

# **Migration Agents Amendment Regulations 2002 (No. 2) 2002 No. 346**

## **EXPLANATORY STATEMENT**

### **STATUTORY RULES 2002 No. 346**

Issued by the Minister for Citizenship and Multicultural Affairs

Subject - *Migration Act 1958*

Migration Agents Amendment Regulations 2002 (No. 2)

Subsection 504(1) of the *Migration Act 1958* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, subsection 314(1) of the Act provides that the regulations may prescribe a Code of Conduct for migration agents.

The purpose of the Regulations is to amend the *Migration Agents Regulations 1998* to implement recommendations made following the 2001 - 2002 Review of Statutory Self-Regulation of the Migration Advice Industry.

The Regulations would:

- enable the Migration Agents Regulation Authority to investigate matters referred to it by an organisation;
- require migration agents to provide clients with information on the migration advice industry;
- clarify the requirement that migration agents are to keep separate operating and client accounts with a financial institution;
- clarify and strengthen the conflict of interest provisions; and
- clarify the provisions regarding access of migration agents to, and maintenance of, professional libraries.

Details of the Regulations are set out in Attachment A.

A Regulation Impact Statement has been prepared and is set out in Attachment B.

The Regulations commence on 1 March 2003.

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## **ATTACHMENT A**

### Regulation 1 - Name of Regulations

This regulation provides that these Regulations are the *Migration Agents Amendment Regulations 2002 (No. 2)*.

### Regulation 2 - Commencement

This regulation provides that these Regulations commence on 1 March 2003.

### Regulation 3 - Amendment of Migration Agents Regulations 1998

This regulation provides that Schedule 1 to these Regulations amends the *Migration Agents Regulations 1998* (the Regulations).

### Schedule 1 - Amendments

#### Item [1] - Regulation 3, after definition of *electronic communication*

This item inserts a definition of "financial institution" in regulation 3. It defines a financial institution as a body corporate which as part of its standard activities:

- takes money on deposit and makes advances of money; and
- does so under a regulatory regime, governed by the central bank (or its equivalent) of the country in which it operates, that the Minister is satisfied provides effective prudential assurance.

This item also identifies the document titled "Information on the Regulation of the Migration Advice Profession" as the document produced by the Migration Agents Regulation Authority (MARA), for clients of migration agents (in accordance with new regulation 9A, inserted by these Regulations).

#### Item [2] - Regulation 9

This item inserts the words "or body" into regulation 9 of the Regulations, enabling an organisation as well as a person to make a complaint to MARA about the conduct of a migration agent in his or her professional capacity.

#### Item [3] - Paragraph 9(e)

This item inserts additional examples of who is able to make a complaint with MARA. It clarifies that a tribunal, court, community organisation or the Department is able to make a complaint as well as individuals.

#### Item [4] - After regulation 9

### **Regulation 9A - Information booklet**

This item inserts new regulation 9A in the Regulations requiring MARA to produce a document titled "Information on the Regulation of the Migration Advice Profession". This document will be produced for potential clients of migration agents and contain information about the migration advice industry, the functions of MARA, the legislation regulating the migration agents industry, what clients can expect from a migration agent and complaint procedures. The purpose behind

the amendments made by this item is to promote consumer awareness of the migration advice industry.

Item [5] - Schedule 2, clause 2.1

**Clause 2.1**

This item makes a minor amendment to delete the reference to conflicts of interest in clause 2.1. This amendment is consequential to the insertion by these Regulations of new clauses 2.1A and 2.1B, which deal specifically with conflicts of interest.

**Clause 2.1A**

This new clause clarifies that a migration agent is not to accept a person as a client in situations where a conflict of interest exists. These situations exist where a migration agent:

- has previously assisted or intends to assist the person as a marriage celebrant;
- is or intends to be the employer, sponsor or nominator of the person in a visa application or cancellation review application;
- is or intends to be involved with the person in a business activity (that is, a business activity that goes beyond providing immigration assistance or immigration legal assistance) that is relevant to the assessment of a visa application or cancellation review application;
- has any other interest that would affect the legitimate interests of the client.

**Clause 2.1B**

Clause 2.1B is a new provision inserted to provide guidance to agents about their responsibilities if, following acceptance of a client, they become aware that a conflict of interest exists in relation to that client.

Clause 2.1B provides that if a migration agent discovers that a conflict of interest exists with a client, they must as soon as practicable, and in any case within 14 days:

- inform the client of the conflict of interest; and
- tell the client that in accordance with the Code of Conduct, that they are no longer able to act for the client; and
- advise the client that the client is able to appoint another migration agent to act on their behalf; and
- cease to act for the client in the migration agent's capacity as a migration agent.

**Clause 2.1C**

This new clause ensures that in circumstances where a migration agent terminates the professional relationship with the client, then Part 10 of the Code of Conduct (Termination of Services) is to apply. The provisions of Part 10 provide how and when a migration agent must return a client's documents.

**Clause 2.1D**

New clause 2.1D provides for the requirement that a migration agent must after ceasing to act for a client due to a conflict of interest, advise the Department that he or she is no longer acting for the client. The migration agent must do this as soon as practicable, but in any case within 14 days.

Item [6] - Schedule 2, paragraph 2.5(b)

This item substitutes paragraph 2.5(b). It clarifies that a migration agent must:

- maintain a professional library that includes the materials prescribed in paragraph 2.5(a) which are current versions of the *Migration Act 1958*, the *Migration Regulations 1994*, and other legislation relating to migration procedure, and portfolio policies and procedure; or
- if the agent's employer, or business in which he or she works, maintains the professional library, the migration agent has a responsibility to ensure that they have access to the library and that it contains the materials prescribed in paragraph 2.5(a).

Item [7] - Schedule 2, after clause 3.2

This item inserts a new provision that requires a migration agent to provide a client with a copy of the document "Information on the Regulation of the Migration Advice Profession" before beginning work for a client. This document is to be produced by MARA. It is to contain information on the migration advice industry, the functions of MARA, the legislation regulating the industry, what a client can reasonably expect from a migration agent and complaint procedures. This item also requires a migration agent to keep a record that they have provided clients with this document.

Item [8] - Schedule 2, clause 7.1

This item clarifies that a migration agent must keep separate operating and client accounts with a "financial institution". These Regulations insert a definition of "financial institution" in regulation 3 to provide that a "financial institution" is a body corporate that as part of its standard activities:

- takes money on deposit and makes advances of money; and
- does so under a regulatory regime, governed by the central bank (or its equivalent) of the country in which it operates, and provides effective prudential assurance.

## ATTACHMENT B

### 2001-02 REVIEW OF STATUTORY SELF-REGULATION OF THE MIGRATION ADVICE INDUSTRY

#### REGULATION IMPACT STATEMENT

## 1 INTRODUCTION

### 1.1 Background

1.1.1 Following the Commonwealth government-commissioned review of the Migration Agents Registration Scheme (MARS) in 1996, the government decided that the migration advice industry should move towards self-regulation. In light of concerns regarding consumer protection and the competitive impacts of such a significant change, it was decided that this would be best achieved through a transitional two-year period of statutory self-regulation.

1.1.2 On 21 March 1998, Part 3 (Migration Agents and Immigration Assistance, s.275-s.333 of the *Migration Act 1958* (the Act) commenced, allowing statutory self-regulation for a period of two years until 21 March 2000. The Minister appointed the Migration Institute of Australia (MIA) as the Migration Agents Registration Authority (MARA) to act as the industry regulator. It was stipulated that a review of the industry would be undertaken within this transitional period.

1.1.3 The Department of Immigration and Multicultural Affairs (DIMA) undertook that review in 1999, again with the assistance of an external reference group. DIMA found that whilst statutory self-regulation had achieved its objectives, the industry was not yet ready to move to full self-regulation. The review concluded that the current period of statutory self-regulation be extended for a further three years until 21 March 2003, with a further review to be conducted within that time.

1.1.4 This further review, the ***2001-02 Review of Statutory Self-Regulation of the Migration Advice Industry*** (the Review), has now been undertaken and has assessed the effectiveness of the current statutory self-regulation framework.

1.1.5 This Regulation Impact Statement (RIS) has been produced to assist the government in deciding on the most appropriate regulatory arrangements for the migration advice industry when the current legislation ceases in March 2003. It is based on the findings and the report of the Review, and has been prepared in accordance with *A Guide to Regulation*, a December 1998 publication of the Commonwealth Office of Regulation Review (ORR).

### 1.2 What is the problem being addressed?

1.2.1 The migration advice industry in Australia was largely unregulated until 1992, at which point government regulation was introduced by means of the establishment of MARS. This scheme was introduced in response to increasing consumer complaints concerning incompetent and unscrupulous agents operating in the industry. Since the implementation of industry regulation, only registered agents have been permitted by law to provide 'immigration assistance' as defined in the Act.

1.2.2 In June 1996, the Commonwealth government commissioned a review of MARS. This was the first regulatory arrangement to be reviewed by the Commonwealth as a party to the Competition Principles Agreement. Following the findings of this review, statutory self-regulation was introduced in 1998. The aim was to move the industry towards full (voluntary) self-regulation while maintaining the consumer protection elements of the government (i.e. statutory) regulation scheme.

1.2.3 A review was conducted in 1999 of the regulatory arrangements set up under the MARA. Like the current review it assessed the effectiveness of the statutory self-regulation framework and the capacity of the migration advice industry to move to full self-regulation. The 1999 *Review of Statutory Self-Regulation of the Migration Advice Industry* found that as statutory self-regulation had been in place for only a little over a year, the industry was not yet ready for voluntary self-regulation. The review recommended that the framework be continued for at least three years until March 2003 and be the subject of a further review within that time.

1.2.4 In assessing whether or not the migration advice industry will still need to be regulated after March 2003, the 2001-02 Review conducted by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) also considered the advice provided in the ORR's *A Guide to Regulation*. This Review found that the industry is not yet ready to move towards voluntary self-regulation. Further, it found that regulatory intervention is still necessary to alleviate a number of concerns, such as the:

- quality of service being provided by some agents;
  - level of professionalism within the industry;
  - level of client service standards offered by the MARA to their stakeholders;
  - need to continue the Commonwealth indemnity currently offered to MARA board members;
- and
- continuing vulnerability of client groups using migration agents including those overseas.

### **1.3 Assess the risk**

1.3.1 Complaints about the migration advice industry are a significant indicator of the level of consumer protection provided to clients of the migration advice industry, whether they concern practice by registered migration agents or unregistered operators. The MARA is responsible for investigating complaints concerning the former and DIMIA is responsible for investigating complaints concerning the latter.

1.3.2 The Review found that the total number of complaints received against registered and unregistered agents showed only a slight decrease from 177 in 1999-2000 to 168 in 2000-2001. However, only 4.8 percent of agents in the industry were the subject of these complaints, of which 80-85 percent related to standards of professional conduct.

1.3.3 The Review reported that 24 cases of unregistered practice were reported to DIMIA in 2000-01, down from 38 in 1999-2000. Unregistered practice, which is illegal, continues to cast a shadow over the migration advice industry. DIMIA has taken a proactive role in the investigation of unregistered practice but it remains a difficult sector to monitor, due to its underground nature, the problem of evidentiary issues and spurious allegations. DIMIA understands the importance of eliminating unregistered practice and continues to place priority on investigations and prosecution of such practitioners. Unregistered practice continues to undermine the migration advice industry and creates the perception, albeit inaccurate, that the industry has large numbers of unscrupulous operators.

1.3.4 Incompetent and unethical practice can also impact substantially on individual consumers, the community and the government, notwithstanding that only a minority of agents are the subject of complaints. The current statutory underpinning of the industry provides strong tools in the form of administrative and criminal sanctions to regulate the industry. There is considerable risk that under a voluntary regulation scheme the MARA would not have the tools it needs to effectively modify the professional conduct of agents, or where appropriate, to remove them completely from the industry.

1.3.5 For example, unethical practice may include consumers being encouraged to apply for visas in circumstances when there is little or no evidence that they satisfy requirements. This has the effect of undermining the integrity of the government's migration and humanitarian programs. It increases DIMIA's workload through handling applications that are fraudulent or have little hope of success. This can lead to substantial administrative and legal costs for the government as well as administrative and judicial review bodies.

## **2 OBJECTIVES**

### **2.1 What are the objectives of government action?**

2.1.1 Prior to the introduction of regulation to the migration advice industry in 1992 there was a high level of consumer complaints against migration agents. The market was open to exploitation by some operators and it was perceived that clients of the industry were vulnerable and not adequately protected. Consumer vulnerability was seen largely as a function of the inability of consumers to inform themselves about the quality of the migration advice they were purchasing and thus to make an informed choice of agent. Consequently, in introducing the *Migration Legislation Amendment (Migration Agents) Bill 1997* incorporating statutory self-regulation arrangements to Parliament, the Minister for Immigration and Multicultural Affairs stated that the objectives of the scheme were to:

- maintain and strengthen consumer protection; and
- contribute to the integrity of the migration and humanitarian programs by promoting an ethical and competent migration advice industry.

### **2.2 Is there a regulation/policy currently in place? Who administers it?**

2.2.1 Statutory self-regulation of the migration advice industry commenced on 21 March 1998. The Minister for Immigration and Multicultural Affairs appointed the Migration Institute of Australia (MIA) as the Migration Agents Registration Authority (MARA) to undertake the role as industry regulator. The regulatory framework is contained in Part 3 of the *Migration Act 1958* (the Act), the *Migration Agents Regulations 1998*, the *Migration Agents Registration Renewal Charge Act* and the *Migration Agents Registration Application Charge Act 1997*. These set out the industry's Code of Conduct and Continuing Professional Development (CPD) requirements, and issues relating to matters such as business management, the setting of fees and sound knowledge and other requirements for entry to the profession.

2.2.2 As already outlined, this transitional arrangement was implemented as a step towards full self-regulation, hence the inclusion of a sunset clause which came into effect on 21 March 2000.

2.2.3 The shift from government regulation involved a fundamental change to the way the migration advice industry would be regulated. A rigorous and publicly defensible set of procedures needed to be developed and implemented in a short time frame. On 1 April 1998, regulations came into effect providing for:

- publication of notice of intention to apply for registration as a migration agent;
- prescribed qualifications for initial registration as a migration agent;
- CPD for migration agents;
- persons who may make complaints;
- publication of notice of cancellation or suspension of registration;

- a Code of Conduct for migration agents; and
- the gazettal of specified newspapers for the purpose of publication of notices of intention to apply for registration as a migration agent, notices of cancellation or suspension of registration, and gazettal of approved activities for CPD purposes.

2.2.4 Detailed policy and procedures including the relationship between the MARA and DIMIA are set out in a Deed of Agreement (the Deed). The Deed outlines the support to be provided by DIMIA to the MARA in areas such as legal advice and assistance with litigation. It also sets out the operating procedures for the MARA and their reporting requirements.

2.2.5 MARA's role under statutory self-regulation includes:

- assessing, approving or refusing new registrations and re-registrations;
- monitoring the conduct of registered agents;
- investigating complaints against registered agents, applying sanctions where appropriate; and
- administering CPD requirements.

2.2.6 DIMIA has responsibility for investigating criminal allegations of offences under the Act, including unregistered practice. DIMIA may also investigate related allegations concerning other offences under the Act, such as people trafficking and presentation of false documents.

2.2.7 The current arrangements have been working effectively to date. The 2001-02 Review has highlighted that statutory self-regulation is continuing to achieve its objectives of improving consumer protection, competence and ethical standards in the migration advice industry.

### **3 OPTIONS**

3.1 Three options were considered during the Review: a continuation of statutory self-regulation (co-regulation), a move to voluntary self-regulation, and a return to statutory (government) regulation.

3.2 Whilst the government is concerned that vulnerable consumers of the migration advice industry are suitably protected, the risks to the community are not sufficiently high or widespread as to warrant direct government regulation.

3.3 The efforts of the MIA/MARA as the industry association and regulator have brought about considerable improvements to the level of professionalism and consumer protection in the industry. Notwithstanding the acknowledged improvements, none of the submissions to the Review considered that the industry was ready for voluntary self-regulation.

3.4 Given the public interest in the government continuing to have some involvement in the regulation of the industry the continuation of statutory self regulation was the option examined in more detail by the Review.

### **4 IMPACT ANALYSIS**

#### **4.1 Who is affected by the problem and who is likely to be affected by the solution?**



4.1.1 Those involved in some way in the migration advice industry who are affected by its problems and possible solutions include migration agents, consumers of migration advice, a range of regulatory and review bodies, government and the community.

## **4.2 Migration agents - operating in small and medium/large business environments**

4.2.1 As at 30 June 2002, a total of 2,773 registered migration agents operated within two sectors in the migration advice industry:

- the commercial ('for profit') sector - 2,503 migration agents (90.3 percent of all agents) operate in this sector, within which are two groups:
  - migration agents without legal qualifications, but who had to complete sound knowledge entry requirements. There are 1,899 such agents (58.5 percent of all agents); and
  - migration agents with legal qualifications. There are 874 such agents (31.5 percent of all agents).
- the non-commercial ('not for profit') sector - 270 migration agents currently operate in this sector (9.7 percent of all registered migration agents).

4.2.2 During the 2001-02 year, 703 new registration applications were received (634 commercial, 69 non-commercial) and 677 applicants became registered migration agents (605 commercial, 72 non-commercial). The average number of years of experience in the profession is only 3.3 years.

4.2.3 The Office of Small Business defines 'small business' as one employing fewer than 20 employees or where a person is self-employed running his or her business. The MARA has advised that between 90 and 95 percent of all registered agents are working in businesses employing fewer than twenty staff (about one half to two-thirds of whom may be agents). The remaining five to ten percent of agents are working in a very small number of businesses employing twenty or more staff, but the vast majority of these large businesses are community (not for profit) organisations.

## **4.3 Consumers**

4.3.1 Consumers of migration advice would include visa applicants, review applicants and applicant sponsors or nominators. However, it is very difficult to get an accurate snapshot of the overall number and breakdown of types of consumers utilising migration agents. To date, DIMIA has not been able to provide statistical reports on the relationship between visa applicants and migration agents, but work is now being done to provide this link and to produce comprehensive statistical data on the use of migration agents. Evidence to date suggests that the usage of migration agents by applicants for business visa categories is high; however, the 'ability to pay' of people in this group does not render them invulnerable to exploitation.

## **4.4 Regulatory Bodies**

4.4.1 As discussed at paragraph 2.2.1 above, in March 1998 the MIA was appointed as the MARA to be the industry regulator. The MARA has invested much energy in the migration advice industry to eliminate unscrupulous practice. The MARA has leased premises and appointed staff, and has been operating successfully for the last four years. The MIA has shown a committed dedication to the industry as its peak body and there would be a substantial loss of expertise if it were to cease regulating the industry.

## **4.5 Government and Community**

4.5.1 If changes were made to the regulatory framework, DIMIA could be affected by:

- increases to its processing workload if there were a reduction in the availability of competent and ethical advice provided externally;
- a need to increase staff numbers to process a potentially larger number of incomplete applications, leading to a greater burden on the taxpayer;
- a need for additional investigation of malpractice if fraudulent behaviour by agents increased; and
- a lessening of its investigation responsibilities if unregistered practice were no longer an offence.

#### **4.6 How will each proposed option affect existing regulations and the roles of existing regulatory authorities?**

##### Voluntary self-regulation

4.6.1 After an analysis of the industry, the Review found that the migration advice industry would not be ready for full (i.e. voluntary) self-regulation at the expiry of the sunset clause on 21 March 2003. The reasons for this finding included that:

- the client base is vulnerable
  - Many clients lack English language skills and thus cannot access, or do not know how to readily access, information concerning the industry and administrative decision-making processes, or having accessed this information cannot understand it, and therefore it difficult to make informed decisions about the professionalism of migration agents;
- the handling of complaints and the professionalism and integrity of the industry are critical to the credibility of the regulatory framework
  - A number of submissions expressed concern over the way in which the MARA handles complaints, the extent of their disciplinary powers and how they utilise these powers. It was clear that more work-would need to be done to improve their image, if any move toward self-regulation could be considered;
- the competence of some agents is of concern
  - The Review highlighted a number of serious concerns in relation to the level of knowledge and continuing education of migration agents; a large number (80-85 percent) of complaints relate to professional conduct. It is considered that before the industry can be ready to move towards voluntary self-regulation a number of fundamental changes need to be made in relation to an enhanced CPD regime and higher entry standards; and
- there are continuing concerns about customer service
  - The Review found that public accessibility to the MARA is critical to its credibility and, indirectly, to the continued health of the industry. There have been a number of complaints from migration agents and visa applicants who have found it difficult to contact a MARA officer on matters ranging from general enquiries to complaints:
    - on the general inquiry number it is possible to leave a message and await a return call;

- on the information service line (for initial applicants), direct access to a MARA officer is only possible between 12.30pm and 2.30pm, for a fee of \$4.95 per minute. The average minimum call time is five minutes; thus an average minimum cost to a caller is \$25.00. More complex matters would take longer and thus be more costly;
  - similarly, due to the way in which the Authority Secretariat is structured, the front desk is not staffed; and
  - concerns were raised about the absence of the Authority's street address on both their letterhead and website.
  - The accessibility of the Authority is inconsistent with contemporary customer service philosophies and practices in both public and private administration.
- It is essential that the Authority improve its access and communication channels. The Review, in concluding that the industry is not yet ready to move to voluntary self-regulation, took into account that the Authority will need to take a more proactive role in the migration advice industry.

4.6.2 The Review concluded that if the industry were to move to voluntary self-regulation, the MIA should have sole responsibility for regulating the migration advice industry. Overall, the MIA is seen as representative of the migration advice industry. Some community organisations have suggested that because the MIA membership only accounts for just over a third of the industry, the MIA is not necessarily representative of it. In response, the MIA stated that the number of cases handled by individual migration agents varies considerably -some agents handle only one or two cases a year, while some larger practices may handle over a thousand a year. As its membership includes most of the larger practices, MIA members are likely to account for a much larger percent of all applications handled by migration agents.

#### Government Regulation

4.6.3 A return to government regulation of the industry was rejected on the grounds it offered no advantages over the current statutory self-regulation arrangements.

#### Statutory Self-Regulation

4.6.4 The Review then examined the existing co-regulatory arrangements. The recommendations resulting from this examination relate to the future of statutory self-regulation, sound knowledge, continuing professional development, discipline and ethics, and overseas practice.

### **4.7 Recommendations**

#### Future of Statutory Self-Regulation

##### Recommendations 1 and 2

4.7.1 To provide ongoing consumer protection, statutory self-regulation should be extended and reviewed again at an appropriate juncture to determine whether the industry has improved to the extent that consumer protection and agent competence could be assured without a regulatory framework. The Review concluded that the MIA's position as regulator should be embedded more fundamentally in the legislation. To give effect to the sense of security the MIA has in its role as the regulator, it was decided that the current framework should no longer be subject to a sunset clause.

4.7.2 It was further recommended that the MIA and DIMIA should immediately commence consultations to identify specific milestones to be agreed between DIMIA and the MARA in the development of the industry and in the effectiveness of the MIA as the regulator. The Review considered that the industry should focus on achieving a number of key milestones and that a move to full self-regulation would be evaluated in light of these key milestones being achieved. They would relate to the MARA's effectiveness in its core roles of registration, CPD, complaints handling, discipline and industry monitoring and ensuring that consumers have the necessary information - e. g. on price and quality of services - to allow them to take decisions in their best interests. Key milestones should thus include a further significant decrease in complaints and a manifest increase in the level of satisfaction on the part of both clients of migration agents and of migration agents as clients of the MARA.

4.7.3 The Review has also recommended that to ensure that the MARA is fully representative of the migration advice industry, the MARA should be enabled to include community representatives or other non-MIA representatives in its decision-making processes in a manner to be agreed with DIMIA.

### Sound Knowledge and Entry Requirements

#### Recommendations 3 and 4

4.7.4 Entry-level knowledge requirements are fundamental to maintaining acceptable standards of competence and professionalism within the industry. The Review has recognised that there is concern that the current sound knowledge course is not sufficiently rigorous or comprehensive. The current course involves only three to five days of training and does not provide sufficient of the necessary information to work in such a changing and complicated industry. This view is shared by many migration agents, members of the Migration Review and Refugee Review Tribunals and DIMIA officers. It was an issue that was raised in a significant proportion of the submissions.

4.7.5 To improve competence within the industry the Review has recommended that the current sound knowledge course and examination be lengthened and made more comprehensive, and that an alternative means of entry should be introduced whereby individuals could complete a period of supervised practice followed by an entrance examination. The Review also agreed that the prescribed qualification for sound knowledge purposes, for people with a law degree, should be a practising certificate.

4.7.6 The Review found that the current legislation does not make it clear that satisfactory completion of the sound knowledge course and examination or other relevant qualifications should be mandatory for initial registration. To rectify this the MARA should be given the power to refuse to register a person seeking initial registration unless they have sound knowledge of migration procedure or other relevant qualifications.

4.7.7 The Review recognised the need to maintain participation levels in the industry of non-commercial (i.e. 'not for profit') agents and also recognised the impact the cost of initial registration has on persons wishing to enter this sector. To provide some assistance to this sector, the Review recommended that bulk publishing be permitted of community organisation employees' details in the one newspaper notice where more than one employee of the organisation is making an initial registration application. The Office of Small Business suggested there was no reason why persons wishing to enter the commercial sector should not also be able to decrease their costs by bulk-publishing and that individual notification served no beneficial purpose to the migration advice industry or to consumers, to which the Review agreed. Accordingly it is recommended in the submission to be considered by Cabinet that those employees within a business or organisation (i.e. both the commercial and non-commercial sectors) who intend to register as migration agents, be permitted to advertise their intention together in the one newspaper notice.

## Continuing Professional Development

### Recommendations 5 to 10

4.7.8 Whilst the Review recognised that migration agents have little difficulty in completing the CPD requirement, the majority of complaints against agents in fact refer to competence. There is also anecdotal evidence from other parties that the knowledge of many migration agents is inadequate. To improve ongoing knowledge and competence within the industry across the full scope of immigration assistance, the Review has recommended that certain CPD activities be made mandatory in the first year of registration and periodically thereafter, and that the differentiation between 'core' and 'elective' activities be reassessed. The Review, recognising that migration agents operate in a statutory environment which is constantly changing, also recommended that amendments to portfolio legislation should be the subject of a mandatory assessable annual activity.

4.7.9 The recommendations support existing arrangements to reduce the burden of CPD activities on those migration agents who are also legal practitioners. Other recommendations enhance the MARA's powers in relation to requiring agents to meet CPD requirements within an appropriate time-frame prior to lodging an application for re-registration (i.e. both repeat and late registration). This will require defining the requirements for all agents applying to register, whether at an initial stage, or whether making a repeat or late application.

4.7.10 The Review noted that currently the only measure of consumer satisfaction in the industry is via the level of complaints. It concluded that it was advisable to obtain a more objective understanding of the level of consumer satisfaction with the conduct of agents, through DIMIA and the MARA conducting regular client surveys.

4.7.11 Arising from recent litigation, the Review found that there was uncertainty about the MARA's powers to apply a 'fit and proper person' test at the stage of renewal of a registration. It recommended that the MARA be given the power to apply a 'fit and proper person' test to applicants for re-registration. To further ensure that agents can be better prepared to meet these tests at the time of re-registration, it also recommended that the MARA adopt a proactive approach and develop an education strategy to better explain these requirements to agents.

## Certified Migration Agent Scheme

### Recommendation 11

4.7.12 Currently there is only one level of registered migration agent. In its submission, the MIA proposed a second, higher category of registered migration agent, the Certified Migration Agent (CMA). The introduction of such a category is designed to foster the pursuit of high professional standards and the attendant market advantages within the industry. Some of the contrary views argued that CMAs were unnecessary, would not reward agents specialising in one area, would favour the large operators, may be confusing to clients and would not necessarily lead to better consumer protection.

4.7.13 The Review examined the registration practices of comparable industry groups and found that the legal and accountancy professions were prime examples where practitioners had an opportunity to obtain a higher level of registration. The creation of a high level practitioner can help to improve consumer protection standards by giving clients a high level of assurance, as well as imposing more onerous responsibilities on the professional who wishes to be recognised at this higher level. An important requirement was that a CMA would hold a specified level of professional indemnity insurance. The Review noted that protection of client interests, as well as those of agents, is desirable for the industry as a whole, not just for those seeking to be registered at a higher level.

4.7.14 The Review noted that the accountancy profession's CPA scheme is widely well regarded and has been a positive influence in improving professional accountancy standards. It also places a focus on consumer protection issues.

4.7.15 Whilst a CMA scheme is no guarantee of improved standards or better consumer protection the Review concluded that this was an option deserving of further investigation and recommended that the MIA/MARA and DIMIA should consult further on options for the possible development of a CMA scheme.

4.7.16 The Review also recommended exploring the feasibility of requiring migration agents, either as part of the CMA scheme or within the existing arrangements, to hold professional indemnity insurance at a specified minimum level, to better protect clients from professional negligence.

### Discipline and Ethics

#### Recommendations 12 to 19

4.7.17 The ability of the MARA to discipline agents is crucial to the credibility and improvement of the migration advice industry. These recommendations provide the MARA with greater scope in relation to disciplining agents and strengthening the current arrangements. For example, the MARA will be given the power to increase the penalties for inactive agents who fail to comply with requests to provide or return client documents and information.

4.7.18 The existing sanction to caution migration agents will be strengthened to allow for conditions to be attached. The onus will then be on the migration agent to demonstrate that he or she has complied with the conditions before the cautionary sanction can be lifted. The MARA will be also be provided with strengthened powers to publish, on its *Register of Migration Agents* and elsewhere on its website, for a specified period, the names of all agents who have been sanctioned and the reasons for the sanction.

4.7.19 Some agents who have been sanctioned then inappropriately seek to stay within the industry using a variety of business structures or employment relationships. In order for the MARA to be able to pursue these unscrupulous agents the definition of 'relationship by employment' will be strengthened.

4.7.20 Vexatious applications have a considerable negative impact on the workloads of DIMIA and on the integrity of the migration and humanitarian programs. DIMIA, through enhancing its Integrated Client Service Environment (ICSE) system, and the MARA will together improve the monitoring of agents and develop a more effective means of sanctioning those agents who lodge high numbers of vexatious or incomplete applications.

4.7.21 The Code of Conduct will also be strengthened to require migration agents to provide their clients with detailed and clear information on the industry in general, on its regulation and the complaints handling mechanism and what they can expect from migration agents and the MARA.

### Overseas Practice

#### Recommendation 20

4.7.22 The unscrupulous behaviour of some individuals operating offshore as migration agents, whether registered or not, continues to cloud the credibility of the migration advice industry. While DIMIA and the MARA promote the use of Australia-registered agents offshore, their ability to address offshore consumer protection issues generally and to address the conduct of unscrupulous agents offshore is severely limited, because so few offshore agents are

registered under the current onshore scheme. The Review has recommended that the legislation be amended to extend registration to foreign nationals who wish to provide advice to visa applicants in relation to temporarily entering or permanently migrating to Australia. This would include a measure limiting the categories of people who can be appointed as representatives or agents of a visa applicant.

#### Decision-making, client services, MARA efficiency, fraud, unregistered practice, fees and the DIMIA-agent relationship

Recommendations 21 to 27

4.7.23 These recommendations cover a wide variety of topics such as decision-making, client services, efficiency of the MARA, fraud and unregistered practice and the relationship between migration agents and DIMIA. These recommendations include that MARA produce a client service charter, develop community education information, including about the average fees charged within the industry, review its public access arrangements and fully implement the recommendations of Ernst and Young's September 2000 *Review of the Migration Agents Registration Authority*. The Review also recommended that DIMIA give, where other priorities allow, a higher priority to investigating and facilitating convictions for unregistered practice and of migration agents engaged in fraudulent activities.

4.7.24 These recommendations are expected to result in better client service and improved efficiencies in the MARA's operations, and thus a more ethical and robust migration advice industry.

### **4.8 Identification of expected impacts of the review's proposed options as likely benefits and costs and effects on particular groups**

4.8.1 Compliance costs vary between agents but are estimated to be around \$6,500 per annum per fee-charging re-registering agent currently. These costs include re-registration, CPD, maintenance of library and insurance. Compliance costs for persons wishing to enter the industry as fee-charging agents are around \$6,950 currently, and include entry costs (the cost of obtaining sound knowledge or other qualifications and passing the entry examination), advertising, initial registration and library). Non-commercial ('not for profit') agents' costs are lower as their registration fees are considerably less than their commercial ('for profit') counterparts. Given that the Review is recommending a continuation of the present arrangements, it is anticipated that these compliance costs will continue to apply, and at the same level, apart from any increases in the cost of e.g. CPD, insurance etc. that may be imposed by providers of these products in the future.

4.8.2 Whilst the impact of compliance costs - in any industry - is likely to be somewhat greater on small businesses than on larger businesses, and greatest on those who operate one-person businesses, this is largely due to the fact that the smaller a business, the fewer possible economies of scale are available to it. This is also true for the migration advice industry; where an agent works in a partnership or company with one or more other agents, economies of scale may operate to reduce each agent's costs. However, such cost-reducing opportunities in the migration advice industry are in reality limited to the sharing of a professional library and perhaps the costs of non-CPD and in-house training, and an agent working in a smaller business may not enjoy, to the same degree, the financial advantage accrued from these limited opportunities as an agent in a larger business. Overall, it is anticipated that the Review's recommendations will not increase the costs on small business to a significantly greater degree than on medium to large businesses, as virtually all of the costs apply to each agent, not to each business.

4.8.3 The Review in making a recommendation to allow bulk publishing for initial registration (refer to paragraph 4.7.7 above) provides the potential for further cost saving for both the

commercial (fee-charging) and non-commercial (non-fee-charging) sectors of the industry. Together with members of the industry body, the Migration Industry Association, all non-fee-charging agents are also eligible for reductions in fees charged for training (e.g. for CPD activities) by the industry body.

4.8.4 Table 1 (following paragraph 4.9.3 below) summarises the costs and benefits of statutory self-regulation, and is based on a more detailed analysis provided in the report of the Review. The only sector significantly adversely affected by the charging arrangements under the current regime is the non-commercial ('not for profit') sector.

#### 4.9 Identify the data sources and assumptions used in making these assessments

4.9.1 The information used in this table was gathered from the MARA Secretariat and the Board of the MARA.

4.9.2 To gather accurate data on the costs passed onto consumers by agents, a comprehensive survey would need to be conducted across all sectors of the migration advice industry. It is difficult to predict costs in relation to agents and their clients as they would vary greatly from agent to agent. Some agents have hundreds of clients while others may have only one or two. Their areas of speciality vary too, as does the degree of complexity in assisting with certain visa subclasses, which may be reflected in higher fees.

4.9.3 Statutory self-regulation provides the benefit of protection to consumers and to the community in relation to the integrity of the migration and humanitarian programs. DIMIA benefits from improved information to clients and assistance with processing. With the MARA paying DIMIA \$150,000 annually towards the costs associated with this environment, the cost to the taxpayers is minimal. The regulatory environment is stable with government regulation able to provide a check on the industry and ensure that the MIA is fulfilling its role as industry regulator.

**Table 1: Summary of the impacts of the preferred statutory self-regulation option on consumers, business including small business and government**

	<b>Benefits</b>	<b>Costs</b>		
	Description	Estimate (\$)	Description	Estimate (\$pa)
<b>Consumers</b>	Greater protection for consumers through mandatory registration, minimum training requirements and established complaints mechanisms.	Main financial benefit is protection from paying exorbitant fees significantly higher than average fees of \$2,500 to \$4,000.	Costs of registration and ongoing compliance costs may be passed on to clients by registered agents.	If passed on these direct costs are estimated at \$8 to \$14 per client.
<b>Business - including small business</b>	Industry codes provide framework for ethical practice.	Not readily quantifiable.	Up-front compliance costs for each person entering industry include qualifications, initial registration fee, advertising of intention to apply and library.	\$6,950
	Improved public perception of the industry.			
	Registered agents participate in development of		Ongoing costs for each agent include	\$6,500



industry policies.

registration fee, CPD,  
library and insurance.

**Government** DIMIA establishes  
and oversees  
regulatory settings and  
takes action against  
unregistered agents.

Cost of the provision  
of policy advice and  
litigation. Costs to DIMA  
are estimated to  
vary between  
\$300,000 and  
\$500,000 pa.  
If this,  
\$150,000 pa is  
recovered from  
the industry.

## 5.1 Who are the main affected parties?

5.1.1 Affected parties include consumers, registered migration agents (an estimated 90-95 percent of whom work in a small business environment; refer paragraph 4.2.3 above), the MIA, some government departments and other regulatory, review and professional bodies.

5.1.2 The review process commenced with the development and dissemination by DIMIA of a Discussion Paper in September 2041. This Discussion Paper invited stakeholders to make submissions on the operation of the current arrangements and options for future industry regulation. The stakeholders included ethnic community organisations, peak bodies, the MIA, the MARA and statutory review bodies such as the Refugee Review Tribunal and Migration Review Tribunal (see [RIS: Attachment A](#) for a complete list of organisations invited to comment). The discussion paper was also posted on the DIMIA and the MARA websites.

## 5.2 What are the views of these parties?

5.2.1 Stakeholders were asked a number of questions on key issues raised in the Discussion Paper. Seventeen submissions were received from various sectors, migration agents and the general public (see [RIS: Attachment B](#) for a list of submissions received).

5.2.2 In relation to the issue of future regulation of the migration advice industry, the majority of submissions held the view that the industry should continue to operate in the same manner. The main reasons cited were that the MARA needs to:

- increase the level of professionalism in the industry;
- increase consumer protection; and
- improve ethical standards.

5.2.3 The MIA indicated that it was ready to assume the role as industry regulator but that the industry was not yet ready for self-regulation. The MIA argued for greater powers, such as responsibility for the gazettal of CPD courses. The MIA also requested that a greater emphasis be placed on the industry moving towards voluntary self-regulation, with itself as the industry regulator.

5.2.4 Submissions generally expressed support for the MARA's performance as the industry regulator. A majority of submissions commented on the need for greater consumer protection, greater transparency in the MARA's processes and greater access by the public to Secretariat staff. There was also considerable support for improving academic entrance requirements for entry into the industry and enhancing the CPD scheme.

5.2.5 The MIA in their submission suggested the concept of a higher level of registered migration agent or Certified Migration Agent (CMA). A number of submissions raised concerns

about this concept while others offered variations on it. The Review examined in considerable detail the registration regimes of comparable industry groups and concluded that there was merit in the MIA/MARA and DIMIA consulting further on options for a CMA scheme.

5.2.6 The issue of extending regulation to include overseas practice also raised concerns relating to the costs of such a scheme, the potential for limiting choice for clients and the potential for there to be an adverse impact on humanitarian and refugee visa applicants. Having considered the arguments supporting this proposition, the Review found sufficient grounds for this idea to be developed further.

5.2.7 Both the CMA concept and the regulation of overseas practice will be the subject of separate consultations with stakeholders.

## **6 CONCLUSION AND RECOMMENDED OPTION**

6.1 The 2001-02 Review found that the migration advice industry is not ready for voluntary self-regulation in March 2003 in view of:

- the the low rate of membership of the industry association, the MIA, and the lack of homogeneity in the industry, which would threaten the viability of voluntary regulation by any industry body;
- the vulnerability of consumers and the significant consumer protection and national interest issues; and
- concerns of the department and of consumers of existing levels of client service and client access to the MARA.

6.2 All submissions to the Review supported the continuation of statutory self-regulation on the basis of the need to curtail the impact on the industry of the activities of unscrupulous agents and the continuing need to raise professional standards. In view of these industry characteristics and the very real risks associated with introducing voluntary self-regulation prematurely, this RIS recommends that statutory self-regulation should be extended. In order to provide the MIA with more certainty and the necessary time to achieve the key measures towards self-regulation, the sunset clause will be removed.

6.3 The Deed of Agreement between the Minister and the MIA should be renegotiated to reflect the government's recommendations arising from the Review. The renegotiated Deed of Agreement should include key milestones relating to enhancements in the MARA's effectiveness in its core roles of registration, CPD, complaints handling, discipline, industry monitoring and consumer education. An ongoing review process will assess the industry's progress towards achieving the standards of consumer protection and agent competence necessary for voluntary self-regulation.

## **7 IMPLEMENTATION AND REVIEW**

### **7.1 How will the preferred option be implemented?**

7.1.1 The preferred option requires an extension of the current statutory framework, by removing the current sunset clause and instead developing key milestones to be achieved by the industry as a step towards its achieving self-regulation.

7.1.2 This Review recommended enhancements to the existing statutory self-regulation framework. This will require changes to the *Migration Act 1958*, to the Migration Agents Regulations 1998 and to the Deed of Agreement between the MIA and the Minister for Immigration and Multicultural and Indigenous Affairs.

7.1.3 The extension of the current arrangements will have no impact on other agencies.

## **7.2 Is the preferred option clear, consistent, comprehensible and accessible to users?**

7.2.1 The proposed option is supported by all of the stakeholders who made submissions to the Review. This preferred option is clear, consistent and easily understood by consumers and agents.

7.2.2 The Review suggests targeting certain areas for the development of policies and procedures by the industry body, which will improve access to information for consumers, agents and others. This includes more transparent decision-making and more stringent education requirements for agents entering the industry.

## **7.3 What is the impact on business, including small business, and how will compliance and paper burden costs be minimised?**

7.3.1 As stated previously the costs of compliance varies between agents. As discussed at paragraphs 4.8.1 and 4.8.2 above, there are ways in which agents, commercial or non-commercial, where two or more are working in the same business, can share resources (e.g. by sharing the holding and maintenance of a professional library) and thus minimise compliance costs. The proposal to allow 'bulk publishing' for persons intending to enter the industry (see paragraphs 4.7.7 and 4.8.3 above) also aims to reduce compliance costs for all agents, and is one which will be of particular interest and benefit to the smaller, non-commercial ('not for profit') sector as it will ease their financial burden and recognises the importance of this sector's continued participation in the industry.

7.3.2 Continued cross-accreditation by the MARA with legal professional bodies will ensure that the current CPD requirements do not overburden those migration agents who are also practising lawyers.

7.3.3 All agents must meet the 'fit and proper person' and 'person of integrity' tests at initial registration and again at the time of re-registration. Those who do not meet the requirements run the risk of not having their initial or reregistration application approved and possibly losing their livelihood. Many agents also seek a review by the Administrative Appeals Tribunal or the Federal Court of any refusal by the MARA to register them. This can be expensive for all concerned. The aim of a proposed education campaign to be run by the MARA is to encourage agents to more responsibly manage their professional development. This will give agents the benefit of increased certainty, that the time and cost expended on meeting their sound knowledge and CPD requirements, will lead to a positive decision on their initial and reregistration application. The industry as a whole will also benefit from improved levels of knowledge and competence across all aspects of immigration assistance.

7.3.4 There are a number of recommendations made by the Review, which go to providing greater certainty about the MARA's powers relating to registration and sanctions. While the primary aim is to enhance consumer protection these recommendations have not been made without due consideration of the impact on a migration agent's business. For example, strengthening the provisions relating to a caution will provide the MARA with the capacity to intervene at an early stage to remedy an agent's conduct, while still allowing the agent to continue to practise.

7.3.5 Whilst the proposed regulation of offshore practice and examination of the feasibility of establishing a Certified Migration Agent scheme are key recommendations of the Review, they are currently at the conceptual stage only. Another RIS will not be required in respect of the regulation of offshore practice as practice by foreign nationals will not impact on small business

in Australia. However, the CMA concept will need to be the subject of a separate RIS when it has been further developed.

7.3.6 The Review recommends exploring the feasibility of requiring migration agents to hold a specified minimum level of professional indemnity insurance cover, either within the current scheme or as part of the CMA scheme. Currently, there is no definitive information available on the number of migration agents who hold professional indemnity insurance, or the level of coverage purchased. It is estimated that of the 2,773 registered migration agents as at 30 June 2002, some 400 would hold professional indemnity insurance and a further 500 who are also legal practitioners are covered under their legal insurance. A more comprehensive examination of the impact on business would need to take place in conjunction with the feasibility study.

#### **7.4 How will the effectiveness of the preferred option be assessed? How frequently? Is there a built-in provision to review or revoke the regulation after it has been in place for a certain length of time?**

7.4.1 The Review recommended that the existing regulatory framework be extended and reviewed again at an appropriate juncture and that the current framework should no longer be subject to a sunset clause.

7.4.2 A system of performance milestones set by DIMIA and agreed to by the co-regulator, the MARA, will be introduced. These performance indicators will address, among other matters, the development of the industry in relation to:

- competence and sound knowledge of migration agents;
- MIA coverage and performance in a regulatory role;
- client service and public access to the MARA;
- agent discipline and ethics; and
- appropriate protection for consumers.

7.4.3 The Minister will retain the right to conduct a further review at a time of his choosing to assess if statutory self-regulation is continuing to achieve its objectives.

7.4.4 Finally the Review proposed that the need for continued legislative underpinning should be considered in any future review of industry regulation. It was noted that despite significant gains in protection available to consumers, the nature of the migration advice industry and of visa application and other migration advice transactions, could mean that there would always be an argument for a strong regulatory framework. The Review recognises that it may be impossible for even a committed and capable industry body to effectively regulate the industry without some statutory support.

## **RIS: ATTACHMENT A**

### **List of Organisations Invited to Comment on the Discussion Paper**

ACCC  
Australian Chamber of Commerce and Industry  
Australian Council of Social Services  
Australian Section of the International Commission of Jurists  
Baulkham Hills/Holroyd/Parramatta Migrant Resource Centre  
Commonwealth Director of Public Prosecutions  
Deakin Australia  
Department of the Treasury, Consumer Affairs Division  
Each member of the Business Advisory Panel  
ECC of Illawarra  
ECC of Loddon Campaspe  
ECC of Newcastle & Hunter Region  
ECC of Northern Tasmania  
ECC of Shepparton  
ECC of Sunraysia  
ECC of WA  
ECC of Wagga Wagga  
ECC/MRC Albury-Wodonga  
Ethnic Communities Council of NSW  
Ethnic Communities Council of Qld  
Ethnic Communities Council of Victoria  
Fairfield Migrant Resource Centre  
Federation of Ethnic Community Councils  
Immigration Advice and Rights Centre  
Inner Western Region (Footscray) Migrant Resource Centre  
Law Council of Australia  
Law Society of NSW  
Law Society of Victoria  
Legal Aid Commission NSW  
Legal Aid Western Australia  
MC of ACT  
MC of NT  
MC of Tasmania  
MCC of Gold Coast  
MCC of Griffith  
MCC of SA  
MCC of Sunshine Coast  
Migration Agents Registration Authority  
Migration Institute of Australia  
Migration Review Tribunal  
MRC of Geelong  
MRC of Gippsland  
MRC of Townsville  
Multicultural Access and Resource Service, Coffs Harbour  
Multicultural Society, Northern Rivers  
National Council of Churches in Australia  
Refugee and Immigration Legal Centre  
Refugee Council of Australia  
Refugee Review Tribunal  
Regional MRC of Ballarat  
The Victorian Foundation for the Survivors of Torture  
Transcultural Community Council, Lightning Ridge  
UNHCR

## **RIS: ATTACHMENT B**

### **List of Organisations and Individuals who made Submissions to the Review**

ACOSS  
Business Skills Section, DIMA  
Commonwealth Director of Public Prosecutions  
Geelong Migrant Resource Centre  
Harvey Wade, Consumer  
Immigration Rights and Advice Centre  
John Gillespie, Migration Agent  
Law Council of Australia  
Law Society of New South Wales  
Legal Aid Commission of New South Wales  
Mervyn Rothstein, Lawyer and Migration Agent  
Michael Hutchinson, DIMA  
Migration Agents Registration Authority  
Migration Institute of Australia  
Paul Vilips, Migration Agent  
Refugee Review Tribunal  
Springvale Community Aid and Advice