Guidance Document Number 2 for 1 March 2022 Code of Conduct for Registered Migration Agents – 25 March 2022

1. Signing authority for a service agreement with a business client (section 42)

Does section 42 of the Code of Conduct require that a person who has signing authority on behalf of a business/organisation (corporate client) provide their personal details such as date of birth and residential address? If so, and if the person who signed the service agreement leaves the corporate client, does a new service agreement need to be signed?

Guidance

One of the key purposes of subsection 42(3) is to establish the identity of the client (be it a business or a natural person) entering into a service agreement with a registered migration agent (RMA). It also promotes accountability and helps the RMA to satisfy themselves that the individual signing on behalf of a business has the authority to do so.

Where an individual has the signing authority for a business, they would generally need to provide their personal details in the service agreement as required by subsection 42(3). However, where the client is a business, the Office of Migration Agents Registration Authority (OMARA) is of the view that the street address of the "principal place of business" will be acceptable as the residential address. This is because the residential address of the individual with signing authority for the business would be of less relevance to the service agreement.

Where the individual with signing authority for the business leaves the business entity, it may be necessary to vary the service agreement in compliance with section 44 of the Code of Conduct to reflect the new arrangements. However, it would not be necessary to enter into a new service agreement.

2. Global company service agreements (section 42)

RMAs have raised questions about how a global company, which operates in Australia, whose service agreements are signed overseas in the head office, can meet its obligations under section 42 of the Code. In this scenario, the RMAs advise that sometimes their only contact is with the employer. As such, guidance has been sought on whether their obligations under section 42 of the Code can be met by using a supplementary service agreement with the following features:

- to be signed by each visa applicant
- provide confirmation from the visa applicant that they understood who was assisting them with the visa application
- contain all the details of each applicant
- provide confirmation from the visa applicant of other matters, for example, that the RMA may undertake VEVO checks.
- include reference to the main service agreement with the employer/business, as this would have the details of fees and disbursements, but would not repeat these as they are paid by the company.

Guidance

While it is not entirely clear from the information provided above whether the proposed approach would comply with the Code, the following advice is provided to guide RMAs in developing a suitable service agreement for both sponsoring and visa applicant clients.

In situations where an RMA is representing both a sponsoring business and a visa applicant, it is possible for one service agreement to cover both (see subsection 42(4) of the Code). It would be necessary however in such a situation for such a service agreement to be signed by each client and contain the relevant details of each client. Each client must also authorise the RMA to act on their behalf.

It is likely that there would also be a requirement for an RMA in such circumstances to inform each client in writing about a potential conflict of interest and receive, in writing, confirmation from each client that they still wish to receive immigration assistance (see subsection 34(1)).

It may be possible for a service agreement covering two clients to be structured as a main agreement and a supplementary agreement, however such an agreement would need to meet the requirements of section 42 of the Code in respect of each client being covered by the agreement.

Key principles that should be taken into account when developing a service agreement are:

- there should be an agreement with each client – including the visa applicant if they are being provided with immigration assistance.
- the agreement should set out
    - the actual services to be provided by the RMA and
    - the fees and disbursements to be charged
    - when the fees are due
    - the identity of the RMA providing the assistance
- the agreement must be signed.

3. Inclusion of RMA details in the service agreement (section 42)

RMAs have sought advice as to whether the requirements of subparagraph 42(3)(b)(ii) of the Code can be met by reference to the MARA website showing all current registered migration agents (RMAs). This issue is raised as migration firms could assign any RMA to provide immigration assistance to any client, in the event of staff unavailability for any reason. For reference, subparagraph 42(3)(b)(ii) is copied below:

42(3) The service agreement must include the following:

(b) the name, MARN and contact details of:

(ii) each migration agent who, at the time the agreement is signed, is expected to give immigration assistance under the agreement;

Guidance

Paragraph 42(3)(b) makes it clear that the service agreement must contain the name, Migration Agent Registration Number (MARN) and contact details of the RMA who signs the agreement as well as each RMA who, at the time the agreement is signed, is **expected** to give immigration assistance under the agreement.

Unless it is expected that an RMA named in the service agreement will be unavailable, it would be unnecessary to list the details of any RMA who might be called upon to assist the client in the event of an unanticipated absence of the nominated RMA.

However, should an RMA have planned leave during the period in which a particular client will require immigration assistance, then the details of any RMAs who are expected to assume responsibility for the matter, in that RMA's absence, should be listed in the service agreement. A reference to the OMARA website showing all current registered migration agents would not be sufficient for the purposes of subparagraph 42(3)(b)(ii).

Should it be necessary for an RMA who was not listed in the service agreement in accordance with subparagraph 42(3)(b)(ii) give immigration assistance to the client, then an amendment to the service agreement should be made in accordance with section 44 of the Code.

4. Service agreements and flexibility for global companies (section 42)

Guidance has been sought about the requirements under paragraph 42(3)(a) of the Code to include specific details of each client to whom immigration assistance is to be given under the service agreement. For reference, the relevant paragraph is copied below:

(3) The service agreement must include the following

(a) the following details of each client to whom immigration assistance is to be given under the agreement:

(i) name;

(ii) date of birth;

(iii) email address (if any);

(iv) residential address;

The issue arises in the context of global immigration firms, which employs both lawyers and RMAs and where, generally:

- the immigration assistance often relates to employer sponsored applications such as Temporary Skill Shortage visas or Temporary Work (subclass 400 visas),
- immigration assistance is provided to both the sponsoring employee and the individual visa applicant
- the sponsoring employer pays the fees and disbursements
- the service agreement will generally be with the sponsoring employer, with written confirmation provided by the RMA to the visa applicant of:
    - the services to be performed
    - and any disbursements directly payable (if any),
    - associated rights and obligations
- the term of the agreement will usually be in line with the sponsorship validity, often lasting a number of years
- multinational clients usually have an overarching service legal agreement which directs the fees and services in each jurisdiction
- visa applications are often initiated on a project by project basis, and in frequent cycles dependent on project lead times
- rather than issuing a service agreement for each individual visa applicant, the firm would usually enter into a service agreement with the sponsoring employer for visa services
- given time sensitivities for some projects, individual visa applicant details (or those of accompanying family members) might not be available at the time that the visa application is initiated by the employer.

In this scenario, guidance is sought as to:

- whether individual service agreements will need to be issued to every individual visa applicant, even where the employer is solely responsible for all fees and disbursements
- if so, whether there is any flexibility with respect to s42(3)(a) and the items prescribed in subsection (3)(a)(ii) and (iv)
- whether the service agreements would also need to be signed by all adult clients (eg main visa applicant and dependent spouse).

Guidance

Subsection 42(1) prohibits an RMA from giving immigration assistance to a client unless there is a service agreement in place that, among other things, complies with the requirements of Division 2 of Part 3 of the Code. Subsection 42(2) (in Division 2) requires the service agreement to be in writing and signed by the client and the RMA. Subsection 42(3) requires the service agreement to include the name, date of birth, email address (if any) and residential address of each client.

It follows, that where a person falls within the definition of 'client' of the RMA, there needs to be a service agreement in place in order to provide immigration assistance. The term 'client' is defined in section 306C of the Migration Act. Subsection 306C(1) provides that a client is a person to whom the RMA has given, or has agreed to give (whether or not in writing), immigration assistance. 'Immigration assistance' is defined in section 276 of the Migration Act and includes (among other things) preparing, or helping to prepare a visa application.

Therefore, if an RMA is helping prepare a visa application for a person, that person will be a client of the RMA. This would be irrespective of whether or not the visa applicant is the person paying for services. Section 42 of the Code requires a service agreement to be in place for the visa applicant client that includes the information specified in subsection 42(3) of the Code, before the immigration assistance (such as preparing the visa application) can be given.

As such, the practice of having a service agreement with the sponsoring employer only, and not with the visa applicant as well, does not comply with the Code. Firms which have such a practice in place should consider amending those practices to align with the Code requirements.

With regard to the practice of commencing a visa application without the relevant details of the visa applicant, it is important to note that subsection 36(1) provides that an RMA must not give immigration assistance to a client unless the RMA has taken all reasonable steps to verify the identity of the client and is reasonably satisfied of the identity of the client. Subsection 36(3) provides that an RMA must not deal with a client through an agent or other intermediary representing the client unless the RMA has taken all reasonable steps to verify the identity of the agent or intermediary and is reasonably satisfied that the client has agreed in writing to the agent or intermediary dealing with the RMA on the client's behalf.

As such, the practice of initiating visa applications without the relevant details of the visa applicant would not comply with the requirements of section 36.

Having said this, where an RMA is providing immigration assistance to an employer, there may be activities undertaken on behalf of that employer to support their intention to employ a person on a sponsored visa, and which may ultimately be used in the visa application. To the extent that these activities are generic and not related to a specific visa application, and are undertaken in the context of the service agreement with the sponsoring employer (and not on behalf of the applicant) they will be permissible.

A service agreement may be expressed to cover more than one client (s42(4)). As such, there would be scope to include both the sponsor and the visa applicant (or a number of visa applicants) in a single service agreement. However, it would be necessary to have the service agreement signed by each client, or someone acting on behalf of the client.

In the case of a sponsoring employer acting on behalf of a visa applicant (and signing the service agreement on behalf of that client), it would be necessary for the RMA to ensure that they have taken all reasonable steps to verify the identity of the visa applicant (s36(1)(a)) and are reasonably satisfied of the identity of the applicant (s36(1)(b)).

The RMA would also need to be reasonably satisfied that the visa applicant had agreed in writing to the sponsoring employer dealing with the RMA on their behalf (s36(3)). This could be done by requesting verification of this written notice. If the sponsoring employer was unable to provide a copy of this authorisation, the RMA should seriously question whether the required authority is in place.

Regardless of whether or not an intermediary (such as the sponsoring employer) acts on behalf of a client for the purposes of the service agreement, it is still necessary for the service agreement to include the relevant details for each client to whom the RMA is providing immigration assistance (s42(3)). The Code does not provide any flexibility in relation to this. The employer and visa applicant should be treated as separate clients. If there is an issue with the employment relationship then the RMA will potentially, if not actually, face a conflict of interest.

Specific issues:

- Do individual service agreements need to be issued to every individual visa applicant, even where the employer is solely responsible for all fees and disbursements?
- If so, is there is any flexibility with respect to s42(3)(a) and the items prescribed in subsection (3)(a)(ii) and (iv)?

Guidance

Subsection 42(4) makes it clear that one service agreement can be expressed to cover multiple clients. However, the service agreement must comply with the requirements of section 42 in relation to each client to whom immigration assistance is being provided.

There is no flexibility in respect of the client details that must be included in the service agreement other than in relation to the client's email address. It would be assumed that if an RMA is providing immigration assistance to a client, given the requirement in section 36 to verify the identity of each client, the items prescribed in subparagraphs 42(3)(a)(ii) and (iv) would be known to the RMA before entering into a service agreement with that client.

- Do service agreements need to be signed by all adult clients (e.g. main visa applicant and dependent spouse)?

Guidance

The service agreement would need to be signed by all adult clients or on the adult client's behalf under the common law doctrine of agency. However, it would be necessary for the RMA to ensure that any person signing the service agreement on behalf of the client had authority to act on that client's behalf. Depending on the circumstances, it may also be necessary to meet the requirements of subsection 36(3) of the Code.

5. Service agreements – Registered migration agents (RMAs) employed by legal practitioners (sections 42 and 43)

Guidance has been sought as to whether RMAs who are employees of law firms (and who are covered by the law firms professional indemnity insurance) must prepare service agreements in compliance with the Code of Conduct, rather than using the law firm's usual cost agreements (which comply with law society rules).

Background provided indicates that RMAs employed by legal practitioners would usually operate under cost agreements prepared under Law Society rules, where legal practitioners can:

- hold several consultations before putting cost agreements in place, which includes their immigration assistance operations
- also adopt law of contract principles which permits acceptance of service agreements by
    - signature
    - payment of fees
    - provision of further instructions.

Guidance

Subsection 314(2) of the Migration Act provides that RMAs must conduct themselves in accordance with the Code. There is no differentiation in the Migration Act or the Code between RMAs who are employed by a legal practitioner and those who are not. That is, being employed by a legal practitioner does not remove or amend an RMA's obligations to comply with the Code.

As such, an RMA may not provide immigration assistance to a client without a service agreement being in place (except in the circumstances described in section 43 of the Code). This obligation will not change where the RMA is an employee of a legal practitioner.

An RMA who is employed by a legal practitioner and provides immigration assistance under a Costs Agreement will only be complying with section 42 of the Code if the Costs Agreement meets all the requirements of section 42 (and can therefore also be considered to be a service agreement for the purposes of the Code).

6. Service agreements and disbursements (section 47)

Questions have also been raised about the requirements of section 47 of the Code that relate to disbursements. Specifically, guidance is sought on whether it is necessary to include the amount, or reasonable estimates, of disbursements to be paid directly by the client (such as medical or police check fees) as well as the immigration/visa related fees. Some RMAs have commented that they would ordinarily just mention there would be extra costs that the applicant must pay, but not identifying those costs or giving estimates.

Guidance

Section 47 of the Code requires the service agreement to include details of the likely disbursements that will be incurred in relation to work or services under the agreement and for which each client will be required to pay (see s47(2)). This includes where the disbursement is to be paid directly by the client (s47(2)(b)(i)). Where an RMA is aware that the client will be required to pay disbursements for medical or police checks and fails to include the disbursement and its amount or a reasonable estimate in the service agreement, the RMA will be in breach of section 47 of the Code of Conduct.

7. Refund policy (section 52)

Questions have been raised about RMAs obligation under section 52 to include a 'fair and reasonable' refund policy in the service agreement. In particular, guidance is sought about what should reasonably be included in a refund policy to make it fair and reasonable.

Guidance

What is fair and reasonable in a refund policy will depend on the circumstances, including the nature of the agreement entered into with the client. "Reasonable" is a relative term and all relevant circumstances must be considered to determine whether a refund, and the extent of any refund, was reasonable in the circumstances. The ordinary meaning of the term "reasonable" is simply "rational; not irrational, absurd or ridiculous". As such, this will ultimately be a matter for each RMA to determine. However, as a general rule, a refund policy should allow for a refund of any money which was paid by a client but not ultimately required for services or disbursements.

8. Obligation to provide submissions to clients (section 39)

Section 39(a) of the Code requires an RMA to give a copy of a submission lodged with a government official to the client. Does the word “submission” include emails and electronic communications with the department of Home Affairs? What are the words “submission” and “lodged” defined as here?

Guidance

The word “lodged” is not defined so has its ordinary meaning. Similarly, the words “submission”, “representation” and “application” are not defined and as such have their ordinary meaning.

Generally, things which should be provided to the client include, but are not limited to:

- Written submissions or arguments that require consideration or judgement
- Written statements or documents intended to influence the outcome of a matter
- Anything material to the outcome of an application
- Copies of any completed application forms that have been submitted.

Communications of an administrative or clerical in nature would generally not need to be copied to the client. However, RMAs should exercise professional judgement in what needs to be provided to the client in each situation.

9. Must not defeat the purpose of migration law (section 18)

Guidance has been sought about the meaning of paragraph 18(1)(a) which provides that a registered migration agent must not act in a way intended to "defeat the purpose of the migration law". RMAs have expressed concern that this requirement puts them in a positon of conflict of interest with their clients as they are required to put their clients’ interests first. Questions have been raised as to whether they are prevented from utilising a loophole in legislation if it was to their clients’ advantage. Some RMAs have expressed the view that this would be unreasonable and may prevent certain reviewable decisions from being pursued.

Guidance

While an RMA may have fiduciary obligations to their client, such obligations do not extend to breaching legislative provisions. As such, an RMA has a duty to act in a client’s interests while complying with the migration law, including the Code. It follows that if an RMA acted to benefit a client by acting in a way that undermined the migration law that RMA would be in breach of the Code. There would be no conflict of interest between an RMA and their client arising from the RMA complying with their obligations in the Code.

The Explanatory Memorandum to the Code provides further guidance on the nature of the conduct section 18 was intended to address – the relevant excerpt is copied below for reference.

> *Section 18 – Duty not to undermine the migration law*
>
> *This section would impose a general duty on a migration agent not to undermine the migration law in the ways set out in the section.*
>
> *Subsection 18(1) would impose a duty not to act in a way that is intended to defeat the purpose of the migration law or to evade a requirement of the migration law, for the purpose of obtaining a benefit or advantage for the migration agent, a client, or any other person.*
>
> *For example, an agent who advised a client to apply for a protection visa as a means to extend the client’s stay in Australia when the client does not have genuine protection visa claims would be breaching this provision.*
>
> *Subsection 18(2) would impose a duty on migration agents not to withhold relevant information or documents from a government official for the purpose of causing delay when making an application or giving other immigration assistance.*

For example, an agent who did not provide a "decision ready" application to the Department in the first instance where relevant information or documents were available would be in breach of this provision. Similarly, not providing all the documents required in response to a request for further information made under section 56 of the Act or in relation to a request for the same by the Administrative Appeals Tribunal (e.g., under section 359 or 424 of the Act) would be in breach of this provision if the aim was to charge the client for subsequent submissions when the documents or information could have been reasonably submitted in the first instance.

Subsection 18(3) would impose a duty not to act in a way that is intended to frustrate the proper disposition of any review or appeal process in relation to a decision made under the migration law, or to delay or abuse a review or appeal process.

For example, submitting a large volume of documents to the Administrative Appeals Tribunal close to the hearing with the intention of forcing the tribunal to postpone the hearing (as a deliberate strategy to garner more time either for the registered migration agent or the review applicant) would breach this provision.

It may also be of interest in this context to note the provisions of section 19 of the Code relating to futile immigration assistance. While section 19 requires that an RMA does not give immigration assistance that is futile, the Explanatory Statement clarifies that seeking ministerial intervention, for example, where there is genuine potential for success, would not be considered futile immigration assistance even if there was little prospect of success of the review application itself. A relevant excerpt from the Explanatory statement is provided below for reference:

However, a situation where there was an intention to seek ministerial intervention (with genuine potential for success) but where lodgement of a review application with the review authority would seem to be futile, would not necessarily be in breach of this section.

10. Document verification and use of third party providers (section 20)

The OMARA has been advised that organisations are offering document verification services to assist RMAs to comply with their obligations under section 20 of the Code. Guidance has been sought about whether or not RMAs should use such services.

- Relevantly, subsection 20(3) of the Code provides that an RMA must not give a government official a document that the migration agent suspects, or reasonably ought to suspect, (but does not know) is false or misleading, unless the agent:

(a) discloses to the government official that the agent suspects that the document is false or misleading; or

(b) has taken all reasonable steps to determine whether the document is false or misleading.

Subsection 20(6) provides that an RMA must not state to a government official that a particular document originated from a specified person other than the agent or a client of the agent, unless the agent has taken all reasonable steps to verify the origin of the document.

Guidance

Whether or not an RMA chooses to engage the services of a third party organisation to assist with their business operations is a matter for them. However, RMAs need to be aware that if they choose to do so, they are still responsible for ensuring they are complying with the Code. An RMA cannot contract out of their obligations under the Code.

In this context it is important to note that the OMARA does not approve, nor endorse, private organisations offering services to RMAs unless specifically stated on the OMARA website or in legislation (for example continuing professional development providers who are approved by the OMARA and listed on the website and the providers of the Capstone assessment and the Graduate Diploma).

Guidance about RMA obligations under section 20 of the Code is published on the OMARA website: Guidance for 1 March 2022 Code of Conduct (mara.gov.au). As indicated, RMAs are not expected to be, nor to engage, fraud experts. Rather, they are expected to exercise due diligence, common sense and the reasonable person test when taking steps to verify the origin of a document. For example, if an RMA is approached by a client seeking an employer sponsored visa and who presents the completed nomination paperwork, it would be expected that the RMA would contact the employer to confirm if they actually know about the visa application and intend to sponsor the visa applicant.

RMAs should exercise their professional judgement and due diligence in determining whether to use services of third party providers. For example, it may be prudent to consider matters such as, but not limited to, the qualifications of the provider, whether the provider advertises their MARN (if claiming to be an RMA) and whether the RMA can have confidence in the integrity and expertise of the provider.

Additionally, RMAs should also consider other obligations under the Code, including section 40:

> *Duty not to act in a way that causes unnecessary expense or delay.*
>
> *A migration agent must not, when dealing with an application, submission or representation for a client (including when lodging the application, submission or representation with the Department or a review authority), act in a way that causes, or is reasonably likely to cause, unnecessary expense or delay.*