

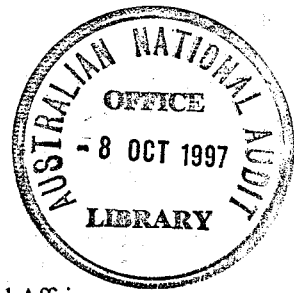
1997

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION LEGISLATION AMENDMENT (MIGRATION AGENTS) BILL 1997

EXPLANATORY MEMORANDUM



(Circulated by authority of the
Minister for Immigration and Multicultural Affairs,
the Hon. Philip Ruddock MP)

MIGRATION LEGISLATION AMENDMENT (MIGRATION AGENTS) BILL 1997

OUTLINE

Overview

1 The Migration Legislation Amendment (Migration Agents) Bill 1997 ("the Bill") amends the *Migration Act 1958* (the Migration Act) to implement a scheme of statute-based self-regulation for the migration advice industry.

2 Part 3 of the Migration Act currently provides a scheme - the Migration Agents Registration Scheme (MARS) - to regulate the conduct of migration agents and to provide consumer protection to vulnerable clients by investigating complaints and imposing sanctions on agents where necessary. The Bill amends Part 3 to set out the statutory scheme for self-regulation.

3 Features of the amendments to Part 3 of the Migration Act made by the Bill include:

- creation of a Migration Agents Registration Authority (MARA) to administer the scheme for regulation of the immigration assistance industry;
- a power for the Minister to appoint an industry body, the Migration Institute of Australia (MIA), as the MARA - the default MARA will be the Minister;
- streamlined procedures for making initial application for registration as a migration agent;
- clarification of the criteria to be met by persons seeking registration as a migration agent;
- from 21 March 1999, a requirement that registered agents apply for registration each year and demonstrate that they have met continuing professional development requirements;
- a power for the MARA to refer parties in dispute to mediation;
- a power for the MARA to refer lawyers' conduct to an authority responsible for disciplining lawyers;
- enhancements of relevant offence provisions to bring them in line with Commonwealth policy on criminal law; and
- a sunset provision on the statutory self-regulatory scheme.

4 The Bill also enhances the regulatory scheme by:

- extending the scheme to include assistance provided to persons seeking to sponsor or nominate another person for a visa;
- setting criteria in relation to competency for migration agents working in the voluntary sector of the industry (the term voluntary sector is applied to government and non-government agencies which provide immigration assistance without charging clients a fee); and
- clarifying the meaning of "immigration assistance" to ensure that it does not cover assistance of the kind normally provided by travel agents or translation and interpretation services.

5 The Bill provides appropriate transitional arrangements ensuring that, amongst other things:

- agents working in the voluntary sector (who are presently not required to pay levies in relation to registration applications or renewal of registration applications) have a reasonable period in which to pay any charges under the new arrangements; and
- the requirement that agents meet continuing professional development criteria not commence until the second year of the new scheme - this will allow ample time for registered agents to become familiar with the new criteria and make plans for meeting those requirements.

6 The Bill also repeals the *Migration Agents Registration (Application) Levy Act 1992* and the *Migration Agents Registration (Renewal) Levy Act 1992*. These Acts will be replaced by Acts allowing a more flexible scheme for imposing charges on applications for registration as a migration agent or subsequent renewals.

FINANCIAL IMPACT STATEMENT

7 The amendments proposed are budget neutral.

REGULATION IMPACT STATEMENT

8 A regulation impact statement appears at the end of this Explanatory Memorandum. The statement has been approved by the Office of Regulation Review.

MIGRATION LEGISLATION AMENDMENT (MIGRATION AGENTS) BILL 1997

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short Title

1 The short title by which the Act will be known is the *Migration Legislation Amendment (Migration Agents) Act 1997*.

Clause 2 Commencement

2 Subclause 2(1) provides that, subject to the other subclauses, the Act commences immediately before 21 March 1998. Commencement "immediately before" that date is intended, amongst other things, to ensure that there is no doubt over the continued existence of the Register of Migration Agents kept pursuant to section 287 of the Migration Act - see also item 69 of Schedule 1.

3 Subclause 2(2) provides that items 67 and 68 of Schedule 1 - which provide for disclosure of personal information between the Migration Agents Registration Board (MARB) and the Department; and the Department and the new Migration Agents Registration Authority (MARA) - commence on the Royal Assent. The early commencement of these provisions is intended to allow the MARA to be fully operational on 21 March 1998.

4 Subclause 2(3) provides that Part 3 of Schedule 1 commences on 21 March 1998 if the *Public Service Act 1997* commences before that day. In any other case that Part will commence upon commencement of the *Public Service Act 1997*.

5 Subclause 2(4) provides that Schedule 3 (apart from Parts 3, 4 and 5) commences on 21 January 1999. The objective here is to provide some lead time for the MARA to implement the repeat registration scheme and to allow consideration of repeat registration applications lodged with the MARA before 21 March 1999.

6 Subclause 2(5) provides that Part 3 of Schedule 3 commences on 21 February 1999. The objective here is to allow a transition from the MARA being required to notify registered agents of renewal of their registration, to notifying registered agents of the expiry of their registration (and consequent need to make a repeat registration application).

7 Subclause 2(6) provides that Parts 4 and 5 of Schedule 3 commence on 21 March 1999.

Clause 3 Schedule(s)

8 This clause provides that, subject to section 2, the provisions of the various Acts that are set out in the items of the Schedules are amended or repealed as indicated.

SCHEDULE 1 - REGULATION OF THE MIGRATION ADVICE INDUSTRY

Part 1 - Amendment of the *Migration Act 1958*

Item 1 Subsection 5(1) (at the end of the definition of *offence against this Act*)

9 This definition is amended to remove any doubt over the application of relevant parts of the *Criminal Code* to Part 3 of the Migration Act.

Item 2 Section 275 (definition of *Board*)

10 This definition is repealed as a consequence of the abolition of the MARB.

Item 3 Section 275 (definition of *entrance applicant*)

Item 4 Section 275 (definition of *entrance application*)

11 These definitions are repealed as the relevant persons and applications are now referred to as *visa applicants* and *visa applications* respectively.

Item 5 Section 275 (definition of *immigration case*)

12 This definition is repealed as a consequence of repealing the *Migration Agents Registration (Application) Levy Act 1992* and the *Migration Agents Registration (Renewal) Levy Act 1992*. These Acts allowed for lower rates of levy to be paid where assistance was provided in 5 immigration cases or less.

Item 6 Section 275

13 This amendment inserts reference to the industry body proposed to be appointed as the MARA - the Migration Institute of Australia Limited.

Item 7 Section 275

14 This amendment inserts the term "*Migration Agents Registration Authority*", which replaces the MARB. The MARA will be the Minister unless the Migration Institute of Australia Limited has been appointed under new section 315 of the Migration Act.

Item 8 Section 275 (definition of *paid immigration assistance*)

15 This definition is repealed as a consequence of repealing the *Migration Agents Registration (Application) Levy Act 1992* and the *Migration Agents Registration (Renewal) Levy Act 1992*. These Acts allowed for lower rates of levy to be paid where assistance was provided in 5 immigration cases or less.

- Item 9** **Section 275 (definition of *registration application fee*)**
Item 10 **Section 275 (definition of *renewal fee*)**

16 These definitions are repealed and substituted as a consequence of the new *Migration Agents Registration Application Charge Act 1997* and the *Migration Agents Registration Renewal Charge Act 1997* which sets out the maximum level of the charge for the first financial year, with an annual indexation formula for future financial years.

- Item 11** **Section 276**
Item 12 **Paragraphs 276(a), (b), (c) and (d)**

17 These amendments omit references to "entrance applicant" and substitutes "visa applicant" and omit references to "entrance application" and substitutes "visa application".

- Item 13** **At the end of section 276**

18 New subsection 276(2) expands the scope of transactions for which a person must be registered as a migration agent to include immigration assistance in relation to sponsorship or nomination of a visa applicant for the purposes of the regulations.

19 New subsection 276(3) clarifies some types of assistance which are not considered to be immigration assistance for the purposes of the registration requirement. The objective of this provision is to clearly exclude services provided by persons such as travel agents and interpreters from the need to register as migration agents.

- Item 14** **Paragraph 277(a)**
Item 15 **Paragraph 277(a)**
Item 16 **Paragraph 277(b)**
Item 17 **Paragraph 277(b)**
Item 18 **Paragraph 277(c)**
Item 19 **Paragraph 277(c)**
Item 20 **Subparagraphs 277(c)(i), (ii) and (iii)**

20 These amendments omit references to "entrance applicant" and substitutes "visa applicant" and omit references to "entrance application" and substitutes "visa application".

- Item 21** **At the end of section 277**

21 New subsection 277(2) is intended to expand the scope of transactions which a lawyer may perform without having to be registered as a migration agent. The amendments mean that certain kinds of immigration legal assistance provided in relation to sponsorship or nomination of a visa applicant for the purposes of the regulations will not result in a need for the lawyer to be registered as a migration agent.

22 New subsection 277(3) clarifies some types of assistance which if performed by a lawyer will not be considered to be immigration legal assistance. The amendments mean that a lawyer who provides the kind of assistance set out in paragraphs 277(3)(a) to (d) inclusive will need to be registered as a migration agent.

Item 22 At the end of section 279

23 New subsection 279(2) makes it clear that provisions in Division 3 of Part VIIC of the *Crimes Act 1914* apply to the MARA. The effect of this provision is that, if a person's conviction is spent, the person is not required to disclose to the MARA the fact that they have been convicted of the offence.

Item 23 After section 279

24 This item inserts new section 279A, which makes it clear that those provisions of the *Criminal Code* which set out the general principles of criminal responsibility apply to all offences created by Part 3 of the Migration Act. The purpose of this item is to ensure that all offences in Part 3 comply with Commonwealth policy on criminal law.

Item 24 Subsection 280(1) (penalty)

Item 25 At the end of subsections 280(1), 281 (1) and (2) and 282(1) and (2)

25 Item 24 substitutes penalty units equivalent to the existing fine as the penalty for providing immigration assistance when not a registered agent (the pecuniary value of a penalty unit is set out in the *Crimes Act 1914*). Item 25 inserts a note into various provisions to draw attention to general principles set out in the *Criminal Code*.

26 The purpose of these items is to ensure that the penalty provision complies with Commonwealth policy on criminal law.

Item 26 Subsection 282(4)

27 This item repeals subsection 282(4) and substitutes new subsection 282(4). The new subsection reflects the content of the repealed provision but also extends the meaning of "makes immigration representations" to include representations made on behalf of persons nominating or sponsoring (or seeking to nominate or sponsor) a visa applicant.

Item 27 Subsection 283(2)

28 This item removes a subjective element from the requirement that a person must not falsely represent that a person is a registered agent. The purpose of this item is to ensure that offences in Part 3 comply with Commonwealth policy on criminal law.

- Item 28** **At the end of section 283 and subsection 284(1)**
Item 29 **Subsection 285(1)**
Item 30 **At the end of subsection 285(1)**

29 Items 28 and 30 insert notes to draw attention to general principles set out in the *Criminal Code*. The purpose of these items is to ensure that all offences in Part 3 comply with Commonwealth policy on criminal law.

30 Item 29 removes a subjective element from the requirement that a person must not falsely advertise that a person who is not a registered agent gives immigration assistance. The purpose of this item is to ensure that all offences in Part 3 comply with Commonwealth policy on criminal law.

Item 31 **Subsections 287(1), (3) and (4) and 288(1)**

31 This item makes amendments consequential to the new self-regulatory scheme, so that the MARA (and not the Secretary) will be responsible for keeping a register of migration agents and accepting applications for registration.

Item 32 **After subsection 288(1)**

32 New subsection 288(1A) inserts a requirement that an individual publish notice of an intention to register as a migration agent and notify that objections may be made to the MARA. The purpose of the provision is to streamline processing of applications for registration as a migration agent.

33 The method by which the individual publishes the notice is to be prescribed in regulations and is expected to involve the placement of appropriate advertisements in major metropolitan or national newspapers.

Item 33 **Subsection 288(3)**

34 This item repeals subsection 288(3) and substitutes new subsection 288(3). The new subsection retains the provisions of paragraph 288(3)(b) in a new format, but does not retain the provisions in paragraphs 288(3)(a) or (c). Those paragraphs relate to provisions found in the *Migration Agents Registration (Application) Levy Act 1992* which is repealed by this Act.

Item 34 **At the end of section 288**

35 New paragraph 288(4)(a) replaces the provision formerly at subsection 289(2) with effect that the registration application is not to be considered unless the registration fee has been paid.

36 New paragraph 288(4)(b) provides that an application cannot be considered if the applicant has not given notice of his or her intention to apply pursuant to new subsection 288(1A).

37 New paragraph 288(4)(c) requires the applicant to provide the MARA with evidence that they have given notice pursuant to new subsection 288(1A).

Item 35 Sections 289 to 298 (inclusive)

38 This item repeals sections 289 to 298 (inclusive) of the Migration Act which deal with the obligations of the Secretary and the MARB in relation to administration of the Migration Agents Registration Scheme.

39 This item also clarifies the responsibilities of the new MARA, and inserts seven new sections in the Migration Act, which make provisions about when and how registration of a migration agent must occur, when an applicant must not be registered, and notice of refusal to register.

Section 289 Registration

40 New section 289 provides when and how the Authority must register a person as a migration agent.

Section 290 Applicant must not be registered if not a person of integrity or not fit and proper

41 New section 290 prohibits registration of an applicant who is not a person of integrity or not a fit and proper person. The provisions found in this new section reflect repealed subsections 292(1) and (3).

42 Subsection 290(3) also makes clear what the MARA must take into account when considering whether an individual to whom the applicant is related by employment is not a person of integrity.

Section 291 Applicant must not be registered if registration refused in past year

43 New section 291 prohibits registration of an applicant who has been refused registration less than a year prior to his or her present application. This new section reflects repealed paragraph 294(1)(a). This new section is consistent with current provisions which have been in place since 1992, so that applicants will not be disadvantaged compared to their position under the current law.

Section 292 Applicant must not be registered if registration cancelled in past 5 years

44 New section 292 prohibits registration of an applicant whose registration has been cancelled within five years before his or her application. This new section reflects repealed paragraph 294(1)(b). This new section is consistent with current provisions which have been in place since 1992, so that applicants will not be disadvantaged compared to their position under the current law.

Section 293 Applicant under 18 must not be registered

45 New section 293 prohibits registration of an applicant who is less than 18 years old. This new section reflects repealed paragraph 294(1)(d).

Section 294 Applicant must not be registered if not an Australian citizen, permanent resident or New Zealander with special visa

46 New section 294 prohibits registration of an applicant who is not an Australian citizen, an Australian permanent resident (within the meaning of the Migration Regulations) or a New Zealand citizen who holds a special category visa. This new section reflects repealed paragraph 294(1)(c) and inserts particular reference to New Zealand citizens.

Section 295 Notice of refusal of application

47 New section 295 provides that the MARA must give an applicant written notice of a decision to refuse registration and the reasons for that refusal. This new section reflects repealed section 298.

48 The note draws attention to the merits review rights of the applicant and the requirement of the *Administrative Appeals Tribunal Act 1975* that they be given notice of these rights.

Item 36 Section 300 and subsection 301(1)

49 This item makes consequential amendments to reflect that the scheme for registration of migration agents will now be administered by the MARA.

Item 37 Subsection 301(2)

50 This item repeals subsection 301(2), which refers to the *Migration Agents Registration (Renewal) Levy Act 1992* which is repealed by this Act.

Item 38 Subsection 302(1)
Item 39 Paragraph 302(1)(a)

51 These items make consequential amendments to reflect that the scheme for registration of migration agents will now be administered by the MARA.

Item 40 Paragraph 302(1)(b)

52 This item reduces the period of time in which an agent may pay the renewal fee from 2 months to 2 weeks. The objective of this item is to enhance the professionalism of agents by requiring that they take steps to ensure payment of the fee no later than 2 weeks after renewal of their registration.

Item 41 Subsection 302(2)

53 This item repeals subsection 302(2), which provides that the Secretary must deregister an agent in certain circumstances. These circumstances relate to provisions of the *Migration Agents Registration (Renewal) Charge Act 1992* which is repealed by this Act.

Item 42 Section 303

54 This item makes consequential amendments to reflect that the scheme for registration of migration agents will now be administered by the MARA.

Item 43 At the end of section 303

55 This item inserts a note to cross-reference to procedural requirements which the MARA must comply with before proceeding to caution an agent, or cancel or suspend an agent's registration. These include allowing the registered agent to make a submission on the matter and, at MARA's discretion, allowing the person making the submission to appear before it.

Item 44 Subsection 304(1)

56 This item makes consequential amendments to reflect that the scheme for registration of migration agents will now be administered by the MARA.

Item 45 Section 305

57 This item repeals section 305 and substitutes a new section 305 with similar effect but which refers to the MARA.

58 In addition new section 305 provides procedural requirements that the MARA must comply with in relation to giving notice to, and publishing details about, registered agents whose registration is cancelled or suspended. The method of publication will be prescribed in regulations.

59 The note below subsection 305(1) draws attention to the merits review rights of affected agents and the requirement of the *Administrative Appeals Tribunal Act 1975* that they be given notice of these rights.

60 Subsections 305(2) and (3) are intended to ensure that publication of the statement about the cancellation or suspension only takes place after the decision is no longer able to be set aside on appeal.

Item 46 Section 306

Item 47 Division 4 of Part 3 (heading)

61 These items make consequential amendments to reflect that the scheme for registration of migration agents will now be administered by the MARA.

Item 48 Sections 307 and 308

62 This item repeals sections 307 and 308 because the MARB no longer administers the scheme for registration of migration agents.

63 New section 308 makes provisions equivalent to those of repealed section 308.

64 Subsection 308(3) provides that a registered agent is not excused from giving information or providing documents required under subsection 308(1) on the grounds of self-incrimination.

65 However, subsection 308(4) provides a "use-derivative use immunity" to ensure that any answer, document or thing obtained as a direct or indirect consequence of the agent's compliance with a requirement under subsection 308(1), is not admissible in evidence against the agent in any criminal proceedings.

66 The exception to the immunity is proceedings under section 487 of the Migration Act in relation to obstructing, hindering, deceiving or misleading persons exercising powers or performing duties under the Act.

Item 49 Subsections 309(1) and (2) and 310(1), (2) and (3), section 311 and subsection 312(1)

67 This item makes consequential amendments to reflect that the scheme for registration of migration agents will now be administered by the MARA.

Item 50 Subsection 312(1) (penalty)

68 This item substitutes penalty units equivalent to the existing fine as the penalty for failure to notify the MARA of prescribed matters (the pecuniary value of a penalty unit is set out at in the *Crimes Act 1914*). The purpose of this item is to ensure that the penalty provision complies with Commonwealth policy on criminal law.

Item 51 At the end of subsection 312(1)

69 This item draws attention to general principles of criminal responsibility set out in the *Criminal Code*. The purpose of this item is to ensure that all offences in Part 3 comply with Commonwealth policy on criminal law.

Item 52 Subsection 312(2)

70 This item repeals subsection 312(2) and substitutes new subsection 312(2). The new subsection retains the provisions of paragraph 312(2)(b) in a new format, but does not retain the provisions in paragraph 312(2)(a) or (c). Those paragraphs relate to provisions found in the *Migration Agents Registration (Renewal) Levy Act 1992* which is repealed.

Item 53 Before subsection 313(1)

71 This item inserts new subsection 313(1A), which defines "assisted person" to incorporate the expanded definitions of assistance provided for in new subsections 276(2) and 277(2).

Item 54 Subsection 313(1)

72 This item amends subsection 313(1) as a consequence of the new definition of assisted person in subsection 313(1A).

Item 55 Subsection 313(3)

73 This item repeals subsection 313(3) and substitutes a new subsection 313(3) which restructures the existing provisions and incorporates the new definition of assisted person in subsection 313(1A).

Item 56 Division 6 of Part 3 (heading)

74 This item repeals the heading for Division 6 and substitutes a new heading as a consequence of the replacement of the MARB by the MARA.

Item 57 Section 315

75 The purpose of this item is to make provision for the scheme for registration of migration agents to be administered by an industry body, the Migration Institute of Australia Limited.

76 The item repeals the provision establishing the MARB and substitutes a provision permitting the appointment of the Migration Institute of Australia as the MARA. Subsection 315(2) ensures that it is the MARA, rather than the Institute itself, which is taken to have exercised powers or performed functions under the Act.

77 Should any appointment of the Institute be revoked, subsection 315(2) will ensure that anything done by, or in relation to, the Institute will be taken to have been done by the person who is the authority afterwards (in the absence of another appointment this would be the Minister).

Item 58 Section 316

78 This item makes consequential amendments to reflect that the scheme for registration of migration agents will now be administered by the MARA.

Item 59 Paragraph 316(g)
Item 60 At the end of section 316

79 These items ensure that one of the functions of the MARA is to monitor the adequacy of any Code of Conduct. During the period of any appointment of the Institute, the MARA will also have the function of advising the Minister on the adequacy of any Code of Conduct.

Item 61 Sections 317 to 332 (inclusive)

80 This item repeals sections 317 to 332 inclusive and substitutes five new sections which empower the MARA to perform its functions.

Section 317 General powers of the Migration Agents Registration Authority

81 This section provides the MARA with power to do all things necessary or convenient in connection with the performance of its functions. This new section reflects repealed section 331.

Section 318 Power to refer people to mediation

82 This section provides that the MARA may refer both a complainant and the agent being complained about to a mediator. This provision ensures that alternative dispute resolution is available and can be used by the MARA with the consent of the parties.

Section 319 Power to refer lawyers' conduct to other authorities

83 This section provides a discretionary power for the MARA to refer practising lawyers to a relevant disciplinary body. This may be done for example where the lawyers conduct may amount to a breach of ethical or professional obligations.

84 Where such a referral takes place the power of the MARA to caution a registered agent, or suspend or cancel a registered agent's registration, is spent in respect of that conduct. This is intended to ensure that no "double-jeopardy" arises.

Section 320 Delegation of powers and functions

85 New section 320 provides for the Minister to delegate the powers or functions of the MARA under Part 3 for any period when the Institute is not appointed as the Authority. It also makes provision for the Minister to disclose personal information to the delegate to assist performance of those powers or fulfilment of those functions.

Section 321 Disclosure of personal information to the Migration Agents Registration Authority

86 The objective of this section is to authorise certain disclosures of personal information for the purpose of the MARA exercising powers, or performing functions. The disclosure of this personal information may otherwise have been prohibited by the *Privacy Act 1988*.

87 Subsection 321(2) ensures that the Department may make a disclosure to the MARA. This provision is required as the Department is, in the normal course of business, the recipient of complaints about the actions of registered agents. This provision will also allow the Department to bring to the attention of the MARA personal information which may relate to a pattern of conduct by particular agents (and hence which may not be apparent to the individual clients of those agents).

88 Subsection 321(3) allows the Minister to make disclosures to the Migration Institute of Australia Limited, or its officers or employees, after the appointment of the Institute as the MARA.

89 Subsection 321(4) allows the Department or the Minister to make disclosures to the Migration Institute of Australia Limited, or its officers or employees, after the appointment of the Institute as the MARA but before the appointment takes effect. This is intended to help ensure that the Institute will be fully operational upon its commencement as the MARA.

90 Subsection 321(5) ensures that information collected before and after commencement of the section may be disclosed to the MARA or the Institute.

Item 62 After Division 6 of Part 3

91 This item inserts a new Division 6A to provide for the collection and application of registration application fees and renewal fees.

Section 332A Regulations about collection of fees

92 New section 332A provides that the regulations may make provisions in relation to the time for payment of registration application fees and renewal fees, and the recovery of those fees.

Section 332B Payments to Migration Institute of Australia Limited

93 New section 332B provides an appropriation out of the Consolidated Revenue Fund of the Commonwealth for the Migration Institute of Australia Limited. The amount payable to the Institute is an amount equal to the registration application and renewal fees collected by the Institute as the MARA.

94 It is intended that separate agreements and appointments will be made allowing the Institute to collect registration application and renewal fees on behalf of the Commonwealth. These agreements and appointments will be made under relevant finance legislation and according to guidelines issued by the appropriate Commonwealth authorities.

Item 63 Division 7 of Part 3 (heading)

95 This item repeals the heading of Division 7 and substitutes a new heading as a consequence of the life of Part 3 of the Migration Act being extended to 21 March 2000.

Item 64 Subsection 333(1)

96 This item is a sunset provision which provides that Part 3 of the Migration Act ceases to be in force on 21 March 2000. The heading of the section is amended by the note.

Item 65 Subsection 333(2)

97 This item repeals subsection 333(2) and substitutes a new subsection 333(2) which includes provisions equivalent to that of the subsection it replaces. To avoid any doubt over the effect of subsection 333(2) it also provides that the powers for investigation and disciplinary action under Part 3 of the Act cease even if the investigation or action relates to a period when this part was in force.

Item 66 Subsection 333(4)

98 This allows for the refunds of all or part of registration application fees paid after 21 March 1999 should Part 3 of the Act cease to be in force on 21 March 2000. It makes no provision for the refund of renewal fees as these fees will not be paid after repeal of the *Migration Agents Registration Renewal Charge Act 1997* on 21 March 1999.

Part 2 - Application and transitional provisions

- Item 67 Migration Agents Registration Board may disclose personal information**
Item 68 Department may disclose personal information

99 Item 67 makes transitional arrangements to permit the MARB to disclose to the Department the personal information it has obtained in the course of its regulation of the migration advice industry. The disclosure of this information might otherwise have been prohibited by the *Privacy Act 1988*.

100 Subitem 68(1) provides for the Department to make disclosures to the MARA which might otherwise have been prohibited by the *Privacy Act 1988*.

101 Subitem 68(2) provides for the Department to make disclosures to the Institute which might otherwise have been prohibited by the *Privacy Act 1988*. It allows disclosures to be made after the Institute has been appointed as the MARA but before the appointment takes effect.

102 These items repeat material which is found in new section 321. However these transitional items will commence on the Royal Assent whilst new section 321 does not commence until immediately before 21 March 1998. The intention is to ensure, as far as possible, that the MARA will be fully operational on 21 March 1998 by having all relevant information available to it, and if appropriate the Institute, for a reasonable period before that date.

Item 69 Transitional provision for Register of Migration Agents

103 This provision provides for the continued registration of currently registered migration agents until the original registration expires or is suspended or cancelled, or until he or she is deregistered.

Item 70 Applications for registration made before 21 March 1998

104 This item provides that new applications for registration which are unresolved at 21 March 1998 will be deemed to be corresponding applications made under the new scheme. This includes provisions relating to the correct form and payment of the fee.

105 Subitem (5) provides that unresolved applications for registration where a relevant *Gazette* notice has been published, but the six week period for lodgement of complaints has not expired by 21 March 1998, are deemed to have met the new notification requirement found at subsection 288(1A). The notification is taken to have allowed objections to the proposed registration to be made to the MARA within 6 weeks of the date of publication (instead of the 10 days provided for by subsection 288(1A)).

106 Subitem (6) provides that where any objection has been lodged against registration of the applicant, that objection is effectively deemed to be an objection under the new scheme and must be considered by the MARA.

Item 71 Application of section 291 of the Migration Act 1958

Item 72 Application of section 292 of the Migration Act 1958

107 These items are transitional provisions to ensure that refusals and cancellations of registration under the previous scheme will be recognised under the new scheme.

Item 73 Special arrangements for renewal of registration of some migration agents in the voluntary sector

108 This item provides a concession for certain agents working in the voluntary sector. The relevant agents are those who were exempt from the need to pay registration application or renewal fees pursuant to section 5 of either the *Migration Agents Registration (Application) Levy Act 1992* or the *Migration Agents Registration (Renewal) Levy Act 1992*.

109 Subitem (2) allows relevant agents 6 months from the date of renewal of registration in which to pay the renewal fee. These agents would otherwise have had to pay the renewal fee within 2 weeks of the date of renewal.

110 Subitem (3) provides that the MARA must deregister the relevant agents if either:

- does not have prescribed qualifications; or
- the MARA does not consider the agent to have a sound knowledge of migration procedure.

111 The latter deregistration requirement is intended to ensure that all agents working in the voluntary sector have a sound knowledge of migration procedure. Some voluntary sector agents were granted registration under the old scheme under an administrative arrangement by which by the Secretary would find that the agent had such a sound knowledge solely on the basis of a certificate issued by a relevant employer. This subitem ensures that the MARA must deregister any voluntary sector agent who does not, in fact, have such a sound knowledge.

112 Subitem (4) ensures that merits review is available to agents who are deregistered pursuant to subitem (3). This subitem is required as the general entitlement to merits review provided for at section 306 of the Migration Act does not extend to these transitional provisions.

Item 74 Cancellations, suspensions and cautions continue to have effect

113 This is a transitional provision to ensure that cancellations, suspensions and cautions made under the old scheme continue to have effect after 21 March 1998.

Item 75 AAT proceedings relating to the Migration Agents Registration Board

114 This item ensures that any proceedings before the Administrative Appeals Tribunal (AAT), in relation to a decision of the MARB, may continue to be dealt with after 21 March 1998.

115 Subsection 25(7) of the *Administrative Appeals Tribunal Act 1975* allows the President of the AAT to specify a "person" to take the place of the MARB in proceedings before the Tribunal. Subsection 3(2) the *Administrative Appeals Tribunal Act 1975* makes clear that the MARA may be a "person" for the purposes of subsection 25(7) of that Act.

116 These provisions should allow the President of the AAT to substitute the MARA for the MARB in any proceedings before the AAT as at 21 March 1998. They should also allow the substitution of the MARA for the MARB in respect of applications made to the AAT after 21 March 1998 but relating to decisions made by the MARB before that date.

**Item 76 Continuation of investigations requested by Migration Agents
Registration Board**

117 Subitem (1) provides that investigations carried out by the Secretary at the request of the MARB may be completed despite the repeal of section 307 of the Migration Act.

118 Subitem (2) provides that the report of the investigation may be given to the MARA together with any material relevant to a registration application, or possible disciplinary action, to be considered by the MARA.

119 Subitem (3) provides that reports or material arising out of investigations requested by the MARB may be given to the MARA only if the complainant agrees. The objective here is to ensure that complainants are agreeable to the pursuit of their complaint in a self-regulatory environment.

Item 77 Information required by Board

120 This item is a transitional provision ensuring that any information required by the MARB under section 308 of the Migration Act, but not available to the MARB immediately before 21 March 1998, is required to be given to the MARA.

Item 78 Submissions to the Board under section 309

121 This item is a transitional provision ensuring that any submission invited by the MARB under section 309 of the Migration Act, but not available to the MARB immediately before 21 March 1998, may be taken into account by the MARA.

Item 79 Obligations after renewal of registration

122 Subitem (1) ensures that the reduction (from 2 months to 2 weeks) in the period of time in which renewing agents may pay their renewal fee and provide information about the capacity in which they provide immigration assistance, does not apply to renewals occurring before 21 March 1998.

123 Subitem (2) ensures that persons whose registration was renewed in the period 21 January 1998 to 20 March 1998, may provide information about the capacity in which they provide immigration assistance to the MARA instead of the MARB. However this information must be given to the MARA within 2 months of the date the person's registration was renewed.

Part 3 - Amendment of the Migration Act 1958 consequential on new Public Service Act

Item 80 Subsection 320(1)

124 This item removes terminology in the new subsection 320(1) which will be made redundant by the *Public Service Act 1997*. Commencement of this item is contingent on commencement of that Act.

125 The form of words used in this item ("appointed or engaged") is intended to ensure that the Minister may delegate to the Secretary as well as APS employees of the Department.

SCHEDULE 2 - REPEAL OF LEVY ACTS***Migration Agents Registration (Application) Levy Act 1992*****Item 1 The whole of the Act**

126 This item repeals the *Migration Agents Registration (Application) Levy Act 1992*, which is replaced by the *Migration Agents Registration Application Charge Act 1997*.

Migration Agents Registration (Renewal) Levy Act 1992**Item 2 The whole of the Act**

127 This item repeals the *Migration Agents Registration (Renewal) Levy Act 1992*, which is replaced by the *Migration Agents Registration Renewal Charge Act 1997*.

SCHEDULE 3 - CONTINUING PROFESSIONAL DEVELOPMENT OF REGISTERED AGENTS

Part 1 - Object of this Schedule

Item 1 Object

128 This item describes the purpose of the Schedule - which is to ensure that, from 21 March 1999, registered agents meet prescribed standards for continuing professional development and character. This is achieved by requiring that agents apply for registration annually and satisfy the MARA that they have met the relevant standards.

129 The main changes that are made by the Schedule relate to the application process. It replaces the renewal scheme (which only requires that agents pay a fee) with a repeat registration process. Under this process agents will be required to complete an approved form, pay the fee, and satisfy the MARA that continuing professional development requirements have been met.

130 The repeat registration process will not commence until 21 March 1999 to ensure that all registered agents will be aware of the requirements which will have to be met (the entire complement of registered agents seeking renewal will have been dealt with by the MARA by that time).

Part 2 - Amendment of the Migration Act 1958 commencing on 21 January 1999

Item 2 At the end of subsection 288(1A)

131 This item provides that after 21 January 1999, the requirement for individuals to publish a notice of intention to apply for registration in new subsection 288(1A) does not apply to an individual who has been registered at some time in the year preceding that application.

Item 3 Subsection 288(4)

132 This item repeals subsection 288(4) and substitutes a new subsection 288(4) with effect that applicants must have paid the registration application fee before the MARA can consider the repeat application.

133 The MARA must also not consider an application if the applicant is required under new subsection 288(1A) to publish a notice of intention to apply for registration, but has not done so.

Item 4 Subsection 289(1)

134 This item inserts a cross reference to new section 290A.

Item 5 Subsections 289(2) and (3)

135 This item repeals subsections 289(2) and (3) and substitutes new subsections 289(2), (3) and (4).

136 New subsection 289(2) requires the MARA to register applicants (including repeat registration applicants) as soon as possible. This is subject to the provisions found in amended subsection 289(3).

137 New subsection 289(3) provides that the MARA must not register applicants until the time for objections to the proposed registration has expired, and any objections have been considered. As objections can only be lodged in response to notices published pursuant to subsection 288(1A) this provision will not apply to repeat registration applications.

138 New subsection 289(4) is intended to ensure that agents are not penalised by putting in early applications for repeat registration, and having them processed quickly. It ensures that the later registration only takes effect at the end of the existing registration.

Item 6 After section 290

139 New section 290A prohibits registration of a person who has failed to satisfy prescribed requirements for continuing professional development. These requirements will be set out in the regulations and are expected to cover further education, research and *pro bono* work performed by the agent.

Part 3 - Amendment of the Migration Act 1958 commencing on 21 February 1999

Item 7 Section 301

140 This item repeals section 301 and substitutes a new section 301. The new section amends the notification requirement as a consequence of the repeal of section 300 (which will occur on 21 March 1999).

141 Section 301 is amended to require the MARA to give 1 month advance notice of the expiry of the agent's existing period of registration. As some agents' registration will be expiring on 21 March 1999 it is necessary for the MARA to start giving these notices as early as 21 February 1999.

Part 4 - Amendment of the Migration Act 1958 commencing on 21 March 1999

Item 8 Section 275 (definition of *renewal fee*)

142 This item repeals the definition of "renewal fee" as a consequence of the removal of renewal provisions from the Act.

Item 9 Paragraph 287(2)(e)

143 This item ensures that the MARA keeps a record in the Register of Migration Agents of the most recent registration of an agent.

Item 10 Paragraph 287(2)(f)

Item 11 Subsection 299(2)

Item 12 Subsection 300

Item 13 Paragraphs 302(1)(b) and (c)

Item 14 Subsection 312(2)

144 These items repeal provisions which provide for renewal of registration. An historical record of when registrations were renewed will be kept by the MARA pursuant to paragraph 287(3)(a) which will allow interested persons to work out the period for which an agent's registration has, or had been, renewed.

Item 15 Division 6A (heading)

Item 16 Paragraphs 332A(a) and (b)

Item 17 Subsection 332B(1)

145 These items make amendments as a consequence of the repeal of provisions which enable renewal of registration.

Item 18 Collection and application of renewal fees on and after 21 March 1999

146 This item provides for the collection of charges due under the *Migration Agents Registration Renewal Charge Act 1997* before that Act was repealed, and will ensure that de-registration may take place where those charges have not been paid.

Item 19 Continuation of registration renewed after 21 March 1998 and before 21 March 1999

147 This item preserves the registration of agents whose registration was renewed under the repealed renewal provisions.

Item 20 Continued obligation to provide information after renewal of registration

148 Subitem (1) preserves the requirement on agents whose registration is renewed after 6 March 1999 under the repealed renewal provisions, to notify the MARA of the matters prescribed in subsection 312(2) of the Migration Act - these matters go to the capacity in which the agent gave immigration assistance at the time registration was renewed.

149 Subitem (2) ensures that the MARA must deregister an agent who fails to provide the information required by subitem (1).

Part 5 Repeal of the Migration Agents Registration Renewal Charge Act 1997

Item 21 The whole of the Act

150 This item repeals the *Migration Agents Registration Renewal Charge Act 1997*, as this Act is redundant once the registration renewal provisions are repealed.

REGULATION IMPACT STATEMENT

REGULATION OF MIGRATION AGENTS

1. BACKGROUND AND CONTEXT

In June 1996, the Government commissioned a review of the Migration Agents Registration Scheme (MARS or the Scheme), and its enabling legislation.

MARS is the first regulatory arrangement to be reviewed in the context of the Commonwealth Government's commitments as a party to the Competition Principles Agreement. In deciding to establish the review the Government specified that it should take into account options for future regulation of the migration advice industry, including self-regulation. The terms of reference for the review are at Attachment A.

This Regulatory Impact Statement draws on the findings of the review's exposure draft and report. The former provides an analysis of the costs and benefits of the current regulatory Scheme, while the latter reports on the findings of consultations and the deliberations of the review Taskforce, and the Reference Group that guided the review.

Consultations

The exposure draft was sent to a wide range of stakeholders (including the Reference Group and other interested parties) seeking their comment and input. Comments were received from over 50 percent of those contacted and were broadly representative of the views of industry, the legal profession, the community sector and Government agencies with a consumer affairs mandate.

Consultation comments were then incorporated into a draft final report. The Reference Group analysed the findings and guided the review to conclusions and recommendations. A list of the stakeholders is in Attachment B, including a list of those making submissions.

The consultation process found unanimous agreement from industry stakeholders that this industry had a continued need for regulation with stakeholders expressing preference for a continuation of the current Scheme with enhancements or for a co-regulation model oversighted by an independent statutory authority.

No respondent has argued for deregulation of the industry.

2. NEED FOR REGULATION IN THE MIGRATION ADVICE INDUSTRY

Background

The migration advice market is small with 2,200 migration agents currently registered. The industry is broken into the following occupational groups:

- lawyers (54 percent of registered agents);
- non-fee charging agents largely working in the community sector (24 percent);
- fee charging non-lawyer agents (22 percent).

Sixty-four percent of the lawyers practising in the industry provide only occasional migration advice.

The industry consists largely of small businesses operated by single proprietors. Many of these are run by persons of non-English speaking background who are providing services to their own communities. A number of large specialist migration advice practices exist, some of which are also legal practices. In addition, several of the large accountancy firms and major banks have specialist migration advice practices targeted at the business sector.

The consumer group consists of persons in Australia who are applying for visas or for citizenship. A small proportion of this market is informed and has market power, for example the business sponsors of skilled migrants and temporary workers. However, the largest proportion of clients are of non-English speaking background - either persons in Australia on a temporary visa seeking to remain permanently or the Australian relatives of persons outside Australia who are seeking to migrate.

The client group also includes people in Australia who are seeking refugee status and people whose visas have expired and are unlawfully in Australia as a result.

The Problem

A key finding was that the market for migration advice is characterised by information and other asymmetries between agents and their clients, resulting in consumers facing difficulties in making an informed choice about the quality of the migration advice they are purchasing. The absence of effective regulation prior to the introduction of the current regulatory Scheme resulted in the exploitation of consumers by unscrupulous operators and market failure.

The Review also found that consumers are unable to rely solely on the remedies available under consumer protection provisions of either State or Federal trade practices legislation and to date few have taken any action in the courts.

There are a number of reasons for this including lack of access, particularly relevant for a consumer group characterised by disadvantage, and the considerable delays involved in court proceedings (persons who receive inappropriate advice and are only temporarily in Australia may well be required to leave Australia as a result of the expiry of their visas before the finalisation of litigation).

Redress is more accessible through the State and Territory small claims tribunals however such processes provide only financial remedy and do not prevent an agent repeating inappropriate behaviour. In addition, there is a lack of uniformity in the size of the claims that can be brought under each jurisdiction and the procedures that are followed. Finally, such jurisdictions lack expertise in areas such as migration law.

The second key finding of the Review was that the migration advice industry was not "mature", a characteristic required for self-regulation to be effective. This finding was based on evidence that:

- there were limitations to voluntary compliance with industry standards among industry practitioners;
- the industry lacked cohesiveness, with only limited cooperation occurring in the training area between the three main occupational groups in the industry; and
- the industry association, the Migration Institute of Australia (the MIA), has only limited coverage of the industry having only 10 percent of registered agents as members:
 - the Association also lacks resources with a membership of 250, an annual income sufficient only to meet the costs of one full-time Secretary and with executive positions filled on an honorary basis.

Need for Government action

The Review found that a form of voluntary self-regulation was theoretically feasible in the migration advice market but cautioned that the migration advice market had not yet reached a level of maturity which made voluntary self-regulation achievable for the reasons cited above.

The Review also found that in order to achieve effective self-regulation, the industry association would need to develop both its position and role in the industry so that it was broadly representative of the industry. The Reference Group noted that this was an industry that facilitates the relationship between Government and its clients.

A more representative industry association could be achieved through two alternatives, both of which rely on government support. These were:

- in a climate of deregulation, provide commercial incentives for agents to join the association in the form of preferential government services to association members:
 - the Review found that it was unlikely that sufficient incentives would be offered in the current climate because of financial restraint on government and the limited opportunities provided by migration legislation; or
- provide delegated statutory power to the industry association, following a brief transitional period, to enable the association to regulate the industry.

Objectives of regulation

The objective of continued Government regulation of the migration industry is, and has been, to ensure consumer protection in order to avoid market failure. This requires regulation to address the asymmetries that characterise the market.

It was also an intention of the architects of the Scheme that regulation should act to draw the industry together in a way which would encourage self-regulation. A focus of the review was to look at the prospects for enhancing self-regulation in the industry

Current Regulatory Arrangements

The migration advice industry is currently regulated through a mandatory registration requirement established in the *Migration Act 1958* (the Act). The Act requires all persons providing "immigration assistance" to register or face penalties which are specified in the Act.

It also provides for sanctions to be applied to agents who breach professional and ethical standards as specified in a binding Code of Conduct, which is prescribed in the *Migration Agents Regulations*.

These processes are administered by a Ministerially appointed Board, which has the power to approve and refuse applications for registration and to investigate complaints. The Chairperson of the Board is the Secretary to the Department of Immigration and Multicultural Affairs (the Department) or his or her appointee. The Board is supported by a Departmental secretariat.

The Secretary to the Department (in his or her capacity as an official) has the power to approve routine applications for registration. This power has been delegated to Departmental officers in the secretariat.

The Scheme is funded on a cost recovery basis. The Migration Agents Levy Acts provide the basis for levying registration and renewal fees and establish base rates for fees and for annual adjustment of fees based on the Commonwealth Government Final Consumption Expenditure Implicit Price Deflators.

Review Findings on MARS

The findings of the Review on the Scheme were:

- that the Scheme had not placed undue barriers to entry to the migration advice market and was not anti-competitive in its effect;
- that the Scheme ensured a measure of consumer protection but that this would be improved by increasing competency standards in the industry providing this was not anti-competitive in its effect;
- that the focus of the current Scheme's complaints handling process on disciplinary outcomes was slow and expensive, providing little in the way of appropriate redress to the consumer and placing an undue compliance cost on industry; and
- that the fee structure of the Scheme was economically inefficient and characterised by inappropriate cross subsidies which had the effect of discouraging agents to develop expertise.

3. OPTIONS FOR REGULATION OF THE MIGRATION ADVICE INDUSTRY

The Review examined three options for future regulation of the migration advice industry:

- Voluntary Self-Regulation, with the option of a limited "negative licence"
- Statutory Self-Regulation
- Co-Regulation.

Each to varying degrees recognises Government policy favouring increased self-regulation and a reduction in the costs faced by business in complying with regulation.

Option I Voluntary Self Regulation

This arrangement presents no barriers to entry to the industry, other than those presented by a limited negative licence (see below). An industry body would voluntarily undertake to regulate the industry through the following mechanisms :

- membership criteria (or accreditation) which guarantee that its members meet set competency and ethical standards;
- adopting a code of conduct binding on members;
- adopting disciplinary procedures to deal with breaches of the code;
- adopting a complaints resolution scheme to resolve complaints between consumers and members; and
- sponsoring entry level courses and continuing education.

Consumers could be confident of obtaining a competent and ethical service if they use the services of an association member but get no such guarantees if they hire the services of a non-association member.

However, because of the depth of concern about consumer protection issues expressed in submissions, the review proposed that this voluntary arrangement be supported by a limited form of "negative licence", ie a provision in the Migration Act that would make it unlawful for a person to practice as a migration agent if they:

- have a criminal record, are bankrupt, or a non-Australian citizen or permanent resident; or
- were a person who had their registration refused on integrity grounds or cancelled by the Migration Agents Registration Board.

The current industry body, the MIA, has a limited membership. Unless it could attract a significant proportion of agents as members in a reasonably short time, the industry would remain largely unregulated. In order to attract members, the MIA would need to be able to offer agents commercial incentives to join the Association.

The review considered a preferential servicing arrangement such as that provided by the Australian Taxation Office to registered tax agents but provided selectively to MIA members. However, in an environment of constraint on government expenditure and in the context of migration legislation which provides little flexibility to offer preferential processing of visa applications, the review concluded that there was little which DIMA could offer in preferential services that would confer a significant commercial advantage in joining the Association.

In the absence of mandatory regulation, lawyers and other groups concerned about mandatory self-regulation would be free to decide whether or not they joined the association and participated in voluntary self-regulation. Organisations in the voluntary advice sector, which are currently required to register their staff who provide migration advice, would not be required to register, unless it was a condition of the grant they received from government that their staff be so registered.

This voluntary arrangement, including the role of the industry association, would need to be supported by a consumer information campaign to address difficulties which consumers in this industry face in making an informed choice about a migration agent.

Option 2 Statutory Self-Regulation

Under this option, the power to register and sanction agents would reside with the Minister for Immigration and Multicultural Affairs. The Migration Act would provide for this power to be delegated to an industry body following a formal agreement between Government and the industry body on the role of the industry body in the enforcement of regulation.

This provides Government with the capacity to negotiate with industry on standards maintenance, codes of conduct, consumer focus and procedural fairness.

The industry body would be subject to an accountability processes, including performance indicators and an annual reporting process. If the industry association failed to operate regulation in a fair, pro-competition and consumer friendly manner, it could lose its delegated power. This removes a large part of the concern about industry capture and the regulatory arrangement operating in the self-interest of industry.

Such a model ensures consumer protection by leaving a statutory registration process in place but this process is administered by industry rather than by a Government appointed statutory authority. Such an arrangement should be more responsive to the market and develop procedures which reduce the compliance costs of regulation. In addition, this option assists in building up the industry association by increasing its industry coverage and its capacity to manage self-regulation.

Unregistered practice would remain an offence under the Migration Act. As with the current Scheme, responsibility for investigating unregistered practice would remain with the Department.

Option 3 Co-Regulation

This option is a partnership between government and industry, with each taking responsibility for different components of regulation. Government would manage those processes in which conflicts of interest are most likely, ie registration/licensing and disciplinary processes while industry would be responsible for:

- establishing professional and ethical standards through the establishment and enforcement of a Code of Conduct;
- commissioning entry level and continuing education courses; and
- operating a scheme to resolve disputes between agents and clients.

The licensing and sanctioning function could be administered by an independent Board, as in the current Scheme, or more expensively by a statutory authority. Unregistered practice would remain an offence under the Migration Act. As with the current Scheme, responsibility for investigating unregistered practice would remain with the Department.

4. IMPACT ANALYSIS

Who is Affected

Regulation of the migration advice market is an occupational licensing issue. The key players in the regulatory process are consumers, industry and government. While regulation of the migration advice may generate some positive externalities, for example it may help reduce the extent of immigration malpractice and thus reduce the cost to the community of administering the immigration program, these benefits are difficult to prove and quantify.

The primary beneficiaries of regulation are consumers, in terms of increased protection, and industry in terms of an improved reputation and consumer confidence. The review has used this to argue that regulatory arrangements should be funded on a cost recovery basis not publicly funded.

Option I Voluntary Self-Regulation

Consumers

Benefits

- limited barriers to entry to the industry (ie those imposed in the interests of consumer protection through the "negative licence"), encouraging:
 - greater competition; and
 - reduction in prices.
- however, the migration advice market is characterised by poorly informed consumers and it is by no means certain that a reduction in prices will actually occur:
 - exploitative overcharging was a frequent complaint in the deregulated environment that existed prior to the introduction of the current Scheme.

Costs

- a reduction in consumer protection leading to possible market failure:
 - the consumer is only guaranteed competent and ethical service if they use an association member; and

- the major risk to consumers in this model is that agents will find insufficient incentives to join the industry association leaving voluntary self-regulation ineffective.

Industry

Benefits

- reduction in compliance costs:
 - the removal of a mandatory registration requirement would remove the direct costs, ie fees, imposed by the current Scheme; and
 - the indirect compliance costs of government regulation should be reduced also, in part because voluntary compliance linked to commercial incentives is cheaper to comply with than regulatory compliance based on minimum standards;
- compliance costs on segments of the industry would be reduced also:
 - lawyers have argued that the current Scheme duplicates the professional disciplinary processes operating within their profession and places an undue cost on their segment of the industry; and
 - they would be free to decide whether or not they joined the association and participated in voluntary self-regulation, a decision they could make on the basis of the commercial incentives offered by voluntary self-regulation.
- removal of cross-subsidies:
 - one of the cross subsidies that characterise the current Scheme is the fee-free registration offered agents working for community-based agencies;
 - their registration costs under the current Scheme are met by fee charging agents; and
 - under a voluntary arrangement, this cross subsidy would disappear with agencies deciding whether or not they would seek the registration of their staff, based on the needs of their clients and the nature of the grants they receive from government.

Government

- no additional cost to government:
 - policing the "negative licence" would not be an additional function and could be absorbed into the investigatory functions currently undertaken by the Department;
- gradual improvement in voluntary compliance with regulation, as the industry develops cohesiveness and a stronger identity, leading to a better informed consumer group, should reduce the need for government expenditure on compliance activities over the long term.

Summary

The benefits to industry of reduced compliance costs are substantial but are outweighed by an unacceptable cost in respect of loss of consumer protection. In addition, the risk of market failure and the loss of consumer confidence in the industry outweighs the benefit to industry of reduced compliance costs.

Option 2 Statutory-Based Self-Regulation

Consumers

Benefits

- maintains the level of consumer protection offered by the current Scheme, particularly as the industry regulator will be accountable to government on this issue;
- in the medium term levels of consumer protection should improve as:
 - an industry regulator will be more responsive to the market than a government regulator, operating a more efficient and cost effective regulatory process; and
 - this will lead to faster complaints resolution, more consumer oriented outcomes and better consumer information.
- Continuing Profession Development (CPD) criteria ensure continued competency of registered agents and hence maintains the quality of advice consumers receive.

Costs

- possible anti-competitive effects if the regulatory process is subject to self-interested administration or "industry capture", operating in the interests of existing players in the market by raising barriers to new entrants and thus raising prices to consumers:
 - the industry body's accountability to government should reduce the risk of this happening.
- agents may raise their fees to cover costs of meeting CPD criteria.

Industry

Benefits

- reduction in compliance costs resulting from regulation that is more responsive to the needs and changes of the market and that is more flexible:
 - the introduction of mediation for complaints resolution will speed up complaints handling and reduce the need for disciplinary actions;

- significant reduction of cross subsidies:
 - voluntary agents will now be required to pay a registration fee, although a lesser one than agents in the private sector;
 - all agents in the private sector will be subject to the same fee regime (there will be no subsidy for agent agents who work as employees or those who handle less than five cases); and
 - the duplication of the complaints and disciplinary processes which is of concern to the legal profession would be reduced through negotiation between the parties.
- the mandatory CPD requirement will enhance the professional image of the migration advice industry:
 - the costs to the industry of meeting the CPD criteria will be offset partly by the lower re-registration fee.

Costs

- the mandatory education requirement for re-registration may prove anti-competitive because intending agents may take into account a higher barrier for being able to practice after the first year:
 - a further anti-competitive impact may occur where agents fail to meet the re-registration requirements and drop out of the industry.

Government

- no additional cost to government - unregistered practice would remain an offence and would continue to be investigated by the Department as under the current Scheme;
- gradual improvement in voluntary compliance with regulation, as the industry develops cohesiveness and a stronger identity, leading to a better informed consumer group, should reduce the need for government expenditure on compliance activities over the long term; and
- the mandatory educational requirements will be of benefit to the public interest as improved competency of agents will contribute to the integrity of the Migration Program, and those whose competency did not meet the required standard will no longer be in the industry.

Summary

This model provides clear benefits in respect of consumer protection and, in comparison with the current Scheme, the compliance costs on industry are substantially reduced.

Option 3 Co-Regulation

Consumers

Benefits

- retains the level of consumer protection afforded by the current Scheme; and
- unlikely to restrict entry thereby affecting the level of competitiveness of the migration advice industry and raising prices.

Costs

- may result in slightly higher prices as a result of industry facing slightly higher compliance costs (see below).

Industry

Benefits

- lower compliance costs than the current Scheme (but higher than Options I and 2):
 - industry has responsibility for complaints handling and standards maintenance which should operate more cost efficiently than those of the current Scheme.

Costs

- higher compliance costs than Options I and 2:
 - government administered registration and disciplinary processes, plus confusion about jurisdictional issues, are likely to present higher compliance costs; and
 - in addition, splitting the regulatory function between government and industry may result in uncertainty about jurisdiction and proportionally greater compliance costs.

Government

Benefits

- no additional cost to government:
 - unregistered practice would remain an offence and would be investigated by the Department as occurs under the current Scheme.
- gradual improvement in voluntary compliance with regulation, as the industry develops cohesiveness and a stronger identity, leading to a better informed consumer group, should reduce the need for government expenditure on compliance activities over the long term but at a slower rate than Option 2.

Summary

This model provides a benefit in respect of consumer protection and reduced compliance costs on industry in relation to the current Scheme. However the compliance costs on industry are likely to be higher than those imposed under the alternative options.

Summary of Costs and Benefits

First Preference

Option 2 benefits both industry, through reduced compliance costs, and consumers through at least maintaining the level of protection offered by the current Scheme. It has no direct impact on government although may reduce the cost of enforcing compliance in the longer run. This model allows for industry self-regulation while avoiding the risk of industry capture which can be anti-competitive in its effect. In comparison with the current Scheme, this option is neutral in its effect on competition.

Less Preferred Options

Option 3 benefits both industry, through reduced compliance costs, and consumers through at least maintaining the level of protection offered by the current Scheme. Although the compliance costs should be reduced somewhat, the extent of the reduction will not be as great as under Options I and 2.

Option 3 has no direct impact on government although may reduce the cost of enforcing compliance in the longer run. This model allows for limited industry self-regulation with a reduced risk of industry capture which can be anti-competitive in its effect. In comparison with the current Scheme, this option is neutral in its effect on competition.

Option I is not preferred. It primarily benefits the industry by reducing compliance costs but this could be at the price of reduced consumer protection and a loss of consumer confidence in the industry. There is some benefit to consumers from wider choice and potentially reduced prices but this will be outweighed by the risk to consumer protection.

This option would have a positive impact on competition, in comparison with the current Scheme, but, if implemented before the issues of improving voluntary compliance with industry standards and consumer awareness have been addressed, the minor gain in competitiveness could be at the expense of market failure.

5. IMPLEMENTATION

The Government has decided that Option 2, statutory self-regulation, be adopted. The current Scheme has been extended for a further six months to 21 March 1998 to enable the MIA to prepare to take on the role of industry regulator, including building its membership base.

This option meets the objectives of increased self-regulation, reduced government involvement and reducing the compliance costs on industry while maintaining a measure of consumer protection.

The link between the industry body and government on the enforcement of regulation provides more flexibility than the current Scheme. It should enable both parties to respond to market change and to revise the detail of regulation where necessary. The delegation of regulatory power also ensures that the industry body remains accountable and avoids the problem of industry capture.

The implementation of statutory self-regulation should be viewed as an opportunity for the industry to develop a self-regulatory structure, improve competency levels, voluntary compliance and, through improved consumer information, to enhance consumer awareness and bargaining power. This option is intended as a staging post to consideration of voluntary self-regulation.

In line with the intention to move to voluntary self regulation following a period of statutory self-regulation, and with Government policy on regulatory review, this legislation is subject to a sunset clause to come into effect two years from the commencement of the new arrangement. This will allow time for the Government to review the arrangements prior to the sunset clause taking effect.

ATTACHMENT A**REVIEW OF THE MIGRATION AGENTS REGISTRATION SCHEME****including****REVIEW OF****THE MIGRATION AGENTS REGISTRATION (APPLICATION) LEVY ACT, 1992
AND THE MIGRATION AGENTS REGISTRATION (RENEWAL) LEVY ACT, 1992****TERMS OF REFERENCE**

The purpose of the Review is:

1. to evaluate the Migration Agents Registration Scheme (the Scheme) and its enabling legislation and regulations.
2. to report on the appropriate arrangements for any regulation of the migration advice industry, including the prospects for enhanced self-regulation, taking into account:
 - 2.1 the goals of regulation;
 - 2.2 the costs and benefits of the Scheme to the community, industry and consumers;
 - 2.3 the effects of the Scheme on consumer interests, the competitiveness of businesses seeking to provide migration advice and efficient resource allocation;
 - 2.4 the feasibility of reducing compliance costs to the migration advice industry, including small business; and
 - 2.5 the findings of the Joint Standing Committee on Migration review of the Scheme.
3. The Review will research and report on:
 - 3.1 the nature, intent and impact of the legislation and regulations on the migration advice industry, consumers and the community;
 - 3.2 the conduct of migration agents, including the nature, extent and costs of non-compliance;

- 3.3 options for any regulation, including self-regulation;
- 3.4 any arrangements that may need to be established, in the absence of industry-specific regulation, to develop alternative sources of redress for consumers with complaints about the activities of migration agents; and
- 3.5 proposed legislative changes, including a timetable for implementation and transitional arrangements.

4. The Review of the Scheme will be undertaken by the Department of Immigration and Multicultural Affairs, guided by a Reference Group with an independent Chairperson and comprised of industry and consumer representatives, which will report to the Minister.

The review of the Levy Acts will be undertaken by a Committee of officials and will also report to the Minister.

5. The following consultations will be undertaken:

- 5.1 Office of Regulation Review;
- 5.2 representatives of comparable self-regulating industries;
- 5.3 representatives of current migration industry "peak" bodies and the MAR Board; and
- 5.4 any other interested person or group.

6. The Minister will present a preferred option to Government, including any necessary legislative response.

ATTACHMENT B**List of Stakeholders***Industry*

The Migration Institute of Australia*
 The Law Council of Australia*
 Australian Chamber of Commerce and Industry
 Council of Small Business Organisations of Australia
 Institute of Chartered Accountants in Australia
 Australian Society of Certified Practising Accountants
 Australian Federation of Travel Agents*
 Inbound Tourism Organisation of Australia*
 Law Society of New South Wales
 Law Institute of Victoria

courtesy copies to:

Financial Planning Association
 Life Insurance Complaints Service Ltd
 The Insurance Brokers Disputes Facility*

Non-Government Organisations

The 5 voluntary advice agencies funded under the Scheme (IARC, VIARC etc)*
 The Federation of Ethnic Communities Council of Australia
 The Ethnic Communities Council of New South Wales*
 Australian Council of Trade Unions
 New South Wales Migrant Welfare Workers Cooperative Ltd
 Migrant Resource Centre Forum of NSW*

Government

Migration Agents Registration Board*
 Office of Regulation Review
 Federal Bureau of Consumer Affairs*
 Legal Aid Commission of New South Wales*
 Office of the Legal Services Commissioner of New South Wales*
 New South Wales and Victorian Consumer Complaints Tribunals*
 Immigration Review Tribunal*
 Refugee Review Tribunal*

courtesy copies to:

Australian Securities Commission
Australian Taxation Office
South Australian Bureau of Consumer Affairs

Individuals and Companies

Brett Slater
Price Waterhouse
Coopers Lybrand

* those from whom submissions were received.

Unsolicited submissions were received from Gilton Business Associates and two other practising agents.

Submissions were also received from the following Migrant Resource Centres

: St George
: Fairfield
: Adelaide

Printed by Authority by the Commonwealth Government Printer



9 780644 510905