

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2013] NZIACDT 19

Reference No: IACDT 023/11

IN THE MATTER

of a referral under s 48 of the Immigration
Advisers Licensing Act 2007

BY

Immigration Advisers Authority

Authority

Between

Donnie McLeod

Complainant

AND

Christine Lai Chun Yap

Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 28 March 2013

DECISION

Introduction

- [1] Ms Yap is a licensed immigration adviser based in New Zealand. Mr and Ms McLeod, whilst in the UK, approached the UK division of the practice where Ms Yap works. They were referred to the New Zealand division where licensed immigration advisers were employed, including Ms Yap.
- [2] A different licensed immigration adviser, in the same practice as Ms Yap, provided some preliminary services to Mr and Ms McLeod.
- [3] Ms Yap's involvement with Mr and Ms McLeod began when Mr and Ms McLeod were deciding whether to engage Ms Yap's firm to assist them with the process of migrating to New Zealand.
- [4] There were various issues in relation to the initial engagement between the parties where Mr McLeod was not satisfied. The papers initially presented to the Tribunal did not provide sufficient information to deal with a number of the potential issues.
- [5] Ms Yap was requested to provide information in relation to such issues in the first minute issued 14 November 2012. She presented satisfactory explanations and supported them with documentation. However, there was one issue which has not been satisfactorily explained by Ms Yap. That issue concerned representations made regarding fees. Ms Yap's role entailed dealing with the client engagement process, and accordingly the terms of that engagement included matters relating to fees.
- [6] The Tribunal found that Ms Yap dealt with Mr and Ms McLeod on the basis that the fees payable were at a discounted price (i.e. below the usual level of fees). However, it later transpired that the fees were actually at a premium rate and that the service provided was an inferior type of service. Mr and Ms McLeod were expected to partly manage their own immigration affairs, pay a minimum fee, and pay for any professional time which was charged at a high rate.
- [7] The complaint has been upheld on the basis Ms Yap engaged in misleading behaviour during the engagement process.

The Complaint

- [8] Ms Yap is a licensed immigration adviser and her practice is based in Christchurch. She works in conjunction with other immigration advisers under the trading name "Migration Bureau Consulting Group", which appears to be used by a company named Oceania Development Group (EMEAR) Ltd ("Oceania"). Ms Yap is employed by the company.
- [9] Mr McLeod wished to lodge an Expression of Interest, and to follow that with an application for a residence permit. He approached Oceania to assist him. Three licensed immigration advisers were engaged with his affairs; Ms Yap, Ms Jessy Mathenge and Ms Rosemary Gregory.
- [10] Mr McLeod's initial contact with Oceania occurred on 3 September 2010 through a website. This resulted in a communication from Mr Greg D'Aoust, who was apparently located in an office in London and associated with Oceania. The website inquiry involved filling in a questionnaire for the purpose of receiving an indicative assessment of immigration entitlement. There was no fee for this service. Mr D'Aoust's response only involved acknowledging the contact.
- [11] It appears the website inquiry also resulted in Mr McLeod receiving an email. This email said Mr McLeod was "now a full client", and described Oceania, a process for service delivery, the services provided, and some information relating to fees. The document was presented in the style of an agreement. However, the document did not meet the requirements of the Licensed Immigration Advisers Code of Conduct, as it was not personalised to Mr McLeod's

circumstances and did not contain a full description of the services to be provided (clause 1.5 of the Code). Mr McLeod did not accept or return the document.

- [12] On 3 March 2011, Ms Jessy Mathenge wrote to Mr McLeod referring to his recent contact with Oceania and provided detailed immigration advice. The essence of the advice was that Mr McLeod was apparently eligible to submit an Expression of Interest as a basis for him and his family to migrate to New Zealand. This report was accompanied by a document stating it was a fee estimate. The document states that the fees for Oceania's services are "in line with industry standards". In fact, the fees reported appear to be grossly in excess of industry standards with professional time charged in the range between £322/hr for a "Migration Case Consultant Discount rate" to £489/hr for a "Director/Head of Department". Ms Yap has been identified by Oceania as a "Senior Migration Consultant", and it appears that her time would be charged at the rate of £479/hr (\$1,075/hr). The document offered a "sign on fee" of £2,400, which appears to be the basis for the fee Mr McLeod subsequently paid. This was to provide 18 hours of service, at a deeply discounted rate, but for a lesser service. The service only involved providing advice and checking with clients undertaking the process of preparing and lodging immigration applications themselves.
- [13] On 9 April 2011 Mr McLeod paid \$4,884.29 (paid in pound sterling £2,399.18), being intended as payment of the £2,400 fee for the service.
- [14] Mr McLeod has complained that he considered a six-month period had passed, and his expression of interest had not progressed. He decided to complete it himself, and that took approximately two and a half hours and he required no assistance. It appears Mr McLeod regarded himself as a client and entitled to service from the time he received an email informing him he was a "full client" (para [11] above).
- [15] On 12 April 2011 Mr McLeod requested that his payment of £2,399.18 be refunded in full. He addressed this request to Mr D'Aoust. He expressed concern that he had been waiting six months for the Expression of Interest to be lodged.
- [16] On 13 April 2011 Mr McLeod informed Ms Yap by email he was dissatisfied with the services provided, and that he had contacted the Authority.
- [17] On 15 April 2011 Mr McLeod sent a letter to Ms Atherton, who was presented by Oceania as its Client Care and Compliance Officer. Ms Atherton is not a licensed immigration adviser. Mr McLeod said he had terminated the professional engagement as:
- [17.1] A representative of Oceania was telephoning his wife, despite emails requesting that was to stop.
- [17.2] He had not signed a written agreement, and had only agreed to an engagement by "E-mail and verbally".
- [17.3] His money had not been refunded as requested.
- [18] On 18 April 2011 Mr McLeod completed a complaints form and lodged it with the Authority. He identified Ms Susan Atherton as the subject of the complaint.
- [19] The same day, 18 April 2011, Ms Yap responded to Mr McLeod's email of 13 April 2011. She said she had telephoned Mr McLeod's wife on 11 April 2011 and discussed the migration process and terms and conditions of the payment plan with her, and said she tried to contact Mr McLeod subsequently, but had not been able to do so.
- [20] Ms Atherton also wrote to Mr McLeod that day. The significant points in her letter were:
- [20.1] Oceania had no record of the payment of £2,399.18.
- [20.2] Mr McLeod had requested a preliminary assessment on 23 February 2011, and then elected to continue to engage Oceania to assist with migration. The next step was for a telephone call to confirm the instructions, and then a detailed assessment would be provided; only then could a visa be obtained.

- [20.3] It was Ms Yap who was the person who telephoned Mr McLeod's wife. She was a "Senior Migration Consultant". Ms Yap discussed 18 hours of consultation.
- [20.4] Ms Yap elected to communicate with Mr McLeod's wife as he was not available, and she had not been instructed she could not do that.
- [20.5] Mr McLeod's expectations were unrealistic, as he had only engaged Oceania on 7 April, and terminated the services 11 days later. The six months that elapsed from his initial website inquiry was not relevant.
- [21] Mr McLeod responded to Ms Atherton and said that it was Ms Gregory, not Ms Yap, who had contacted his wife.
- [22] Ms Atherton wrote to Mr McLeod again on 22 April 2011. The significant additional points in this letter were:
- [22.1] Ms Yap contacted Mr McLeod's wife on 11 April 2011 by telephone.
- [22.2] The purpose of this call was to identify areas of concern and clarify terms of service.
- [22.3] A full report was to follow this telephone call.
- [22.4] Mr McLeod was only a client from 7 April 2011.
- [22.5] There had been difficulty in matching the payment with Mr McLeod, as it was paid from a credit card in a different name.
- [22.6] The payment was not refundable, but £2,100 would be refunded as "a gesture of goodwill".
- [23] The refund of £2,100 was made.
- [24] On 25 May 2011 Mr McLeod wrote to the Authority confirming the refund had been made, and complained that now he had lodged the Expression of Interest himself, he had discovered that Oceania's charges were "grossly over expensive".

The Response

- [25] Ms Yap responded to the complaint in a letter to the Authority dated 28 July 2011. Ms Yap stated:
- [25.1] The Authority had addressed the complaint inappropriately, in particular:
- [25.1.1] The Authority submitted Ms Yap's name to Mr McLeod "in order for him to make a complaint and tailor his complaint basing it against me".
- [25.1.2] The Authority had not specified why Ms Yap was potentially in breach of the Code.
- [25.1.3] Ms Yap had been "randomly selected and used in order to make a complaint".
- [25.2] Ms Yap did accept she had made a telephone call to Mr McLeod's wife to confirm the service agreement and reiterate what had been said in Mr McLeod's 'Full Check Assessment'. However, she said she was not representing Mr McLeod as a licensed immigration adviser.
- [25.3] She characterised the complaint as a "trading concern and not a migration advice concern".
- [25.4] The process as Ms Yap understood it, was:

[25.4.1] On 3 September 2010 Mr McLeod used Oceania's website to investigate immigration options. There was no cost. This did not make Mr McLeod a client.

[25.4.2] On 23 February 2011 Mr McLeod made the next contact, and he paid £165 for a Full Check Assessment. With that assessment:

“... the client is given the terms of service, the fee schedule and an estimate fee range for the services of [Oceania] in acting on their behalf to pursue their intended migration. This is an important first step in identifying any underlying issues or possible problems and initially identifies client's possible options. Mr McLeod was under no obligation or pressure to use the services of [Oceania] ...”.

[25.4.3] Mr McLeod and Ms Anderson (Mr McLeod's wife) engaged Oceania and paid £2,350 to have 18 hours of services. Accordingly, it appears the hourly rate would equate to approximately £130/hr (or \$250/hr). The service did not involve Oceania taking responsibility for the process of seeking residence, but rather a checking and advisory service to assist Mr McLeod to himself pursue the process.

[25.4.4] On 11 April 2011 Ms Yap made a call that Oceania describes as a “Go Ahead” call. Ms Yap described this call in the following way:

“As an additional checking measure [Oceania] perform what is called a 'go ahead call' in which the clients are contacted by a consultant who goes through a check list with each client and reconfirms the terms of service, the plan they have engaged and the fee range they have paid. This call also identifies any anomalies or misunderstandings. I, Christine Yap made the Go Ahead call on 11 April 2011 to the given phone number and a female clarified to me that she was Mrs McLeod. I discussed the services they had entered and reiterated the terms and services. Mrs McLeod did not raise any concerns and was happy to proceed with their migration account. As such, I allocated the file to a designated consultant and instructed [Oceania] staff to set up a client file and advised the appropriate staff of the client's intentions.”

[25.4.5] On 12 April 2011 Mr McLeod terminated the services, and Ms Yap was informed of that by email from Mr D'Acoust. Ms Yap then tried to contact Mr McLeod by telephone. That was not successful.

[25.4.6] Oceania decided to refund the fees in part. Some delay in this process was a result of the Christchurch earthquake.

The Tribunal's First Minute

[26] On 14 November 2012 the Tribunal issued a Minute which explained that the Tribunal had conducted a review of the material then before the Tribunal. The Minute identified apparent issues, potential factual findings, emphasised that the parties would have the opportunity to respond, and that the Tribunal had reached no conclusions at that point.

[27] The key elements of the complaint and the response identified in the Minute were as outlined above.

[28] The Authority and the complainant do not lay charges, and are not responsible to prove them. The Tribunal is an expert inquisitorial body, which receives complaints, and determines whether the proof before it is adequate to uphold the complaint, and if so in what respects. Accordingly, the Minute identified issues and potential conclusions on the material presented

before the Tribunal in order to give the parties the opportunity to consider their positions and provide submissions and further proof if they wish.

The issues to be determined

- [29] The Minute identified the relevant professional standards which must be abided by immigration advisers and established, after applying such standards to the alleged conduct, that there was an issue to be determined. The professional standards identified were as follows.
- [30] Clause 1 of the Code of Conduct requires:
- [30.1] A licensed immigration adviser to act with professionalism. In doing so, they must ensure that the terms of professional engagements are fair and appropriate.
- [30.2] They must carry out the lawful informed instructions of clients.
- [30.3] The client engagement be established on terms set out in writing, and accepted in writing; and only after providing a copy of the Code to the client.
- [30.4] That a licensed immigration adviser discharge professional engagements with due care, diligence and respect. That requires them to ensure their professional service delivery meets proper standards.
- [31] Clause 2.1(h) requires that a licensed immigration adviser must hold written authority from their client.
- [32] Clause 3 requires that full records must be maintained of all engagements, including reporting to clients and confirming in writing the details of material discussions. It also provides that fees must be refunded at the end of an engagement, when repayable.
- [33] Clause 4 of the Code treats receipts, to the extent that they are held on behalf of clients, as trust funds, and a licensed immigration adviser must bank them separately.
- [34] Clause 8 of the Code prohibits a licensed immigration adviser setting a fee that is not "fair and reasonable".
- [35] Clause 9 requires that clients must receive a copy of the adviser's internal complaints procedure before any agreement is entered into.
- [36] Section 44 of the Immigration Advisers Licensing Act 2007 ("the Act") provides breaches of the Code, negligence, incompetence, dishonesty and misleading behaviour are all grounds for complaint.

Potential conclusions

- [37] The minute emphasised its purpose was to identify potential findings on the basis of material presently before it, and quite different conclusions may follow if further information was presented, or submissions made as to the effect of the material presently held.
- [38] The minute related the potential factual findings to the professional standards required under the Code, and the Act.
- [39] The Minute stated, on the papers which were before the Tribunal at the time, that the following findings below appeared to be open.

Professional environment

- [40] Ms Yap works in an environment where it appears there were three or more licensed immigration advisers.

- [41] The minute observed that it is not possible for a company to hold a licence, and the Code of Conduct makes it clear that it is necessary for a licensed immigration adviser to be identified, and hold written authority from a client (clause 2.1(h) of the Code). The Code does not leave open the possibility of a licensed immigration adviser providing professional services without personally holding a written record of their authority from the client. That was important, as licensed immigration advisers are personally responsible for dealing with client funds, fees, and all professional obligations under the Code of Conduct. They cannot avoid personal responsibility for these matters by pointing to an employer or other party. Accordingly, Ms Yap should have been in a position where she had control of these issues, and ensured that if she was to conduct her practice in association with Oceania, that the company respected and preserved her professional control over all material financial and professional matters in relation to clients.
- [42] Ms Yap complained she was being singled out and a complaint had been shaped around her role.
- [43] The Minute noted the Tribunal only has jurisdiction to deal with complaints that come before it under the process prescribed by the Act. Ms Yap was subject to a complaint. The complaint would be addressed on its merits on the basis of her role; she will not be made responsible for the actions of others. However, she could expect to be potentially held accountable for furthering, promoting, or relying on any improper actions, whether or not she was the only person involved.

Ms Yap's role

- [44] Ms Yap had identified her role as:
- [44.1] Making the "Go Ahead" call, which involved a review of the instructions and confirming that there was a client relationship and what was to be done.
- [44.2] Allocating the work to a "designated consultant" (presumably a licensed immigration adviser).
- [44.3] Dealing with Mr McLeod's request for a refund of fees by telephoning Mr McLeod's wife.
- [45] Given the nature of the telephone call, it appeared Ms Yap was giving immigration advice. Further, a payment had been made at the time she made that telephone call.
- [46] Accordingly, the view appeared open that Ms Yap had to satisfy herself that the professional engagement met the requirements of the Code. Ms Yap was actively seeking to confirm that instruction, and further it by allocating the work to a licensed immigration adviser.

Whether the Code had been complied with prior to Ms Yap's actions

- [47] The view appeared to be open that when Ms Yap engaged with the file there were a number of serious irregularities in relation to the engagement, and Ms Yap pursued the instruction without addressing them. In particular:
- [47.1] There did not appear to be a written agreement which either complied with the Code, or was accepted in writing.
- [47.2] There did not appear to be evidence of the Code or the internal complaints procedure being supplied.
- [47.3] It did not appear that accurate information was supplied in relation to fees and the client relationship. In particular:
- [47.3.1] The document sent to Mr McLeod on or about September 2010 states "You are now a full client". It appears that caused him to believe he was a full client, and later complain of the lack of service provided.

[47.3.2] That document also said “Our professional charges are in line with industry standards”, whereas subsequent communications indicated that fees represented as normal were grossly in excess of industry standards.

[47.4] The document dated 3 March 2011 apparently sent by Ms Mathenge headed “New Zealand Fee Estimate” was misleading, as it repeated the claim “[Oceania] charges fees that are in line with industry standards”. It included a schedule indicating hourly fees that are grossly in excess of industry standards. The document then offered a “Budget Visa Service” with substantially reduced costs. The false and misleading representations created an impression that a greatly discounted service was offered, when that was not true, and in fact the discounted fee was itself higher than industry standards, and for a service that was less than industry standards.

[47.5] The professional work undertaken by Ms Mathenge was not performed in compliance with the requirements for commencing a professional relationship.

Whether Ms Yap endeavoured to further the engagement improperly

[48] The view appeared to be open that Ms Yap, before undertaking any professional work, was obliged to satisfy herself she was acting in accordance with the Code.

[49] It appeared Ms Yap accepted she was undertaking a full review of the relationship with the client, was aware of the history, and was responsible for confirming the client relationship and managing the ongoing work.

[50] The material before the Tribunal was consistent with the view that Ms Yap should have been fully aware of all the issues raised under the immediately preceding heading in paragraph [47].

[51] Further, Ms Yap actively sought to continue an instruction she knew, or ought to have known, did not comply with the Code, and that she had no written authority herself, and then allocated the professional responsibility to another person who had no written authority.

[52] Ms Yap knew the fees paid had been solicited by a misrepresentation as to industry standard fees, and sought to encourage the instruction without disclosing the true position.

[53] Ms Yap discussed the issues with Mr McLeod’s wife when she had no authority to deal with her. Contact with Mr McLeod’s wife had not been granted either through a client relationship or authorisation by Mr McLeod to disclose his affairs to her.

Request for further information from Ms Yap

[54] Pursuant to section 49(4)(a), the Tribunal requested that Ms Yap produce all of the records relating to Mr McLeod.

[55] The Code (clause 3) requires Ms Yap to maintain complete client records for seven years, and confirm in writing the details of material discussions with clients. Accordingly, she was expected to be in a position to present a fully documented record of the professional engagement which is subject to the complaint.

[56] Ms Yap was required to fully explain:

[56.1] What was done when she took responsibility for the file to ensure the instructions were in order and in compliance with the Code. In particular:

[56.1.1] What the position was in relation to having a written agreement.

[56.1.2] Holding written authority for each of the immigration advisers who were involved in the matter.

[56.1.3] Disclosure of the Code and internal complaints procedure.

- [56.2] The integrity of the process relating to representations that costs were in line with industry norms, the apparently inflated hourly rates presented as industry norms, and presenting a “budget” service as a deeply discounted service when it is potentially in fact a premium price for an inferior service.
- [56.3] Whether it is fair and reasonable to commit a client to 18 hours of service which is purported to be non-refundable, when the service is only supplementary to the client taking responsibility for their affairs; given that some clients may require little assistance. Further, whether an hourly rate of approximately \$250/hr was fair and reasonable. Ms Yap should provide information relating to the person who was to undertake the work, and explain how this hourly rate is justified.
- [56.4] The authority Ms Yap relied on to communicate with Mr McLeod’s wife, given the obligations of confidentiality and lack of evidence of a client relationship with Mr McLeod’s wife.
- [56.5] The extent of Ms Yap’s role in the instructions, and the role of others in Oceania.
- [56.6] Why Mr McLeod was only refunded part of the fees he paid.

Response to the Minute

- [57] Mr McLeod did not respond to the minute, and was not required to respond.
- [58] Ms Yap responded in a submission received by the Tribunal on 12 December 2012.

Ms Yap’s role in Oceania

- [59] Ms Yap said she had been employed by Oceania since 2003. The company provided both immigration and other advice and services for potential migrants. Ms Yap’s own role was partly immigration related services, but included other areas.
- [60] Ms Yap said that services such as confirming the terms of service, fee arrangements and the like were administrative and she distinguished them from her role as a licensed immigration adviser. She said she would allocate files to another licensed immigration adviser after settling the terms of the engagement with a client.

Ms Yap’s role in dealing with Mr McLeod’s file

- [61] Ms Yap claimed that she was not acting as a licensed immigration adviser in dealing with Mr McLeod’s file, but rather, her role was “administrative”. She was ensuring Mr and Ms McLeod were clear on the services they were purchasing, and confirmed the instruction. Therefore, Ms Yap believes that she did not provide immigration advice.
- [62] Ms Yap discovered that Mr and Ms McLeod were dissatisfied with the service provided, before she had allocated the file to another licensed immigration adviser, so she did not allocate the file. She attempted to contact them by telephone, but was not successful.

Submission that administrative work is not subject to professional standards

- [63] Ms Yap referred to sections 7 and 5 of the Act, and contended that what she had done did not come within the scope of “Immigration Advice”, which is reserved to licensed immigration advisers and persons exempt from being licensed.
- [64] While she did not say so expressly it appears she submits that if that were the case, she would not be required to maintain professional standards in relation to that work.

The work on the file prior to Ms Yap's involvement and client engagement

- [65] Ms Yap said she was not involved in the work that was initially undertaken for Ms and Mr McLeod.
- [66] She explained the progress of the work as taking the following steps:
- [66.1] The initial contact was through a website. A self-evaluation is possible, and beyond that there is contact with a licensed immigration adviser.
- [66.2] There is a process to ensure that there is a complying agreement for the provision of services, and the other notifications, and accordingly the Code was complied with in relation to the commencement of a professional engagement.
- [66.3] Ms Yap did not get a specific written authority in relation to the work she undertook, as she did not believe that was necessary. Ms Yap submitted the written authority should relate to the licensed immigration adviser who would undertake the work.

Dealing with Ms McLeod

- [67] Ms Yap believed she was dealing with Mr and Ms McLeod as a couple, who had jointly issued instructions to Oceania. That was supported by correspondence addressed to both of them on the file.
- [68] Ms McLeod had not indicated that Ms Yap contacted her, and there had been no instructions from Mr McLeod to the effect there should not be any contact.

Fees

- [69] Ms Yap provided a complex explanation regarding fees. She used descriptions such as the company provided "a bespoke solution for each individual circumstance based upon a unique combination of service and cost control tools."
- [70] The explanation did not specifically address the concerns regarding what appeared to be exceptionally high hourly rates. Though Ms Yap did say in the particular case the price was £2,400 for 18 hours of service, and she related that to the price charged by UK based service providers.
- [71] Ms Yap did not say whether the services provided by others did equate to the 18 hours service, as it appeared more likely the fees used as a comparable were for estimates of fees for a particular service. Regardless, Ms Yap accepted the fees for UK based service providers were different from, and higher than, New Zealand service providers.
- [72] Ms Yap stated that "[o]nce a client transfers from their origin country to New Zealand their fee schedule is altered automatically by the firm to that of a level which reflects operational costs relevant to the particular market (NZ rates)". However, she did not provide any evidence of that occurring, or answer Mr and Ms McLeod complaint they were expected to pay the full price, whether the hours were required or not. Ms Yap said that the discounting occurred when a client "steps foot in New Zealand".
- [73] Ms Yap claimed that "[b]udget clients are not charged on an hourly basis". However, she said Mr and Ms McLeod agreed to the Budget Service that "provides up to 18 hours of assistance at a total cost of GBP 2,400".
- [74] Ms Yap said that when an issue emerged, Mr and Ms McLeod were refunded the fees, though there was an initial error in processing the refund and £150 were retained in error.

Changes in practice

- [75] Ms Yap noted that since the complaint she had instituted three changes in her practice:

- [75.1] The “Budget Plan” would not be offered to New Zealand destined clients. Accordingly, the payment in advance would be removed.
- [75.2] Clients would not be required to pay a “sign on” fee for any plan involving New Zealand.
- [75.3] Clients would be quoted the New Zealand onshore rates; the UK office had been closed in December 2012.

Discussion

- [76] Ms Yap’s statement and the supporting documents have satisfactorily answered some of the issues.
- [77] I am satisfied:
- [77.1] The procedures under the Code were complied with in relation to the requirements for an agreement for the provision of services, and disclosure. It appears that was also true of the earlier processes; however Ms Yap was not the licensed immigration adviser engaged in the earlier stages, and had no reason to suspect that the adviser who was engaged had failed to fulfil her duties. Accordingly, no issue arises.
- [77.2] The view may be open that Ms Yap should have had a specific written authority for her role; however it is not a matter that reaches the disciplinary threshold. In this case, Ms Yap performed a specific process and related to client engagement, and she was clearly identified. A different licensed immigration adviser provided an earlier service, and another licensed immigration adviser was to provide subsequent services.
- [77.3] Ms Yap understood that the instructions came from both Mr and Ms McLeod, and she had authority to discuss issues with each of them.
- [77.4] There was a full refund of fees; the initial failure to fully refund the fees was an error. To the extent the error was Ms Yap’s responsibility it is not a matter that reaches the threshold for an adverse disciplinary finding.

Scope of professional responsibility

- [78] That leaves only one area of concern. Ms Yap’s dealings with Mr and Ms McLeod concerned them engaging Oceania’s services. They had been told that the costs they were to be charged were in line with industry norms, that the “Budget Plan” was deeply discounted, and that £2,500 for 18 hours of prepaid service was fair and reasonable.
- [79] Ms Yap claims that the work she performed in the client engagement process was “administrative”, and that exempted her from professional obligations.
- [80] Client engagement is one of the critical roles a licensed immigration adviser has under the Code and the Act. Section 7 of the Act defines “Immigration Advice” as including using knowledge or experience to advise or assist a person in regard to an immigration matter. Assisting a person with the selection of the services required, the terms of engagement, and pricing of services all fall within the definition. The Code has express requirements relating to disclosure of pricing, terms and the like that require expert advice. They are not processes that should, or are intended, to be completed by unqualified persons.
- [81] Ms Yap suggested what she did in engaging Mr and Ms McLeod as clients was “clerical work” which is defined in section 5 as a range of processing functions such as recording information under the direction of another person. Client engagement is important professional work, which lies far from the mechanical functions defined in section 5. Clients need to know what services they need, what services they are offered, and what it will cost. That is the function Ms Yap was performing, and had to perform under the Code as part of the client engagement process.

- [82] Regardless, I do not accept that only the provision of “Immigration Advice” as defined in section 7 of the Act is governed by professional standards. The converse is true; if a licensed immigration adviser provides “Immigration Advice”, then there is some certainly that they do so as part of their professional work.
- [83] Section 7 defines work that is only permitted to be performed by Licensed Immigration Advisers or exempt persons. It is commonplace for licensed professionals to have only part of their work reserved exclusively in this way. For example, in representing a client before this Tribunal, a lawyer is undertaking work that is not reserved to lawyers; however that lawyer is nonetheless bound by the standards required of lawyers. The lawyer has taken on the work as part of their legal practice and implicitly represented themselves as undertaking the work on the basis they will do so in accordance with the standards of the profession they identify with.
- [84] Ms Yap has referred to no authority in support of a licensed professional being entitled to disclaim the obligation of maintaining professional standards for work accepted in the course of their professional practice.
- [85] Accordingly, I am satisfied that Ms Yap was required to maintain professional standards in relation to how she represented the terms offered to Mr and Ms McLeod; she was performing important work within the course of her practice as a licensed immigration adviser.

Ms Yap’s conduct in relation to the terms of engagement

- [86] I am also satisfied that when Ms Yap was dealing the engagement process, she had a professional obligation to ensure that she was aware of the information that had been given to Mr and Ms McLeod. I am satisfied she was in fact aware of that information.
- [87] The information they had been given included the document dated 3 March 2011 described as a “New Zealand Fee Estimate”. Key features of the information contained in that document were:
- [87.1] Representations that Oceania “charges fees that are in line with industry standards”.
- [87.2] The fees for normal professional service had hourly rates such as £479 for a senior case consultant and £109 for an administration support person.
- [87.3] As an alternative a “Budget Visa Service” was available, and it was “our most cost-effective visa option”. It required the client to accept “some of the responsibility for managing [their] own case”.
- [87.4] The fee for the budget service was £2,400 which was a “sign on” fee, which apparently conveyed it was not refundable, and the service provided was 18 hours of professional time.
- [88] Ms Mathenge had supplied the 3 March 2011 schedule. She is not subject to this complaint. Ms Yap is not responsible for issuing that statement, but she had professional responsibility for negotiating that Mr and Ms McLeod agreed to paying fees, after they were given that information by Ms Mathenge.
- [89] I am satisfied that the fees were not “in line with industry standards”.
- [90] The hourly rates quoted grossly exceeded the fees that would usually be charged by a New Zealand immigration practice. Indeed, Ms Yap appears to accept that was the case, as she said that when clients arrived in New Zealand the fees would be lower.
- [91] A licensed immigration adviser is required to charge “fair and reasonable fees” under the Code. However, what is fair and reasonable will take account of a range of factors, honest and frank disclosure that a premium price is being paid for a premium service may justify a very high cost where informed parties in a position of equal power negotiate such terms.
- [92] I am not in a position to make a finding whether the fees charged, or the comparison of fees to be charged on an hourly basis, could be considered to not be fair and reasonable if presented

as a premium price for a premium service because this is not what occurred in this case. On the contrary very high hourly rates were quoted as “in line with industry standards”, and a “budget option” offered. In reality, the hourly rates greatly exceeded industry norms, and the budget service was priced at a premium and provided a below average service.

- [93] The material before me establishes that the hourly rates quoted were in excess of the fees charged in New Zealand. Ms Yap accepts that a client present in New Zealand would not be charged fees at that level, and the hourly rates clearly and obviously exceed rates usually charged in New Zealand.
- [94] I am satisfied the budget service of 18 hours professional time for £2,400 was at a premium hourly rate, and had two negative elements:
- [94.1] It was a fee that was to be paid, whether or not the client required the full 18 hours; and
- [94.2] The client was required to accept “some of the responsibility for managing [their] own case”.
- [95] Ms Yap was negotiating the terms with Mr and Ms McLeod, and she was required to ensure that she did not mislead her clients. She did mislead them, causing them to believe they had negotiated a low cost service with the disadvantages discussed, when that was a false impression.
- [96] I am satisfied the complaint must be upheld. Section 44(2) of the Act provides misleading behaviour is grounds for complaint.
- [97] I am not satisfied on the information before me that Ms Yap engaged in dishonest behaviour.
- [98] It appears Ms Yap worked in a corporate environment where she did not sufficiently appreciate she was the licensed professional obliged to take charge of client relationships. She appears to have largely deferred to the managers of her employer, and been willing to accept direction to present information that she should have challenged. Her conduct was misleading through lack of care, and the professional scepticism.

Decision

- [99] Pursuant to section 50 of the Act, the complaint is upheld in respect of Ms Yap engaging in misleading behaviour concerning the fees Mr and Ms McLeod agreed to pay.
- [100] In other respects, the complaint is dismissed.

Submissions on Sanctions

- [101] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions.
- [102] The Authority and Mr McLeod have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, Ms Yap is entitled to make submissions and respond to any submissions from the other parties.
- [103] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

Timetable

- [104] The timetable for submissions will be as follows:
- [104.1] The Authority and Mr McLeod are to make any submissions within 10 working days of the issue of this decision.

[104.2] Ms Yap is to make any further submissions (whether or not the Authority or Mr McLeod make submissions) within 15 working days of the issue of this decision.

[105] The parties are notified that this decision will be published with the names of the parties after five working days, unless any party applies for orders not to publish any aspect.

DATED at WELLINGTON this 23rd day of March 2013

G D Pearson
Chair