In the email communication, he states: *"Hello [the complainant]...We need the following documents as requested by the department: 1. Accountant Support letter – Sample attached. 2. BAS for Sept and Dec 2016..."*. The email correspondence also reveals that the complainant forwarded the same documents to the Agent as were provided to the Agent in October 2016.¹⁷
62. Additionally, according to the Agent, at the time he submitted the bank statements, in support of the second set of applications to the Department, he had identified that the photographs he was provided by the complainant depicted two entirely different premises. The Agent submits that he should have checked the documentation thoroughly before submitting them to the Department and that he subsequently raised the issue of the false documentation with the complainant. The Agent accepts that he should not have submitted the documentation to the Department. However, according to his account, he was concerned that as he had already provided some documents to the Department that he may be held responsible for not reviewing them properly. The Agent contends that had he uploaded the accountant's letter, the SBS application would have been approved. However, he decided that he did not want to be part of the *"trouble"* anymore as he would have been requested to submit nomination applications on behalf of the sponsor in the future.
63. Given the above discussed, I am satisfied that the Agent failed to take proactive action to ensure that the Department was made aware that misleading information had likely been provided in support of the applications. The Agent does not appear to dispute this, indicating that upon reflection he should have raised the provision of the false documentation with the Department. On the basis of the information before me, and the Agent's own account, I am satisfied that the Agent was aware that false and misleading documentation was provided to the Department in support of a number of applications. While the Agent maintains that he did not submit the accountant's letter given his concerns on the genuineness of the documentation, and the information, he did not advise the Department of his concern or cease to act for the clients.

¹⁷ MDD2017/*****

64. As discussed earlier in this decision, the Agent's client file contained email correspondence, dated 19 January 2017, wherein he sent a sample of an 'accountants' letter' to the complainant. The Agent had prepopulated the majority, if not all, the text information contained within the template including training expenditure to the amount of \$500. The accountant was to add their business header and complete the financial information in relation to the turnover, net profit and payroll. The Agent received the accountant's letter on 8 February 2017 reflecting the financial position of the business. The Agent contends that upon review of the letter from the accountant, he identified that the figures did not correspond to the bank statements, which he had already uploaded to the ImmiAccount on 3 February 2017.
65. The Agent claimed that he was at a disadvantage as he had not maintained proper records, in line with his obligations under the Code, and that he should have raised the issue regarding the "inaccurate" documents with Mr [BS] and the complainant. The Agent went on to state that he should have advised the complainant and Mr [BS] that there were concerns surrounding the documentation which should not have been submitted to the Department. Rather, he elected not to upload the accountant's letter to ImmiAccount in what can be considered as a deliberate attempt to conceal the fact that he had already submitted documentation which was false and misleading. In his response to the Authority, the Agent stated that he did not wish to be part of the "trouble" but failed to clarify or explain that his act in withholding the accountant's letter was an attempt on his part to conceal that he had knowingly provided false and misleading information to the Department.
66. Given the Agent's actions discussed above, I find that the Agent submitted false and misleading information and documentation to the Department, failed to take proactive action to notify the Department that this had occurred, and then deliberately withheld information so as to conceal his conduct. It follows, that he has not been honest in his dealings with the Department and has knowingly lodged a number of applications which he knew to be misleading and inaccurate.
67. I find that the Agent has acted in breach of his obligations, specifically **clauses 2.1, 2.9, and 2.23** of the Code.

Acting on instructions from an individual without authority to bind [TCR Pty Ltd]

68. According to the Agent's statutory declaration, dated 12 December 2017, he had advised Mr [BS], at the time, he was the director of [TCR Pty Ltd], that he was prevented by the 457 Regulations from working for another sponsor while on a subclass 457 visa. Australian Securities and Investments Commission (ASIC) records confirm that the complainant was appointed as the sole director and shareholder for [TCR Pty Ltd] on 23 August 2016. The first SBS application was lodged on 24 August 2016 and the first set of nomination applications were lodged on 24 (Mr [SS]) and 26 (Mr [BS]) August 2016. In summary, all three applications were submitted immediately following the changes to the corporate structure and ownership of the corporate entity.

69. The client file in respect of the first SBS application, provided by the Agent to the Authority, contained a copy of a service agreement, dated 23 August 2016, which was signed by the Agent. However, the agreement was not signed by Mr [BS], nor was it signed by the complainant, who was appointed the sole director and shareholder for [TCR Pty Ltd] on the same day. I note that the agreement was also addressed to Mr [BS] even though he was no longer in a position where he could lawfully bind [TCR Pty Ltd]. A review of the client files provided for the SBS applications did not reveal any other agreement for services and fees.
70. According to the statutory declaration, provided by the Agent dated 3 May 2019, at paragraph 69 he stated that it was his understanding that the business was Mr [BS]'s and as such he had provided him with advice *"about the extra problems that the Department of Immigration would be likely to have with the application if they believed this was a case of self-sponsorship"*. I also note that only three days had passed from the time that Mr [BS] was removed as the owner and officeholder for [TCR Pty Ltd] and the lodgement of the nomination application, where he was the listed nominee, for a nomination submitted on behalf of [TCR Pty Ltd]. This supports a finding that the Agent did provide Mr [BS] advice on the risks associated with self-sponsorship, as put forward by the Agent, and that Mr [BS] had acted on this advice. As such, I am satisfied that that the changes to the company details were made for the purpose of concealing the true circumstances surrounding the applications associated with Mr [BS] and [TCR Pty Ltd] from the Department, which may have involved self-sponsorship, and that it was done so in order to facilitate the application associated with Mr [BS].
71. Moreover, in contradiction to the Agent's statement that he had no real understanding of corporations law,¹⁸ in light of his statements in the May 2019 statutory declaration, I am satisfied that the Agent was well aware that the details contained within ASIC records reflected the legal position of the corporate entity, both in respect of ownership and on the office holders who were in a position to represent and bind the company. The Agent's use of the word *"self-sponsorship"* is indicative of such.
72. The Agent has acknowledged that Mr [BS] was included in most, if not all, the communication the Agent had in relation to the above applications. Further, in the Agent's response to the section 308 notice, he stated that when the first SBS application was refused he contacted Mr [BS], not the complainant, by telephone and advised him of the Department's decision.
73. The Agent argued he had done so on account that Mr [BS] was initially the director of [TCR Pty Ltd] and that he signed all the paperwork for the applications. The Agent also argued, in his section 309 response, that he understood that *"the company records were changed to official remove Mr [BS] as a Director and instead list [the complainant] ("R") as the Director. However, it had always been [the Agent's] understanding that Mr [BS] remained in charge of the business and authorised to make decisions for the company"* [sic].¹⁹

¹⁸ Paragraph 72 of the Agent's statutory declaration dated 3 May 2019

¹⁹ Paragraph 70 of the Agent's statutory declaration dated 3 May 2019

74. The statement is indicative that despite the Agent's awareness on the changes made to the ownership of [TCR Pty Ltd], he was still clearly of the view that Mr [BS] "*remained in charge*" and not the complainant and was content in taking instructions from him. Given such, I am satisfied that the Agent knew that Mr [BS] was neither the director, nor legal owner, of [TCR Pty Ltd] yet he continued to take instructions from him. More significantly, it evidences that the Agent was not only aware of the deceit and concealment of the true circumstances from the Department, but that he was complicit in the conduct.
75. The Agent, in his section 308 response, stated that at the time he was blackmailed by the complainant and Mr [BS] he "*talked to Mr [SS] about this scenario he was worried that [the Agent] should not put his name into [his] response to the department as he would be in trouble. On further inquiries on why [the Agent] should not give his details as he was pertinent to this case, [the Agent] got a faint idea that he may have paid Mr [BS] for the sponsorship*". The Agent went on to state that as he had not maintained accurate record keeping practices he was unable to substantiate this claim. Whether or not this assertion that there was a payment for sponsorship is accurate, or credible, is not a matter within the Authority's jurisdiction.
76. In light of that discussed above, I find that the Agent acted on instructions from a person not authorised to bind [TCR Pty Ltd], namely Mr [BS]. Furthermore, that he did so with full knowledge on the changes made to the ownership and the office holders for [TCR Pty Ltd]. As such, based on the evidence before me, I am satisfied that the Agent acted on Mr [BS]'s instruction when he knew that he was not legally authorised to represent or bind the company.
77. On that basis, I am satisfied that the Agent was aware, from the outset, that the applications he had submitted to the Department did not represent the true circumstances of the visa applicants or the business. Rather, that the business model was contrived to facilitate a visa outcome for Mr [BS] and others. Moreover, that the Agent was a knowing and active participant in the conduct.
78. Accordingly, I find that the Agent has breached his obligations under **clauses 2.1, 2.8, 2.9, 2.19 and 5.2 of the Code**.

Use of client signatures without consent

79. According to the Agent's account, during the telephone conversation advising Mr [BS] on the refusal of the first SBS application, he informed Mr [BS] that he would use the signatures from previous documentation, specifically the Form 956 signed by the complainant and nominees, to lodge the new SBS and nomination applications. In the Agent's response to the section 308 notice he argued that he did this to avoid the possible cancellation of their visas,²⁰ and that he lodged the new applications out of "*good faith and good intention*".

²⁰On 16 February 2017, Mr [SS]'s 457 visa was cancelled as a result of him being in breach of condition 8107 due to the lodgement of the nomination application by the Agent.

80. According to the complainant, he noticed that the Transaction Reference Number (TRN) and the file number referenced within the refusal notification in May 2017, were different from those the Agent had provided him in August 2016. More specifically, the TRN reflected in the acknowledgement letter emailed to the complainant by the Agent in August 2016, was noted as E*****Z whereas the refusal notification, emailed to him in May 2017, reflected the TRN as E*****H.
81. The Agent asserted that the complainant and Mr [BS] were aware that the nominations were lodged, as he had exchanged email correspondence with them in relation to the nominations. As discussed above, on the basis of the information before me, I accept that the complainant was aware that nominations were submitted to the Department. What is less clear, however, is whether the complainant was aware of the refusals for the first set of applications (one SBS and two nomination applications submitted in August 2016) and the subsequent lodgement of the second set in November 2016.²¹ Specifically, where there is no evidence of any instructions provided by the complainant in respect of the second SBS application or the four nomination applications. The evidence does, however, support the proposition that the complainant was confused by the discrepancy in the transaction number associated with the SBS application given he questioned the Agent on the matter in May 2017.
82. On 22 May 2017, the complainant emailed the Agent and stated:
- “As You said that our SBS has been refused but This SBS refusal trn and application id doesn’t match to the application which you lodged to the immigration in august 2016 and you emailed me that confirmation which I attached with this email please find that and provide me the accurate information regarding SBS and nominations...[sic]”.*
83. This exchange is indicative that the complainant was not aware of the subsequent applications. In response to this email, the Agent replied to the complainant and clarified that the changes were explained to Mr [BS] *“last year”*. Even if I were to accept that a discussion, of which there is no evidence, had transpired between the Agent and Mr [BS], it further supports the notion that the Agent disclosed information and took instructions from a person who was not entitled to the information and not in a position to bind or represent the business. That is, a person other than the complainant.
84. According to the Agent’s account, had he wanted to deceive the complainant he would have changed the identifiers when he forwarded the request for further information to him. Additionally, the Agent stated that he did not think he *“would be foolish enough not to notify them about refusal and lodge 457 Nominations without their consent”*. I take this to mean that the Agent would not have notified the client on the refusal if he had lodged the November 2016 applications without *‘their’* knowledge or consent. I have already discussed the issue on the complainant’s awareness of the nominations, as opposed to evidence of his instruction and consent on the lodgement of a number of applications, including the second SBS application.

²¹ One SBS and two nomination applications submitted on 8 November 2016

85. In the Agent's response to the Authority, he has not clarified why this communication had transpired with Mr [BS], given that Mr [BS] was the nominee for the nomination application and not the director or shareholder of the business and therefore not authorised to issue instructions relating to the business.
86. Nevertheless, the Agent has conceded²² that it was a mistake to lodge the second SBS and nomination applications and that he should have taken time and care to lodge the applications properly. However, "[he] took a short cut, put their signatures on new documents by [himself] and lodged the new SBS and Nominations." The Agent concedes that this was something that he should not have done and that he should have requested that the clients present to his office and sign the paperwork.
87. While the Agent has asserted he discussed the new applications, in a telephone conversation with Mr [BS], he has provided no evidence to substantiate his claim that the complainant had any knowledge or had provided any instruction on the applications submitted on 08 November 2016. The Agent argued that this was on account of his failure to maintain "*proper*" record keeping practices. While there is evidence that the Agent forwarded the departmental acknowledgement for the SBS application lodged in August 2016 to the client, no such communication is evident in respect of the second SBS application lodged in November 2016. Likewise, there is no evidence before the Authority that the Agent had notified the client on the outcome of the three applications which were submitted to the Department in August 2016.
88. Therefore, the Agent's conduct appears to support a proposition that the complainant was not aware of the lodgement of the applications nor that he had instructed the Agent to submit the November 2016 applications. Moreover, the Agent conceded that he took a "*short cut*" by using signatures which were available to him and did not arrange to have the documentation signed by the applicants before he submitted it to the Department. The Agent has conceded that he used his clients' signatures, obtained from Forms 956 provided to him, to submit new applications endeavouring to ensure that cancellation of their visas did not occur. The Agent further added in response to the section 309 notice, that he has accepted that using "*old signatures from a form 956 on a new form 956 was wrong*" and that further there is "*no excuse*" for this action.
89. I find that the Agent used client signatures without their consent or knowledge in order to lodge the second SBS and two nomination applications with the Department in November 2016. Further, I find that the lodgement of the second SBS application, and the two subsequent nomination applications, served to conceal the outcome of the initial applications, and that the complainant was not aware of the subsequent lodgements nor did he instruct the Agent to lodge them, as alleged.

²² In the Agent's response to the section 308 notice

90. Furthermore, I find that the Agent was not honest in his dealings with the complainant by concealing the refusal of the first SBS application. I am of the view that the Agent concealed the outcome as he had failed to provide any documentation in support of the SBS application in his haste to meet the deadlines. I find that the complainant appears to have been of the view that the request for further information, in relation to the second SBS application, was for the initial SBS application lodged in August 2016.
91. Accordingly, I find that the Agent breached his obligations under clauses **2.1, 2.8 and 2.23** of the Code.

Failure to keep client fully informed and maintain proper record keeping practices

92. A registered migration agent upon agreeing to represent a client is to confirm, in writing, the client's instructions.²³ The client files provided to the Authority by the Agent do not contain evidence of instructions from his clients or his written confirmation of them. Migration Agents are obligated under the Code to ensure that they are acting upon instructions from their clients and that their clients are provided updates as to the progress of their cases. The Agent's client files provided with the Agent's responses to the complaint indicate that the Agent's recording keeping practices were below the standard expected of a registered migration agent and inconsistent with his obligations as set out in the Code.
93. According to the complainant, he was unaware of the lodgement of a second SBS application and two further nominations.²⁴ In his complaint summary, the complainant alleged that the Agent was engaged to provide assistance with an SBS application and only upon approval of the SBS application were the associated nomination applications to proceed. Further, that it was not until he was informed of the refusal of the SBS application in May 2017, that he identified a discrepancy in the client identifiers issued by the Department and sought clarification on the matter, that he came to realise that a second SBS and further nominations were lodged.
94. The Agent contends that he was engaged to provide assistance with the SBS and the nomination applications. As the service agreement between the Agent and Mr [BS], provided to the Authority, only specifies that the Agent's services were engaged for assistance with an SBS application, I do not accept that this agreement also extended to the nomination applications. However, while the nomination applications did not form part of the written agreement, as required by the Code, the Agent has provided evidence of his correspondence with the complainant regarding immigration assistance in relation to the nomination applications. Furthermore, the complainant indicated that the nominations were to be lodged upon approval of the SBS application. On this basis I am satisfied that the complainant was at a minimum aware of the lodgement process, however I am not satisfied that the Agent had acted on instruction or that he kept his client informed as to the progress of the applications.

²³ Clause 2.8(a)

²⁴ Lodged in November 2016

95. Clause 2.8(c) of the Code stipulates that an agent is to inform their clients on the progress of their matters. There is no evidence before me to suggest that the complainant was aware that the first SBS application was refused in October 2016 and that the associated nomination applications were likewise finalised on the same day. Therefore, I find that the Agent failed to keep the complainant fully informed, in writing, on the progress of each application and to advise him of the refusal of the first SBS application within a reasonable time after a decision had been made.
96. In the Agent's response to the section 308 notice the Agent conceded that he *"ha[d] not kept proper records of [his] communication with the client and have not taken proper instructions as required by the code of conduct"*. Moreover, he asserted that the complainant had attempted to blackmail him into buying the café on account of his failure to notify the complainant of the refusal in writing. The Agent stated *"they told me that I have to buy their café and pay them \$50,000 -\$60,000... I advised them that they are trying to blackmail me for my mistake of not sending them the refusal in writing.."*
97. Furthermore, in his response to the section 309 notice the Agent further conceded that he has breached the Code by failing to *"record and maintain proper records on file of advice given and communications with clients"*. It does not, therefore, appear to be in contention that the Agent had not met his obligations in respect of client instructions, record keeping and his notification obligations.
98. The obligation of an agent to keep records in accordance to 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.
99. Given the above discussed, and no evidence to the contrary, I find that the Agent has **breached clauses 2.8, 5.2, 6.1 and 6.1A** of the Code.

Financial Obligations

Statement of Services

100. Section 313²⁵ of the Act provides (as relevant):

(1) A [registered migration agent](#) is not entitled to be paid a fee or other reward for giving immigration assistance to another person (the **assisted person**) unless the agent gives the assisted person a statement of services

(2) A statement of services must set out:

- (a) particulars of each service **performed**; and
- (b) the charge **made** in respect of each such service.

²⁵ Persons charged for services to be given detailed statement of services.

(3) An assisted person may recover the amount of a payment as a debt due to him or her if he or she:

- (a) made the payment to a registered migration agent for giving [immigration assistance](#); and
- (b) did not receive a statement of services before making the payment; and
- (c) does not receive a statement of services within the period worked out in accordance with [the regulations](#).

(4) This section does not apply to the giving of [immigration legal assistance](#) by a [lawyer](#).

101. The client files provided to the Authority as part of the Agent's response to the section 308 notice do not contain any statements of service. As outlined in Section 313 of the Act a registered migration agent is not entitled to be paid a fee unless they have provided a statement of services to the client. The Agent has conceded that he failed to issue the complainant with a statement of services in breach of his obligations under the Code.

Invoices

102. In addition to the above discussed, I also find that the Agent had not issued the complainant with invoices pertaining to the services which the Agent has provided. The only invoice contained within the Agent's client files was for training undertaken by the sponsoring business which was paid for by the Agent. As part of the Agent's client files he has provided an email, dated 16 December 2016, where the Agent had attached an invoice, issued by 'my training online' and requested that the complainant pay the amount directly to his client account. There is no explanation available to the Authority as to why the Agent, as the appointed migration agent, had paid for the sponsoring business' training. No other invoices formed part of the client file.

103. It does not, therefore, appear to be in contention that the Agent had not met his obligations in respect of his financial obligations to the client as required under Parts 5 and 7 of the Code.

104. Given the above discussed I find that the Agent has **breached clauses 5.5, 7.2 and 7.4** of the Code.

Integrity, fitness and propriety

105. 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.

106. 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.

'Integrity' means 'soundness of moral principle and character, uprightness and honesty'.²⁶

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

107. 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.

108. At common law, the basic test to determine whether a person is “fit and proper” is known as the “Allinson test”. A person is not fit and proper person if his or her conduct “would be reasonably regarded as disgraceful or dishonourable by his professional colleagues of good repute and competency”.²⁷

109. 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. Their Honours stated (at 380):

[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.

110. 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.²⁸

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

- (a) the Act which creates offences for misleading statements and advertising, practising when unregistered and misrepresenting a matter; and
- (b) the Code contained within the Agents 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.

112. Key elements of the fitness test are:

- the honesty of the person; and
- the person's knowledge of the migration scheme and ability to fulfil the position of a migration agent.

²⁷ See *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750

²⁸ See *Cunliffe v Commonwealth* (1994) 182 CLR 272

113. 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.

114. 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;
- 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"²⁹.

115. Having regard to the totality of the Agent's conduct in relation to the complaint 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'.

116. The Agent has demonstrated a lack of honesty and competence towards the Department. When the Agent had concerns regarding the genuineness of the documents he had already uploaded in support of the second SBS application, he did not take action to inform the Department of this. Rather his concern was whether he would be held responsible for not reviewing and checking the documents properly and therefore did not take any action to notify the Department. He failed to act with the honesty and professionalism expected of a registered migration agent towards the Department. The Department relies on registered migration agents to provide accurate and relevant information in support of applications they lodge on behalf of their clients.

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

- a. been dishonest in his dealings with the complainant by concealing from him that the first SBS application had been refused;
- b. engaged in fraudulent and deceitful conduct in concealing by the true circumstances surrounding the two sets of SBS and nomination applications from the Department;

²⁹ *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750

- c. submitted two sets of SBS and nomination applications which did not reflect the genuine circumstances of his clients and with the intention to secure visa outcomes for these persons for which they may not have been entitled;
- d. not acted with the professionalism and honesty expected of a registered migration agent. He was aware that the documentation he provided to the Department was false or misleading but took no action to address the situation and inform the Department;
- e. knowingly acted on instructions from a person without legal authority to bind the business;
- f. demonstrated a lack of due regard for the legitimate interests of his clients and their dependence on him; and
- g. the Agent has breached multiple clauses of the Code showing an indifference to his professional obligations.

CONSIDERATION OF APPROPRIATE DISCIPLINARY ACTION

118. 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

119. 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.

120. Having regard to the Complaint Classification Matrix, I have considered that the Agent's conduct falls within the Major classification for the following reasons:

- The Agent has engaged in fraudulent and deceitful conduct;

- He has demonstrated a disregard for the law by lodging misleading information and documents in support of applications;
- He has informed the Authority that he was aware of the false and misleading information he had provided to the Department but decided not to take any steps to inform the Department as he feared being held responsible;
- Whilst the Agent's response to the complaint acknowledges that failed to meet his ethical and legal obligations as a registered migration agent he has not provided evidence or reassurance that these shortcomings would not reoccur.

Mitigating Factors

121. The Agent has provided the following submissions to be taken into account in making this decision:

- The conduct occurred at a time in his life where he was under immense pressure and personal stressors due to his child's health concerns which in turn resulted in his own health concerns.
- He has reduced his work load and has ensured that he only takes on cases where he is confident in his ability and where he has knowledge of the visa subclass.
- He is remorseful for his actions and has stated that the conduct discussed in this decision will not be repeated as the stressors of that time in his life are no longer there.
- He has [removed for privacy].
- He has taken steps to rectify his practice to ensure that he is in line and adhering with his obligations as per the Code. Since the complaint matter was published to him, he has employed administrative staff to take on the paperwork and data entry so that he can work on other matters relevant to the application.
- He has reduced the advice he provides to his clients over the phone and ensures that his clients see him in person in his office.
- He has now implemented a rule where he will not lodge a visa application without the proper documentation, however, there are circumstances where this may be necessary.
- He has learnt valuable business skills from his legal representative in the way that his legal representative runs his own business.

122. I accept that the Agent does not have a history of prior disciplinary action and I acknowledge that the Agent has conceded to making mistakes. Specifically, where he conceded that he used client signatures in order to lodge an application and did not apportion blame onto others for this conduct.

123. The Agent has shown some remorse for the conduct and a review of the Agent's current registration application reveals that he has undertaken³⁰ Continuing Professional Development (CPD) activities to address some aspects of the conduct discussed within this decision.

³⁰ In September and October 2018

124. I have also taken into account that a disciplinary decision would affect the Agent's financial earning capacity and livelihood. In all his responses to the Authority, the Agent has advised that a sanction decision such as a cancellation decision will cause significant impact to his family both financially and emotionally. He has stated that his wife's earning capacity will not sustain their current lifestyle and that as a result they would be required to relocate and subsequently lose their support network.

125. There is no evidence available to the Authority that indicates that the Agent has any other forms of income, and I accept that should the Agent's registration be cancelled or suspended for a prolonged period of time, he may incur some financial hardship as he is reliant on his income as a registered migration agent. The Agent has however noted that his wife is employed and earns an income. Additionally, the Agent has stated that he has reduced his work load which has already reduced his income. I have given weight to these factors in my decision, however I am of the view that this is outweighed significantly by the public interest given the seriousness of the Agent's conduct specifically the use of client signatures without their consent and/or knowledge.

Aggravating factors

126. I consider the Agent's conduct falls short of the standard expected of a registered migration agent and find that the conduct poses a serious risk to migration consumers and to the integrity of the migration advice profession.

127. I find that the Agent:

- Demonstrated misconduct of a serious nature in failing to act in the legitimate interest of his clients which extended to unlawful conduct involving the use of their signatures without consent.
- Submitted false and misleading information and documentation to the Department, failed to take proactive action to notify the Department that this had occurred, and then deliberately withheld information so as to conceal the conduct.
- Had not been honest in his dealings with the Department and has knowingly lodged a number of applications which he knew to be misleading and inaccurate.
- Lodged a number of applications without supporting documentation and subsequently submitted further applications in order to conceal his deficiencies.
- Held concerns on the genuineness of his client's circumstances and the business arrangements but elected to withhold this information from the Department in order to distance himself from any adverse implications.
- Communicated and acted on instruction from a person who was not authorised to bind the business.
- Failed to meet his obligations in maintaining proper records and issuing documentation required by the Code.

128. In his section 308 response, the Agent noted³¹ that he may not have complied with clauses 2.2, 2.6, 2.7, 2.8, 2.17(c), 2.18, 2.21 and Part 6 and 7 of the Code, in the past. This self-evaluation reveals that upon the Agent's own reflection there may be additional concerns not addressed within this decision.
129. The Agent has mentioned [removed for privacy reasons] as part of the reason, why some of the conduct discussed in this decision occurred. In the [removed for privacy] that the Agent had experienced work related stressors at the time his business was established in 2014. The Agent stated that the stressors primarily related to him meeting client deadlines. However, the Agent determined that [removed for privacy reasons] was not required until 2017. The Agent claims that it was the second SBS refusal in 2017 that prompted him to [removed for privacy reasons] following Mr [BS]'s communication that he would lodge a complaint with the Authority.
130. [Removed for privacy reasons] further noted that based upon her interactions with the Agent, during the interview and the review of the documentation provided to her, she was of the opinion that during 2016 the Agent "[removed for privacy reasons]". [Removed for privacy reasons] noted that the Agent had difficulty refusing to assist clients as he wanted to avoid conflict, however, he has since found ways in which to deal with the stressors.
131. Whilst I acknowledge that the Agent has sought [removed for privacy reasons], I note that it was sought and obtained at a time when he was advised that a complaint would be lodged against him. Moreover, the stressors put forward primarily relate to core considerations and factors which form part of a migration agent duties, in terms of meeting client deadlines. I am of the view that deadlines will always form part of a registered migration agents work and therefore registered migration agents will experience some stress in relation to this aspect of their work. Furthermore, the Agent stated that he is experiencing a reduced level of stress in relation to [removed for privacy reasons]. I am however mindful that the Agent has advanced plans [removed for privacy reasons], which may place additional stress on the Agent, not unlike to that experienced and discussed within this decision.
132. Moreover, when [removed for privacy reasons] asked the Agent why he "*chose to forge the signatures, [the Agent] stated that he "have no idea"*". However, in contradiction, the Agent in his statutory declaration response provided to the Authority, stated that he was under stress due to his family life and that for this reason he "*took a short cut*" and inserted their signatures on the new documents.
133. In any event, I am satisfied that while the Agent's [removed for privacy reasons] may explain factors which contributed to his behaviour, they cannot excuse his consistent failure to exercise care and diligence in his dealings with his clients and the Department. If the Agent was in a position where he was unable to manage his work, he should have made this known to his clients and ceased his representation.

³¹ Under the heading 'Self Evaluation on the Code of Conduct'

134. I am of the view that the Agent was cognisant of the fact that he should not have taken on the applications on account of his personal circumstances and the potential complexities surrounding them. However, he elected to do so nevertheless with resulting adverse consequences for his clients. At the time the nomination applications were lodged Mr [SS] was already a holder of a subclass 457 visa with another sponsor. On account of the sponsorship by [TCR Pty Ltd], Mr [SS] was found in breach of his visa condition and his 457 visa was cancelled and he has since departed Australia and may face an exclusion period of up to three years. Mr [BS] has likewise had to depart Australia.

Consumer Protection

135. 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.

136. The behaviour demonstrated by the Agent falls short of the reasonably expected standards of a registered migration agent. 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 at this present time, the Agent would not adequately demonstrate the requisite skills 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.

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

DECISION

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

139. In making this decision, I have turned my mind to a suspension, where I would need to be satisfied that after a period of time, and remedial action, the Agent would be capable of meeting his professional obligations and deal with his clients and others with integrity. As the conduct involved fraudulent conduct through the forging of client signatures to conceal other failings, which were then submitted to the Department without the clients' knowledge or permission, I am of the view that there is no remedial action, which could be undertaken to address the serious adverse conduct. Furthermore, the Department could not proceed on a footing that the documentation and information provided by the Agent is genuine and an accurate reflection of the circumstances of his clients.

140. 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 purposes 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 clauses of the Code.

141. 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.

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

A/g Senior Professional Standards Officer
Professional Standards and Integrity Section
Office of the Migration Agents Registration Authority
Department of Home Affairs

Date of Decision: 23 October 2019

ATTACHMENTS –

Annexure A – Agent’s statutory declaration response to Section 308 Notice

Annexure B – Agent’s statutory declaration response to Section 309 Notice