OBSERVATIONS ON THE IMMIGRATION ADVISER LICENSING SCHEME

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1. Scope of Paper

The focus of the following comments is on published decisions which may shape the licensed immigration advice industry. In particular we will focus on:

1. Appeals to the Courts against determinations by the Registrar of the Immigration Advisers Authority ("the IAA") about whether to grant a license of a particular type;
2. Decisions of the Immigration Advisers Complaints and Disciplinary Tribunal ("the Tribunal");

The IAA has had jurisdiction to issue licenses and to accept complaints about licensed adviser conduct since the Act came into force in 2008. The mandatory onshore licensing regime began on 5 May 2009, while that for offshore advice took effect a year later. The Tribunal has received complaints referred by the IAA over the last few years but the Chairman was not appointed until October 2010.

The IAA has also had power to initiate prosecutions for breaches of the Act since its inception, but so far only a few convictions have been entered. A number of informations have been laid both by the Department of Labour and by the Police, but because of delays in the criminal justice system these will take some time to be determined.

As a result the body of authority is relatively thin. However, the Tribunal in particular has needed to break some early ground as will be discussed below. The writer has also made free to express some opinions on other aspects of the licensing machinery.

2. Getting a License (or Not)

The Registrar applies s 19 of the Act to determine whether to grant a license. The filters applied to this assessment are:

- Is the person prohibited from holding a license by being exempt, bankrupt, or being otherwise *persona non grata* by virtue of criminal convictions, unlawful status in New Zealand etc.;
- Are they "fit to be licensed";
- Do they meet the Competency Standards for the class of license to be granted;

- Did they complete the application and pay the fee.

It is important to note that although someone may apply for a Full license, the Registrar is free to grant them only a Limited or Provisional license if their level of competence allows. At present competence is to be assessed by applying s 20 which sets out various means, including an interview, inspection of the person's business, looking at completed files and so on. Once the Bay of Plenty Polytechnic qualification is underway in 2012 then competence can be shown by completing the Graduate Diploma. The Competency Standards have recently been amended to direct pathways to licensing in light of this.

The case of *Taufa v Registrar of Immigration Advisers*[1] was decided under the present scheme and concerned the Registrar's decision not to grant a Full license. The appellant had failed because it was found that Ms Taufa did not meet the Competency Standards established as a Regulation to the Act. Hubble J made clear that the minimum level of "competence" in the context of applying for a license was the same as meeting the Competency Standards themselves.

The test to be applied is whether the Registrar is "satisfied" that the person has the requisite level of competence. The same term is used elsewhere in the licensing scheme of the Act. As pointed out in the *Nagra* case to be referred to later, this word was discussed by the Supreme Court in *Westfield v North Shore City Council* where the Chief Justice commented that it was a "significant obligation" and was not merely a matter of only just tipping the scales. To be satisfied "is a pointer to additional conviction and the need for some caution."[2] The case law that we have suggests that the purpose of the Act which is (s 3):

> to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination . . .

indicates that the *Westfield* approach is appropriate when determining whether to allow someone to hold an adviser license.

Alongside s 19 sits s 10 which delimits who may be licensed to someone who:

- Is a natural person (not a company);
- meets the Competency Standards;
- is not prohibited by being a bankrupt, have a criminal record, unlawfully in New Zealand etc.;
- is deemed "fit and appropriate" to hold a license; and
- is not exempt from holding a license.

As pointed out in *Austin v Registrar of Immigration Advisers*,[3] all of the above criteria have to be satisfied for success. Austin had recently been struck off the roll of barristers and solicitors and so failed the "fit and appropriate" test in the view of the Registrar. The fact that he might have met the Competency Standards did not cure the defect in fitness.

[1] DC Auckland, 16 May 2010 per Hubble J
[2] *Westfield (New Zealand) Ltd v North Shore City Council* [2005] 2 NZLR 597 at [23] per Elias CJ
[3] DC Auckland, 15 February 2010 per Sharp J

The manner of approaching the "fit and appropriate" question was also dealt with by the High Court in *Nagra v Registrar of Immigration Advisers*.[4] In that case the Registrar had refused a license because of convictions in 2005 for dishonesty offences while employed as an INZ Compliance officer. Section 16 of the Act provides that people convicted of such crimes, or having other types of negative history,

> must not be licensed unless the Registrar is satisfied that the nature of the relevant offence or matter is unlikely to adversely affect the person's fitness to provide immigration advice.

Section 17 also lists other circumstances which would affect fitness to hold a license. Importantly, the Registrar declared that s 16 or s 17 "establishes a presumption against licensing" such people - that is, the starting point is that the person should not get a license.

This case went to the High Court on appeal from the District Court, where the Judge had said that the Registrar was required to focus only on the nature of the offence and not on the applicant's wider circumstances (including positive features of their situation).

Justice Peters in the High Court formed the view that if someone was caught by s 16 or s 17 this did not create a presumption against licensing. Instead, the Registrar must (again) be satisfied that the person is fit to have a license, even if they have a conviction or some other black mark on their record. The Registrar must be persuaded in your favour if you wish to succeed.

The High Court Judge explained that the Registrar must consider whether the *previous* event (such as a conviction) affects their *present* fitness to practice. This means that the applicant's surrounding history and circumstances can be taken into account, including the offence itself but also including any positive circumstances that the applicant puts forward such as positive character references.

An important underlying principle is that it is up to the applicant to argue their case. The Registrar is not required by the Act to enquire any further than what is put before him. Anybody applying to be licensed or relicensed who has a criminal record, has been bankrupted, or is otherwise covered by ss 16-17, should gather evidence to show that they are otherwise of good character or have taken steps to amend their ways. *Nagra* establishes that the Registrar is obliged to look at that other information when making a decision whether to grant a license. Something similar was said in *Austin* where it was suggested that, if Mr Austin had been struck off some years before, he might have been able to demonstrate a pattern of behaviour pointing to "rehabilitation."

3. The Complaints Process

Complaints are lodged through the IAA whose role is to prepare the complaint for submission to the Tribunal. The IAA sends a summary of what it sees as the substance of the complaint to the parties and provides an opportunity to make submissions. As pointed out in an earlier paper,[5] advisers should take full advantage of this opportunity to put their case before it goes up to the Tribunal. This includes supplying the IAA with sufficient documents to set out the events in question, as lay complainants will often be unrepresented and might not fully document the background to their grievance. Having said this, a feature of many of the

[4] HC Auckland, 11 March 2011 per Peters J

[5] *The Immigration Advisers Licensing Act 2007* (Auckland District Law Society seminar, November 2008)

decisions made so far was the contrast between the clarity and credibility of the complaint, and the adviser's failure to address the issues drawn to their attention.

As with any administrative or judicial forum, it is unwise to try to conceal potentially damaging evidence because the IAA and the Tribunal both have powers to, for example, obtain the INZ file. An attempt to mislead the Tribunal could in itself amount to a breach of the Act and/or the Code.

The only decisionmaking function of the IAA in this process is to cull out cases which raise trivial issues. Up to now the IAA has in fact referred all complaints to the Tribunal, presumably in order to allow the Tribunal's to develop guidelines about what should come before it.[6]

It is important to understand that the IAA takes no part in "making" the complaint. This was clarified in *CO v DSI* where it was pointed out that the Tribunal is not limited to determining the complaint by the way in which the IAA might formulate it in its referral documentation.[7] For the Tribunal to adhere to the IAA's version of what the complaint is about could amount to fettering of discretion and open it to review. Furthermore, it would be improper for the IAA to influence the form or content of the complaint because it may itself become a complainant by virtue of the "own motion" complaint mechanism at s 44 of the Act. The Registrar has indicated that own motion complaints may well be used more often in future as a regulatory tool, against advisers who consistently fail to comply with licensing or competency requirements after several years of coming to terms with the licensing system.

The Chair has adopted the practice that, once the IAA has referred the matter and supporting file to the Tribunal, he issues a Minute to the parties setting out a preliminary view of the issues. These are described as "potential factual findings". Section 49(3) of the Act provides that complaints must be on the papers, although any party can apply under s 49(4) for a person to appear live before the Tribunal. Whether such an appearance takes place is a matter for the "absolute discretion" of the Tribunal. In practice it appears that this option is not being encouraged as a matter of administrative efficiency.

Recently the question arose as to whether the IAA should engage in less formal dispute resolution rather than referring every matter before it to the Tribunal. This is especially pertinent right now where a complainant seeks (and may need) a quick remedy, but Tribunal decisions appear likely to take in the order or years to complete (see below). The Registrar has resisted this suggestion on the grounds that it would go beyond the IAA's statutory functions under s 35(1) of the Act. However, it is arguable that the IAA is obliged to engage in low-level intervention where it appears that an adviser could be persuaded to act properly by being counselled to do so by the Authority. Conversely, the IAA's refusal to engage in this way would in some situations frustrate the primary objective of the Act – namely, the protection of migrants. This matter remains unresolved.

4. Tribunal's Approach to Complaint Issues

Once the Tribunal receives a referral from the IAA the Chair prepares a Minute which sets out a preliminary view of what the case is about. Again the parties are invited to make

[6] See for example *EGX v BSL* [2011] NZIACDT 17 which was quickly dismissed as having "no substance".
[7] *CO v DSI* [2011] NZIACDT 5 at [49] and *CO v IBU* [2011] NZIACDT 4 at [49]

submissions and supply evidence. This provides another forum for advisers to defend themselves, but it remains important to use the IAA compilation stage to provide material for the Tribunal to consider, so that the core issues can be identified early.

When does liability for complaints begin? Advisers who obtained licenses prior to the time at which licensing became mandatory (whether onshore or offshore) must bear in mind that they can face complaints about conduct from the date of obtaining their first license. An attempt to argue that one could only be subject to the complaints system after mandatory onshore licensing came into effect in May 2009 failed for this reason.[8]

Fronting for Unlicensed Activity: *JM v DTM* concerned a licensed adviser who worked for a business operated by an unlicensed person (SN). The evidence established that SN was actively engaged in providing immigration advice. The Tribunal stated that a licensed adviser is "personally responsible for the professional relationship, regardless of whether they are employees or otherwise." That is, the adviser incurred responsibility for allowing SN to provide unlicensed advice to the complainant. Furthermore, other breaches of the Code of Conduct committed by SN, including abusive communications with the client and failure to provide a Terms of Engagement, were attributed to the licensed adviser.[9]

The same theme was taken up in *JM v AHX* where SN was also involved:

> The legislation is structured to effect functional exclusion from the professional relationship of any person who is not either licensed or exempt.[10]

In *JM v DTM* the Chair also fired a warning shot to advisers working as employees of an organisation that they did so at their own risk unless they were able to manage all aspects of the professional relationship – that is, anything that a licensed adviser is expected to provide under the Act and the Code, including the charging of reasonable fees, for example. No room was allowed for abdication from those duties simply because of being in an employment relationship.

By extension, the licensed adviser is deemed to be responsible for the handling of client affairs by unlicensed staff and, in the case of *Singh v Devi*, another branch of their business. In that case it was claimed that a lack of proper service was because of shoddy and fraudulent activity in the Fiji office, for which the adviser disavowed any liability as to the level of service provided. The Chair rejected that excuse in short order.[11]

Negligence: This term is not defined in the Act or the Code of Conduct (where it also appears). The Tribunal has determined that the test for a finding of negligence is not that applied in civil tort claims, but instead that established in the professional services context. Guidance was obtained from the medical practitioner disciplinary scheme and in particular the case of *Tolland* where negligence was described as a "breach of duty in a professional setting by the practitioner."[12]

This implies a certain standard of care and diligence expected in that profession. What the Tribunal has not engaged with so far is how that standard is to be known – whether through "what my colleagues do" or by some objective standpoint outside the profession. O'Regan J

[8] *Whiles-Clarry v Standing* [2011] NZIACDT 18
[9] *JM v DTM* [2011] NZIACDT 01
[10] *JM v AHX* [2011] NZIACDT 02 at [26]
[11] *Singh v Devi* [2011] NZIACDT 22
[12] *Tolland* (325/Mid10146P) at [39]

in a medical practitioners disciplinary case has said that the tribunal must be mindful of "patient interests and community expectations" such that it has a role in setting standards rather than just following those accepted by the profession itself.[13]

A necessary component of this assessment is whether the lapse is sufficient to uphold the complaint, but it is not necessarily tied to the degree of loss suffered by the complainant. This is because the Tribunal can find the claim to be made out but need not impose any penalty. It was recognised that applying professional skill in, say, interpreting and acting on Immigration policy, is not a "mechanical formulation" in many cases. If it were, then immigration advisers would not be needed. Advocating for a certain interpretation which does not succeed is not necessarily negligent.

Written Agreements: The provision of a written agreement in some form or other is not sufficient, according to *Nabi v Devi*. In that case the Terms of Engagement specified that a Student Visa would be applied for, and it is implied (but not exactly stated) that more detail about the steps involved in that application and management of the client's immigration status should have been written down. Nor did the agreement tell the complainant that they could seek independent legal advice; and no internal complaint procedure was handed over.[14]

The adviser in *CE v TFX* was accused of having lodged an Expression of Interest which was unlikely to succeed. It had been drafted by a previous adviser and TFX had been asked to carry it forward. Fortunately they had noted on the Terms of Engagement their initial concerns that the status of the EOI was uncertain in a copy of the draft EOI had not yet been sighted.[15]

This highlights the need for advisers to set out in writing, at the first opportunity, any reservations about the merits of an application (or appeal etc.). This could be in the form of a general disclaimer in the Terms of Engagement; but in light of the close scrutiny being applied by both the IAA and the Tribunal to the work of advisers, it is better for advisers to record such matters in each case and get the client to sign off.

Sanctions: The Tribunal may dismiss the complaint; find in favour of the complainant but impose no penalty; or find in favour of the complainant and impose a penalty. A wide range of possible sanctions may be applied (s 51 of the Act). As a result, once the Tribunal has found that a breach has occurred it invites submissions from the parties as to penalty.

The Chair explains in several decisions the principles behind applying sanctions in the early phase of the licensing jurisdiction, and has stated *inter alia*:

> To establish the profession, a relatively low threshold was applied. It required that a person demonstrate competent handling of immigration applications in the past, a knowledge and understanding of the new professional environment, and also language and communication skills . . . The entry to the profession was quite different from the conventional entry to an established profession where an extended period of academic training and then work experience with mentoring from established members of the profession is the norm.
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> . . . However, the inevitably low threshold for entry into the profession, in that entry has not required a long period of academic training, and mentored experience, has resulted in some people entering the profession with no real commitment to maintaining professional standards. It is important that this Tribunal exercise the power to remove people from the profession who

[13] *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774 at [57]
[14] *Nabi v Devi* [2011] NZIACDT 21
[15] *CE v TFX* [2011] NZIACDT 06

> are in this category. In a sense, the transitional entry has put a correlative obligation on entrants to the profession to meet professional standards, having been entrusted with entry to the profession.

However, he points out that some allowance must be made for current advisers who have not had the benefit of a long-standing formal entry system including mentoring by senior colleagues, and during this "transitional stage" of the development of the profession people are being given the benefit of the doubt by being allowed to reapply, say, for a Provisional License even if they have their Full License taken away from them.

In the first case decided by the Tribunal the adviser was found to have acted dishonestly by advertising on her websites that she held an MBA when she did not. The Chair pointed to the purpose of the Act at s 3 – protection of migrants and enhancement of New Zealand's reputation – as indicating that cancellation of her Full license was the starting point. This was softened to allow her to reapply for a new (Provisional) license under supervision.[16]

A couple of well-publicised decisions have seen stiff penalties handed out. Artika Devi faced a series of four complaints, all of which were upheld by the Tribunal. The major decision on sanctions was in respect of the Barry family who were reduced to borrowing money to sleep at a camping ground in Marlborough because an offer of employment promised by Devi was fictitious.[17] It was said that the case showed:

> the Adviser's failure to attain the standards required of professional practice, a disgraceful failure to accept responsibility for error, and a complete indifference to the plight of vulnerable clients harmed by her failure.

Noting Devi's apparent inability to understand what is required of a service professional in this field, the Chair stripped her of her Full License but did not prohibit her from applying for a Provisional License for the reasons set out above. He then ordered compensation to the Barrys for:

- Refund of fees;
- Travel and accommodation costs arising from their trip to Marlborough in pursuit of the non-existent job offer; and
- Loss of wages for the period up to when they found alternative work.

This came up to nearly $17,000, plus a penalty payable to the Tribunal of $2000. The latter was ostensibly discounted because of the compensation order and loss of license, but the Tribunal may also have been influenced by the fact that Devi was being penalised in the other three cases as well. Otherwise the penalty sum could have been much higher.

In the case of Devi's client Nisha, compensation was also ordered in the amount of $2100 because birth and marriage certificates were not returned to the complainant despite repeated and lengthy efforts to obtain them.[18] This signals the obvious importance of care with original identity and personal documents.

General Damages: Interestingly, in *Barry v Devi* the Tribunal did not order "general damages" for stress and humiliation, which might have been available in another civil context. It was said that compensation for accommodation, income etc., without any discount

[16] *Moncur v Deng* [2010] NZIACDT 01
[17] *Barry v Devi* [2011] NZIACDT 29
[18] *Nisha v Devi* [2011] NZIACDT 26

being applied, was enough. Advisers should beware, however, that in future cases complainants could seek such a general award, and there is nothing in the Act to prevent the Tribunal awarding such damages.

This did in fact occur in the other high-profile decision against Glen Standing made in August 2011.[19] The complainants sought $16,000 for stress incurred owing to the uncertainty about their future generated by negligence in handling their visa applications. The Tribunal only ordered $1000 for stress and another $2000 for "additional expenses". This reduction appeared to be driven by a view that there was considerable stress attached to relocation anyway, and that "stress damages" should only cover the anxiety brought about by Standing's negligence.

Although that principle is generally correct,[20] the writer respectfully suggests that it may underestimate the anxiety arising out of an adviser's mishandling of a client's application. Again, in the right circumstances we could see the award of more significant damages for emotional harm.

Name Suppression: Advisers are likely to be concerned to protect their reputation even in cases where they are finally cleared of any wrongdoing. The mere fact of being complained about could be damaging to their business and professional relationships, especially in this relatively small market. It is therefore worth considering submissions as to whether their name should be removed from the published decision. Complainants may also, or course, seek anonymity in certain situations.

The Chair has adopted a standard approach to name suppression as follows, but saving the Tribunal's discretion to deal with matters on a case-by-case basis:[21]

- Where a complaint is dismissed the parties' personal details will not be published. However, publication of the circumstances of and reasons for the decision will be published unless there are "exceptional" reasons not to do so;
- Where a complaint is upheld then the parties' particulars will be published unless a party successfully applies for anonymity of the published decision.

The writer was Counsel in the cited cases and argued that the Tribunal had no jurisdiction to publish as no mechanism was provided for in the Act – unlike the analogous comprehensive statutory schemes for lawyers and medical practitioners. The Chair deemed that publication formed a part of the Tribunal's procedure, which it could regulate as it saw fit. This might be termed an "inherent power" of the Tribunal to develop processes to facilitate its jurisdiction, rather than an issue of jurisdiction itself.[22] However, the lack of any publication mechanism in the Act was a significant oversight in view of the example set by the regulatory schemes of sister professions.

Right of Rehearing? The adviser sought a rehearing of the *JM v AHX* matter, claiming that despite earlier evidence in the substantive hearing, he in fact had nothing to do with the complainant's immigration case. The Chair deemed that the Tribunal lacked jurisdiction to

[19] *Whiles-Clarry v Standing* [2011] NZIACDT 25
[20] See the discussion in *Armstrong v Attorney-General* [1998] BCL 960 per Palmer J (Employment Court)
[21] *CO v DSI* [2011] NZIACDT 11 and *CO v IBU* [2011] NZIACDT 12
[22] See the discussion of "inherent jurisdiction" and "inherent powers" in Joseph, *Constitutional and Administrative Law in New Zealand* (Thomson Brookers, 2007) at 806 - 813

award a rehearing, again referring to the "inherent power" distinction.[23] It is not explicitly empowered by the Act to rehear cases, and the writer observes that it enjoys nothing like the blanket jurisdiction of the High Court conferred by s 16 Judicature Act 1908.

It is also relevant that s 81 of the Act confers a right of appeal to the District Court against Tribunal decisions affecting a person's license or involving sanctions. In *Austin* it was deemed that s 81 granted a rehearing which was distinguished from an all-out *de novo* assessment:

> [T]he Court is to consider for itself the issues which had to be determined at the original hearing and the effect of the evidence then heard as it appears in the record of the proceedings but applying the law as it was when the appeal is heard.[24]

It seems unlikely that any future request for rehearing would have much prospect of success.

5. Timeframes for Tribunal Decisions

Since taking office in October 2010 the Chair has published 18 decisions. As at August 2011 there were 56 complaints before the Tribunal for determination.[25] One must take into account the likelihood that early decisions have taken longer to produce because jurisdictional and substantive issues must be addressed and ironed out for the first time. However, there is cause for concern that, even if one postulated a 100% increase in efficiency in making determinations, it could take two years for any new complaint to be decided.

There are two reasons why this is such an unattractive situation:

1. If the adviser complained about has in fact breached the Act or the Code of Conduct, they may continue to practise with impunity during the intervening period, thus putting other clients at risk;

2. If the adviser is innocent of the allegations against them, they are subject to the stress and uncertainty of the unresolved complaint for a considerable period. Furthermore, the writer suggests that it is unavoidable for the IAA to be influenced by the existence of an undecided complaint when deciding an application for relicensing.

The first factor in particular tends to undermine the very reason for the licensing scheme. Therefore, the Minister of Justice should work together with the Minister of Immigration to secure the appointment at least one and preferably two additional decisionmakers without delay. NZAMI is to approach the Minister of Justice to recommend action on this troubling situation.

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[23] *JM v AHX* [2011] NZIACDT 15 at [10]
[24] *Austin* supra at n 3 at [13]
[25] IAA *Newsletter August 2011*