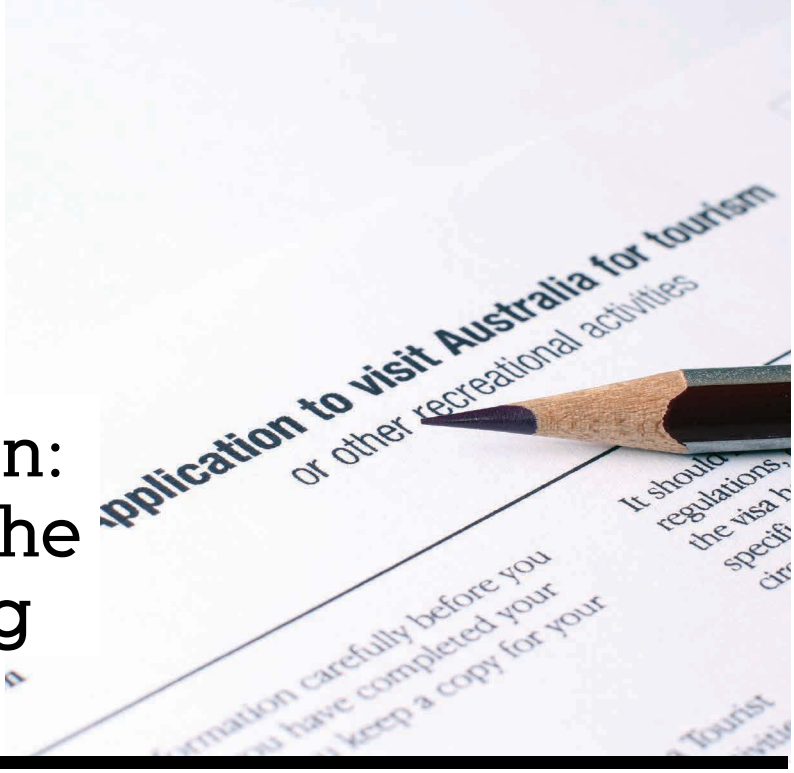

A path of devotion: Migration law & the art of specialising

JANE MCGRATH, MSM LEGAL

When I completed my law degree and GDLP, I started work at Piper Bakewell and Piper. I then went to the criminal law section of the Legal Services Commission until I joined Johnston Withers and Associates Pty Ltd as a solicitor.

At Johnston Withers, I practiced in workers' compensation law, personal injury law and industrial law. My colleague, Clare Byrt, had a migration practice and, when she left Johnston Withers, I took on migration work. Right from the start, I found it very compelling. I became a registered migration agent in 1994.

I cared about the outcome. This was the case whether my client was an individual thinking of relocating a business to Australia, a corporation seeking to move people from one workplace to Australia, or an asylum seeker.

At first, the migration work involved urgent court applications, including applications for injunctions to stop the Minister for Immigration from deporting a client.

Migration work has changed and developed over time because of constant legislative amendments and changes in the political landscape, which informs how government policy is applied.

I am now a partner at MSM Legal and head the Administrative Law section. We undertake work in all areas where a primary visa application is submitted. We advise clients and other legal practitioners on visa cancellations, sponsorship cancellations, merits reviews of refusals, and cancellations. We frequently take judicial review of tribunal decisions, and of administrative cancellations and refusals made on character grounds.

We are taught a wide range of subjects at university and cover different areas of work in practice. It is difficult to know which area you will find best lines up with your skills, experience and interests.

REASONS TO SPECIALISE

There are a number of arguments in favour of specialisation, including:

- You establish a specialty and then market that practice.
- With a specialty practice you are less likely to compete with colleagues within your firm or lawyers outside your firm for referrals. As a result, your colleagues and other lawyers will be more likely to refer work to you in your area of specialty.
- Work as a lawyer is complex. This is true generally, but is especially so with migration work. There are often hidden or secret problems, or sections of Acts, that are not immediately apparent from perusing websites or the legislation. A specialist knows the traps and avoids them.
- Specialisation is a reality of modern practice. IT systems, court systems and other services are designed with the expectation that the legal practitioner will be a specialist. In migration work, we subscribe to a particular service called LEGEND[1]. This service is produced by the Department of Immigration and Border Protection and it is difficult to know how we could possibly cope without it. The LEGEND system allows us to consider the migration legislation and policy at a particular date.
- Specialisation recognises cultural differences and challenges. An individual legal practitioner can become familiar with the types of problem and, in the case of immigration law, can become familiar with cultural differences, allowing the practitioner to help the client make sense of legal advice.
- Good working relationships are built with specialist counsel.

MIGRATION REGISTRATION

Section 280 of the Migration Act 1958 prohibits anyone (other than a parliamentarian, a member of diplomatic post, an officer of an international organisation, a member of the public service, or a family member) from providing 'immigration assistance' if they are not a registered migration agent. This includes lawyers. However, a lawyer is able to provide "immigration legal assistance" without being registered.

Immigration assistance is defined in Section 276 of the Migration Act 1958 as being assistance or advice in relation to a visa application or merits review of that decision or advising a client in relation to these types of applications. Immigration legal assistance is defined in Section 277 of the Migration Act 1958 as all acts and advice in relation to a court proceeding.

It is not in the client's interests to have a good outcome in one area of law that leads to devastating consequences in another.

In 2016, an independent review of the registering authority, the OMARA (Office of Migration Agent Registration Authority), recommended that lawyers be removed from the regulatory scheme that governs migration agents. The removal of lawyers from the Migration Agents Regulatory Scheme requires legislative change which is subject to the Government's legislative timetable. In the meantime, lawyers still need to continue to register with the OMARA in order to provide immigration assistance.

FEES

In migration work, we generally claim fees on a fixed fee basis. It should be relatively predictable how much work is going to be required. This is not an area where we are able to claim large fees or work on an hourly rate basis. The fixed fee model depends on certain work being "easy". Currently, none of our work is "easy" and the fixed fee model is increasingly under pressure. At the same time, however, clients expect to know where they stand. This is not just the case in migration work. Fixed fees are becoming increasingly popular in other areas of work as well.

LEGISLATIVE CHANGE[2]

The migration legislation does change from time to time and that means that a whole area of work can cease to exist. Even without legislative change, government policy may change in accordance with its political ideology or a perception of community expectations.

When I first started practising in migration law in the 1990s, the offices of the Department of Immigration and Multicultural Affairs (now known as the Department of Immigration and Border Protection) had established business centres and had a generally pro-business approach to visa approvals.

One example of legislative change is in relation to asylum seekers who have arrived by boat (or, according to the current terminology of the Department of Immigration and Border Protection, "illegal maritime arrivals"). For people who arrived in Australia illegally by boat after 13 August 2012, a bar under Section 46A of the Migration Act operates so as to not allow applicants an opportunity to apply for any visa (including a Protection visa). The Department started "lifting the bar" from about November 2015.

People who came to Australia illegally by boat before 13 August 2012 and who had already made a Protection claim, were able to remain in the community. If the person arrived in Australia, or attempted to arrive in Australia, by boat after 1 January 2014, they are taken to an offshore facility for visa processing and would never be able to settle in Australia even if they were successful.

Other examples of legislative change that reflect a tightening of the Government's position include:

- The introduction of a "fast track" merits review system for applicants for protection where the applicant is an illegal maritime arrival[3],
- The numerous alterations to the 457 visa category, both in relation to sponsor monitoring and to the visa application - in particular, changes around labour market testing and English language ability.
- In July 2012, a new regime for skilled migration was introduced. The new regime involved the applicant only being able to nominate a limited number of occupations.[4]
- Business Migration changed from July 2012. The requirements for net assets and net assets in the overseas business are now much higher than under the previous category requirements for personal and business assets[5].
- A visa can now be cancelled for reasons other than the holder being of bad character (see below).

Character cancellations

In relation to character cancellations and refusals, it is a requirement that all applicants for Australian visas, or anyone who is currently on a permanent resident visa (as opposed to holding Australian citizenship), be subject to a character test.

The character requirements are a set of conditions that are used by the Department to decide if an individual is a person of good character. The criteria are set out in the legislation under Section 501(6) of the *Migration Act 1958*. The Department (or Minister) will initially decide whether someone passes the character test and, if not, will decide whether to exercise a discretion to cancel or refuse the visa.

If a person has a substantial criminal record, they automatically fail the character test[6].

If the Minister personally makes a decision to cancel or refuse a visa on character grounds, the procedural fairness and natural justice provisions within the *Migration Act* do not apply and the individual does not have access to merits review at the Administrative Appeals Tribunal (AAT).

If the Minister makes the decision personally[7], the only option is to seek judicial review of the Minister's decision.

CONCLUSION

It is not in the client's interests to have a good outcome in one area of law that leads to devastating consequences in another.

Migration issues are often related to problems in other areas, particularly in employment law and criminal law. It is important that all specialist lawyers work collaboratively on their mutual clients' interconnected legal issues. **B**

Endnotes

1 As part of the registration or re-registration process we have to show that we maintain a library and the subscription is sufficient
2 The Parliament of Australia website http://www.aph.gov.au shows Bills that are currently before the Australian Parliament.
3 See Section 5 of the *Migration Act*
4 See subclasses 189 and 190 introduced on 1 July 2012 and look up Skilled Occupation List (SOL) or Consolidated Skilled Occupation List (CSOL) on the Department of Immigration & Border Protection website.
5 See for example Migration Regulation Schedule 2 subclass 188 and 888 requirements.
6 See Section 501(7) – Damaskos & MIMIA [2002] AATA 500 (21 June 2002)
7 Section 500(2) of the Migration Act 1958