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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**MIGRATION LEGISLATION AMENDMENT
(MIGRATION AGENTS) BILL 1999**

EXPLANATORY MEMORANDUM

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

MIGRATION LEGISLATION AMENDMENT (MIGRATION AGENTS) BILL 1999

OUTLINE

Overview

- 1 The Migration Legislation Amendment (Migration Agents) Bill 1999 ("the Bill") amends Part 3 of the *Migration Act 1958* ("the Migration Act").
- 2 The amendments provide for:
 - the extension of the operation of Part 3 of the Migration Act, which deals with migration agents, for 3 years;
 - more cost-effective publication requirements in relation to the suspension and cancellation of migration agents; and
 - the expansion of the Migration Agents Registration Authority's ("MARA's") powers to access client files where:
 - the registration of a migration agent is cancelled or suspended;
 - a migration agent becomes incapacitated;
 - a migration agent dies or is voluntarily deregistered; or
 - a migration agent's registration expires
 and to provide copies of relevant documents to clients.

FINANCIAL IMPACT STATEMENT

3 The amendments to the Migration Act are Budget neutral. The extension of the operation of Part 3 of the Migration Act will increase the forward estimates of administered revenue and expenses of the Department of Immigration and Multicultural Affairs by \$0.47m in 1999-00, by about \$1.8m for 2000-01 and 2001-02, and \$1.3m for 2002-03. (The arrangements are due to cease in March 2003.) These estimates are consistent with the 1998-99 level. Migration agent registration fees are collected by MARA and paid into consolidated revenue, increasing administered revenue estimates. Consolidated revenue is then appropriated in order to return the registration fees to MARA for its administration increasing administered expenses.

REGULATION IMPACT STATEMENT

4 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 1999**NOTES ON INDIVIDUAL CLAUSES****Clause 1 Short title**

1 The short title by which this Act will be known is the *Migration Legislation Amendment (Migration Agents) Act 1999*.

Clause 2 Commencement

2 Subclause 2(1) provides that sections 1, 2 and 3 of the Act and Schedule 1 to the Act commence on the day that the Act receives the Royal Assent.

3 Subclause 2(2) provides that subject to subsection (3), Schedule 2 commences on Proclamation.

4 Subclause 2(3) provides that Schedule 2 will commence 6 months after the Act receives the Royal Assent if it has not already commenced on Proclamation.

Clause 3 Schedule(s)

5 This clause provides that, subject to section 2, the provisions of each Act set out in the items of the Schedule to this Act are amended or repealed as indicated and any other item has effect according to its terms.

SCHEDULE 1 – Amendments commencing on Royal Assent

Item 1 Division 7 of Part 3 (heading)

6 This item repeals the heading to Division 7 of Part 3, and replaces it with a heading which reflects the new cessation date of that Part.

Item 2 Subsection 333(1)

7 This item extends the operation of Part 3 of the Migration Act for three years. Part 3 of the Migration Act will therefore cease to operate on 21 March 2003.

Item 3 Subsection 333(4)

8 This item is consequential to the extension of Part 3 of the Migration Act and amends subsection 333(4) so that if a person pays the annual registration fees (enabling him or her to be registered as a migration agent) after 21 March 2002, the regulations may provide for the refund of all or part of those fees.

Schedule 2 – Amendments commencing on Proclamation

Item 1 Subparagraphs 305(1)(b)(ii), (iii) and (iv)

9 This item repeals subparagraphs 305(1)(b)(ii) to (iv) (inclusive) and substitutes new subparagraph 305(1)(b)(ii). The effect of the amendment is to provide for more cost-effective publication requirements in relation to the suspension or cancellation of the registration of a migration agent.

Item 2 At the end of section 305

10 This item inserts new subsection 305(4) in order to avoid any doubt that section 25D of the *Acts Interpretation Act 1901* does not apply to a requirement under paragraph 305(1)(b).

11 Section 25D of the *Acts Interpretation Act 1901* provides that, where an Act requires a tribunal, body or person making a decision to give written reasons for the decision, the instrument giving the reasons shall also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

12 Under paragraph 305(1)(a) of the Migration Act, the Migration Agents Registration Authority must give an agent who has had his or her registration cancelled or suspended written notice of the cancellation or suspension and the reasons for it. The requirement to publish a statement in the prescribed way under paragraph 305(1)(b) is an additional requirement, and it is not intended that section 25D of the *Acts Interpretation Act 1901* should apply to this additional requirement.

Item 3 After section 305

13 This item inserts new section 305A. New section 305A provides for the Migration Agents Registration Authority to be able to publish a statement about the cancellation or suspension of the registration of a migration agent in a variety of ways.

14 A key purpose of the ability to publish such a statement is to warn potential clients of the suspension or cancellation of the agent's registration. In addition, as the migration advice industry is still a relatively young industry, the ability to publish the statement also serves to demonstrate to the public and potential migration agents the ethical standards and conduct that are required to practise as a migration agent.

15 New subsection 305A(5), which provides that a civil or criminal action or proceeding does not lie against a person for publishing in good faith a copy, fair extract, or fair summary of a statement under subsection 305A(1), is based on a similar provision at subsection 134A(4) of the *National Health Act 1953*.

Item 4 After Division 3 of Part 3

16 This item inserts new Division 3A into Part 3 of the Migration Act.

17 New section 306A sets out the objects of new Division 3A. New Division 3A aims to ensure that clients of inactive or deceased agents are not unduly disadvantaged by the agent becoming inactive, or by the death of the agent.

18 New section 306B relates to inactive agents and sets out when a person becomes an inactive agent, and when the person ceases to be an inactive agent.

19 New section 306B also relates to new section 306D, below. Under new section 306D, the Migration Agents Registration Authority may, in certain circumstances, require an inactive agent to make copies of client documents and produce those copies to the Migration Agents Registration Authority.

20 Paragraph 306B(a) provides that a person becomes an inactive agent if the person ceases to be a registered migration agent because his or her registration lapses under section 299 of the Migration Act. The person will then remain an inactive agent until he or she becomes registered again, or at the end of 2 years after he or she ceased to be a registered migration agent, whichever happens first.

21 Under paragraph 306B(b), a person becomes an inactive agent if he or she becomes deregistered under section 302 of the Migration Act. As above, the person is an inactive agent until the first of the following occurs:

- the person becomes a registered agent again; or
- 2 years have passed since the person became deregistered.

22 Under paragraph 306B(c), a person becomes an inactive agent if his or her registration is cancelled under section 303 of the Migration Act. In such cases, the person will remain an inactive agent for the purposes of these provisions for a period of 2 years.

23 Under paragraph 306B(d), a person becomes an inactive agent if his or her registration is suspended under section 303 of the Migration Act. In such cases, the person will remain an inactive agent until the suspension of the person's registration ceases.

24 Under paragraph 306B(e), a person becomes an inactive agent 14 continuous days after the person became physically or mentally incapable of giving immigration assistance. The person remains an inactive agent until the person ceases to be physically or mentally incapable of giving immigration assistance.

25 New section 306C sets out the meaning of the word "client" for the purpose of Division 3A. A client is:

- a current or prospective visa applicant;
- a cancellation review applicant; or
- a person nominating or sponsoring, or seeking to nominate or sponsor, a visa applicant for the purposes of the regulations.

26 New section 306D sets out the circumstances in which the Migration Agents Registration Authority can require inactive agents to obtain, and produce to the Authority, copies of client documents. The section is related to new subsection 306K(1), below, and is intended to enable the Migration Agents Registration Authority to assist the clients of an inactive agent.

27 New section 306D sets out the steps that the Migration Agents Registration Authority must follow in obtaining copies of documents from an inactive agent. In particular, under new subsection 306D(2), the Authority must give the inactive agent a notice which requires the inactive agent to make copies of client documents described in new paragraph 306D(1)(b) and to produce those copies to the Authority within the period and in the manner specified in the notice.

28 New subsection 306D(4) provides that the notice does not have to identify any particular client or clients. This is because the Migration Agents Registration Authority may not be aware of exactly who the clients of an inactive agent are before the Migration Agents Registration Authority receives the copies of the client documents.

29 One of the purposes of obtaining the copies of client documents is for the Migration Agents Registration Authority to ascertain exactly who the clients are, so that the clients can be assisted by being referred to a registered migration agent who is not an inactive agent.

30 New subsection 306D(5) provides that the period for producing copies, specified in the notice, must not be less than 14 days. This is consistent with Commonwealth Criminal Law Policy.

31 New section 306E sets out the circumstances in which the Migration Agents Registration Authority can require the legal personal representative of a deceased person, if the deceased person was an inactive agent at the time of death, to obtain, and produce to the Authority, copies of client documents.

32 New section 306E is substantially the same as new section 306D, above, except that it relates to the power to obtain copies of client documents from the legal personal representative of a deceased person who was an inactive agent at the time of death. It is also related to new subsection 306K(2), below, and is intended to enable the Migration Agents Registration Authority to assist the clients of an inactive agent who has died.

33 New section 306F sets out the circumstances in which the Migration Agents Registration Authority can require the legal personal representative of a deceased person, if the deceased person was a registered agent at the time of death, to obtain, and produce to the Authority, copies of client documents.

34 New section 306F is substantially the same as new sections 306D and 306E, above, except that it relates to the power to obtain copies of client documents from the legal personal representative of a deceased person who was a registered agent at the time of death. As for new section 306E, above, new section 306F is also related to new subsection 306K(2), below, and is intended to enable the Migration Agents Registration Authority to assist the clients of a registered agent who has died.

35 New section 306G provides that a person is entitled to be paid compensation by the Commonwealth for complying with a notice (requiring the copying of documents) under new section 306D, 306E or 306F.

36 New section 306H provides that a person is guilty of an offence if they are subject to a requirement under new section 306D, 306E, or 306F and they contravene the requirement. The penalty for contravening such a requirement is a maximum of 30 penalty units.

37 The Note at the end of new section 306H highlights the fact that Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

38 New section 306J makes it clear that the privilege against self-incrimination applies in respect of new sections 306D, 306E and 306F. That is, a person is excused from producing a copy of a document under new section 306D, 306E or 306F on the ground that the production of the copy might tend to incriminate the individual or expose the individual to a penalty.

39 New section 306K makes provision for the Migration Agents Registration Authority to give copies of documents that have been produced to it under section 306D, 306E or 306F to clients.

40 New subsection 306K(1) provides that where a copy of a document is given to the Migration Agents Registration Authority under section 306D by an inactive agent, and the document relates to the affairs of a particular client of the inactive agent, the Authority must give the copy to that client and give the client information about how to contact other registered agents as soon as is practicable.

41 New subsection 306K(2) provides that where a copy of a document is given to the Migration Agents Registration Authority under section 306E or 306F by the legal personal representative of a deceased inactive agent or a deceased registered agent, and the document relates to the affairs of a particular client of the deceased agent, the Authority must give the copy to that client and give the client information about how to contact other registered agents as soon as is practicable.

42 The Migration Agents Registration Authority will not hand a list of "favoured" migration agents to the client. Rather, the Authority will give the client information to assist him or her to find a new agent, such as the address of an Internet site listing all registered agents, and / or refer the client to listings of registered migration agents in telephone directories.

43 New section 306L ensures the validity of the operation of the provisions of new Division 3A, even where the operation of the Division might be characterised as resulting in the acquisition of property from a person otherwise than on just terms.

44 However, where such an acquisition of property occurs, the Commonwealth must pay compensation of a reasonable amount to the person in respect of the acquisition. New subsection 306L(2) provides that where an amount cannot be agreed upon, the person from whom the acquisition has been made may institute proceedings in the Federal Court for the recovery from the Commonwealth of the reasonable amount of compensation, to be determined by the court.

Item 5 At the end of section 316

45 This item amends section 316 to broaden the functions of the Migration Agents Registration Authority to include such other functions that are conferred on the Authority by Part 3 of the Migration Act.

Item 6 After subsection 333(3)

46 This item inserts new subsection 333(3A). The effect of new subsection 333(3A) is that if Part 3 of the Migration Act ceases, any liability incurred under section 306G or 306L does not also cease.

Item 7 Application of amendments – section 305 of the *Migration Act 1958*

47 This item makes it clear that if a migration agent's registration was suspended or cancelled prior to the commencement of the amendments in Schedule 2 to this Act, section 305 of the Migration Act, as it was immediately before it was amended by this Act, applies in respect of the suspension or cancellation.

48 That is, the amendments in this Act to section 305 of the Migration Act do not apply where a cancellation or suspension decision was made in respect of a migration agent's registration before Schedule 2 to this Act commenced.

Item 8 Application of amendments – Division 3A of Part 3 of the *Migration Act 1958*

49 This item provides that new Division 3A of Part 3 of the Migration Act applies in relation to immigration assistance given or anticipated to be given, before, at or after the commencement of this item.

50 For example, if an agent has given immigration assistance to clients before the commencement of this item, and then becomes an inactive agent on the day of the commencement of Schedule 2 to this Act, then the Migration Agents Registration Authority will be able to require that inactive agent to make copies of client documents (subject to the requirements of section 306D).

***REVIEW OF STATUTORY SELF-REGULATION OF
THE MIGRATION ADVICE INDUSTRY***

REGULATORY IMPACT STATEMENT

1. Reasons for Government Intervention

1.1. Background

1.1.1. The Regulatory Impact Statement has been undertaken to assist the Government to decide on the most appropriate regulatory arrangements for the migration advice industry, following the cessation of current legislation in March 2000.

1.1.2. Following the 1996-97 review of the Migration Agents Registration Scheme, under the Commonwealth Legislative Review Program, the Government decided that the migration advice industry should move to voluntary self-regulation through a transitional two-year period of statutory self-regulation. Statutory self-regulation commenced on 21 March 1998 when a revised Part 3 of the *Migration Act 1958* came into effect. On 23 March 1998, the Minister for Immigration and Multicultural Affairs appointed the Migration Institute of Australia (MIA) as the Migration Agents Registration Authority (MARA) to administer the relevant provisions of the Act and to undertake the role of industry regulator.

1.1.3. The Government also decided that statutory industry self-regulation arrangements should terminate on 21 March 2000 and a comprehensive review of the regime should be undertaken during the transitional period.

1.1.4. The review has now been undertaken and has assessed the effectiveness of the current statutory self-regulation framework. This RIS is based on the findings and the report of the review. The RIS has been prepared in accordance with the Office of Regulation Review's *A Guide to Regulation* and COAG Guidelines for the Review of Professional Regulations.

1.2. What is the Problem?

1.2.1. Regulation of the migration advice industry has undergone significant change in the last decade. It has moved from a largely unregulated industry in the 1980s, through Government regulation to the current approach where the industry body, the MIA, as the MARA, has statutory responsibility to regulate the industry.

1.2.2. Prior to 1992, the migration advice industry had been subject to only minimal regulation. Following amendments to the Migration Act in 1989, decision-making on migration applications became more complex and there were increasing consumer complaints about migration agents. The Migration Agents Registration Scheme (MARS) was introduced in 1992 as a result of parliamentary concerns about the need to protect consumers seen as vulnerable to exploitation.

1.2.3. Statutory self-regulation, introduced in 1998, aimed to move the industry towards self-regulation whilst maintaining the consumer protection elements of the government regulation scheme.

1.2.4. In considering whether or not the migration advice industry still needs to be regulated from March 2000, the recent review of the industry considered advice provided by the Commonwealth Office of Regulation Review (ORR) in *A Guide to Regulation* (December 1998). Regulatory intervention may be justified to deal with 'market failure' and to attain social goals, such as consumer protection, in instances where, for example:

- there is insufficient or inadequate information to allow consumers to make decisions that are in their best interest
- there is a monopoly or abuse of power and new entrants to the market will not result in reductions in prices, and
- there are costs and benefits to other parties not involved in the transaction, including the wider community.

Information Available to Consumers

1.2.5. Consumers of migration advice frequently lack information to make decisions in their best interest in choosing between migration agents. For example

- it is difficult for a consumer to assess whether an agent has achieved a good outcome unless the consumer understands the operation of the migration and humanitarian programs and the extent to which he or she satisfies the requirements of particular visa classes
- as visa applications can take a long time to process from application to decision, especially in classes where levels of demand exceed available places, the consumer will often become aware of the outcome of the service only a considerable time after paying fees and/or engaging the agent
- few consumers would use migration agents more than once and therefore do not have the experience that may be required to assess the price and quality of the service provided by an agent in relation to other agents
- some consumers do not speak English and may not be familiar with legal processes in Australia and therefore are not well informed of their consumer rights
- consumers seeking permission to stay in Australia will generally be required to leave Australia if their residence application is unsuccessful. Such clients, and those applying from offshore (overseas), may not perceive themselves to be in a strong position to complain about the quality of service provided.

Characteristics of Market including Abuse of Power and Pricing Issues

1.2.6. The history of regulation of the migration advice industry indicates that there has been considerable concern in the past about abuses of power in the industry.

1.2.7. There are indications from MARA complaints data that some migration agents work within particular non-English speaking background communities whose members may be reluctant to seek advice from an agent outside their community. The personal nature of information required in some sponsorships or migration applications, as well as consumers' possible insecurity about their migration status if temporary or illegal entrants could provide agents with a high degree of power over consumers.

1.2.8. Information on the prices of services is not readily available to consumers of migration advice. There is no recommended scale of fees in use in the industry. The long term nature of contracts to provide migration services can make it difficult for clients to withdraw from an agreement with an agent if they are not happy with the service provided or the costs as they may not be entitled to a refund of fees for work not yet undertaken. Costs are often levied for initial consultations so that clients may find it expensive to compare costs of different agents.

1.2.9. Because consumers are not able to compare costs and quality of service easily, competitive pressures do not necessarily arise from the entry of new agents into the industry.

Costs and Benefits to Other Parties

1.2.10. As mentioned above, there are also substantial national interest issues arising out of migration advice transactions which affect the broader community and the government.

1.2.11. Unethical practice can result in 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 migration and humanitarian programs and increasing the workload for the Department through handling of applications that are fraudulent or have little hope of success. Where applicants have merit or judicial review rights, this can lead to substantial administrative and legal costs to government.

1.2.12. Grant of visas to migrants who have misrepresented their circumstances can lead to substantial public interest issues, if these migrants have criminal intent or pose significant health problems.

1.2.13. Selection of applicants who do not meet criteria in relation to business and skilled programs can also lead to a loss of economic potential with opportunity costs for the general economy.

1.2.14. Analysis shows that the market will not necessarily reward competent and ethical practice and consumers are not generally well placed to choose providers on the basis of price and quality of services. It is therefore concluded that the nature of the migration advice industry, including client characteristics and the nature of the migration advice transaction, means that there would be significant consumer protection problems and national interest issues if regulation was removed from the industry.

1.3. What is the Risk?

1.3.1. The recent review of the migration advice industry found that around 200 complaints had been received each year over the last five years against registered agents, initially by the Department and in the last year by MARA, in its role as industry regulator. In 1998-99, an additional 165 complaints about migration agents were investigated by the Department primarily involving practice by unregistered agents. In addition, as mentioned above, consumers' lack of service and benchmarking information makes it difficult for them to access agents on the basis of quality and price and makes them vulnerable to exploitation.

1.3.2. Whilst only a minority of agents are complained about (six per cent in 1998-1999), the impacts on individual consumers and the community from incompetent and unethical practice can be substantial. For example, MARA is currently investigating two complaints by clients in which fees of more than \$100,000 were paid. One of these may result in charges relating to immigration malpractice. One unregistered agent investigated by the Department and currently being prosecuted had around 800 clients, several of whom had paid fees of around \$40,000. The Department has also recently been investigating the alleged involvement of registered migration agents in instances of "people smuggling".

1.3.3. There are substantial risks associated with unethical agents engaging in fraudulent behaviour which undermines the integrity of the migration and humanitarian programs, as clients may not report agents' fraudulent behaviour if they perceive it to advantage their application.

2. Objectives

2.1. What are the objectives of Government action?

2.1.1. 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 regulation/policy currently in place? Who administers it?

2.2.1. The MIA, as the MARA, was delegated responsibility by the Minister for administering the regulatory framework when the current statutory self-regulation framework came into effect in March 1998. The regulatory framework is contained in Part 3 of the *Migration Act 1958*, the *Migration Agents Registration Renewal Charge Act 1997*, the *Migration Agents Registration Application Charge Act 1997* and associated regulations which set out Code of Conduct and Continuing Professional Development requirements, and issues relating to the setting of fees, advertising on entry to the profession and so on.

2.2.2. Part 3 of the Migration Act has a sunset clause and ceases to have effect on 21 March 2000. The Government introduced the statutory self-regulation framework with the intention of moving to voluntary self-regulation after a transitional period.

2.2.3. A Deed of Agreement between the Minister and the MIA sets out detailed policy and procedures including in regard to the relationship between MARA and the Department. The Deed of Agreement outlines support to be provided by the Department in areas such as legal advice, indemnification and assistance with litigation, operating procedures for mediation and investigation of complaints against agents, privacy principles and other issues.

MARA's Role

2.2.4. Under statutory self-regulation, MARA's functions include

- dealing with new registrations and re-registrations
- monitoring the conduct of registered agents
- investigation of complaints about registered agents
- taking disciplinary action against registered agents, and
- administration of continuing professional development requirements.

The Department's Role in the Regulatory Framework

2.2.5. The Department retains responsibility for investigating allegations of offences by migration agents under the Migration Act 1958, including in relation to unregistered agents. The Department may also investigate allegations relating to other offences under the Act, including involvement in people trafficking and presenting false documents in visa applications.

2.2.6. Penalties available for offences can be high, with up to ten years imprisonment for unregistered practice.

3. Options For Regulation

3.1. Background to Regulatory Options

3.1.1. The discussion of the nature of the problem found that the migration industry should continue to be regulated in view of the consumer protection and national interest issues and the prospect of 'market failure' should regulation be removed.

3.1.2. The main regulatory issue for consideration is therefore the progress of the migration advice industry towards voluntary self-regulation and whether it is appropriate to move on from the statutory self-regulation arrangements imposed as an interim measure in 1997.

3.2. Is voluntary self-regulation appropriate?

3.2.1. Voluntary self-regulation of the migration advice industry would mean that the MIA would have sole responsibility for regulating the industry. Voluntary self-regulation is generally interpreted to mean that there is no legislative framework, apart from the consumer protection mechanisms such as small claims tribunals and the potential for applicants to take legal action against agents under the Trades Practices Act and/or civil action for damages.

3.2.2. Some of the expected advantages of voluntary self-regulation would be

- savings in compliance costs for the government and the industry body as those agents who did not wish to participate in registration would not need to do so
- because industry is responsible for setting codes, these could be more responsive to actual practice and take account of profitability and similar issues, and
- easing of entry standards and professional development requirements could lead to increases in competition and reductions of fees.

3.2.3. Without legislative requirements, conformity to the MARA's requirements including the Code of Conduct would rely on the competitive advantages that were seen to accrue to agents from accreditation or membership.

3.2.4. The analysis of the market, outlined in the discussion of the need for regulation, suggests that the industry is not yet ready for voluntary self-regulation, as the basic requirements for voluntary self-regulation are not addressed by the current market

- there are strong national interest issues related to the integrity of the migration and humanitarian programs
- there is considerable potential for abuse by agents and a history in the industry of exploitative conduct, and
- the market will not necessarily reward good practice as
 - consumers are not easily able to discern a good provider because of the nature of the transaction and their lack of knowledge of the market, and
 - consumers are frequently vulnerable especially if they lack English skills, access to information and legal redress, and do not have the right of residence in Australia.

3.2.5. As well, additional characteristics that contribute to the success of voluntary self-regulation are not met in the migration advice industry

- despite increases in the coverage of the MIA since statutory self-regulation became operational in March 1998, there are still only 24% of migration agents who are members of the MIA. While it could be expected that this membership rate could increase if membership of the MIA became the accreditation factor rather than registration, this indicates the level of support for voluntary involvement in the industry body
- the lack of homogeneity in the industry with three main sectors (lawyers, non-lawyers and the voluntary sector) could affect the viability of voluntary registration. It is likely that some community sector agents and lawyers would choose not to be registered, as they may prefer to belong to other professional organisations. This could reduce the number of potential members below a level sufficient to support an industry body for those not covered by other professional bodies.
- the description of the market above indicates that consumers are not well placed to discriminate between providers on the basis of service. This means that agents who chose to belong to an industry association are unlikely to achieve a significant competitive advantage accruing from their membership. If membership is associated with restrictions associated with compliance with codes of conduct and professional standards, the incentive may not be enough to outweigh the costs for some migration agents leading to a low participation rate in the industry organisation.

3.2.6. If voluntary self-regulation were introduced prematurely, there could be the following impacts

- low level of participation in the industry association could lead to a decline in compliance with industry standards and consumer protection
 - only association members would have explicitly indicated their commitment to providing ethical service as a migration agent and only members would be sanctioned by the association in cases of misconduct.
 - unethical practice of non-members would need to be primarily addressed by the consumer taking action through consumer protection mechanisms
- lack of regulation of non-members could lead to negative effects on the integrity of the migration and humanitarian programs. There are likely to be more instances of malpractice and fraud in relation to migration legislation with fewer agents bound by the Code of Conduct and subject to investigation by the association.

3.2.7. This RIS finds that the migration advice industry is not ready for full self-regulation in March 2000 in view of

- the low rate of membership of the industry association, the MIA, and the lack of homogeneity in the industry
- the vulnerability of consumers and the significant consumer protection and national interest issues, and
- features of the migration advice industry including the nature of the migration advice transaction and the lack of consumer understanding of the benefits of using a registered/professional agent.

3.2.8. It is noted that the nature of the migration advice industry and of migration advice transactions may mean that there is always an argument for a strong regulatory framework and that it will be difficult for even a committed and capable industry body to work without some statutory support. It is suggested that the need for continued legislative underpinning should be considered in any future consideration of industry regulation.

Other Regulatory Options

3.2.9. It is not considered appropriate to return to stricter government regulation in view of the government's decision to move to self-regulation.

3.2.10. Quasi regulation is not considered appropriate because

- it is subject to the same concerns as voluntary self-regulation relating to the viability of the industry association, with the lack of homogeneity of the industry and the lack of effective incentives for voluntary compliance; and
- it does not offer any advantages over the current statutory self-regulation arrangements, which are developing industry ownership of the regulatory framework and involvement in setting standards, seen to be advantages of quasi-regulation.

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 affected by problems and solutions in the migration advice industry include consumers of migration advice, migration agents, a range of regulatory bodies, the government and the community.

Consumers

4.1.2. Consumers of migration advice include applicants for visas or review of cancellation of visas and those who are sponsoring or nominating applicants for visas. The recent review of the industry was not able to obtain data on the number of consumers using migration agents, except in relation to applicants for Protection Visas. While approximately two-thirds of applicants for Protection Visas use migration agents, these results cannot be generalised to other visa categories. Consumers include applicants with little money and resources as well as those with greater skills, seeking entry in classes such as the business skills class.

Migration Agents

4.1.3. The registered migration advice industry is comprised of three main sectors

- migration agents with legal qualifications, estimated to be around 40% of the industry
- migration agents without legal qualifications. These include agents who have undertaken specific training designed for migration agents, or for long established agents, through transitional requirements introduced in 1992, and
- agents who do not charge fees for advice (non-fee charging agents). Non-fee charging agents include agents working for community-based organisations such as immigration advice centres and migrant resource centres. Non-fee charging agents comprise around 17% of the industry and include agents with and without legal qualifications.

4.1.4. On 30 June 1999 there were 2210 migration agents registered, of whom nineteen per cent were new entrants to the industry in the year 1998-99.

Regulatory bodies

4.1.5. As discussed above, the MIA was appointed as MARA, the industry regulator in March 1998. MARA has leased premises and appointed staff and has a substantial interest in the regulation of the industry. There would be substantial costs in relation to loss of expertise and termination costs if MARA were to cease operating as the industry regulator.

4.1.6. If MARA were no longer undertaking regulating the migration advice industry, other agencies with regulatory or legal responsibilities could be affected. Agencies regulating lawyers and accountants could be expected to take on responsibility for regulating migration agents who were accountants and lawyers. As well, there could be increased call on consumer protection agencies such as small claims tribunals and courts.

Government and Community

4.1.7. National interest issues and community impacts relating to the administration of the migration and humanitarian programs were outlined above.

4.1.8. If changes were made to the regulatory framework, the Department could be affected by:

- increases in processing workload if there was a reduction in the availability of competent and ethical advice
- a need for additional investigation of malpractice if there was seen to be an increase in fraudulent behaviour by agents
- a reduction in its investigation responsibilities if unregistered practice was no longer an offence.

4.2. How will each proposed option affect existing regulations and the roles of existing regulatory authorities?

Statutory self-regulation

4.2.1. It is proposed to extend the existing arrangements of statutory self-regulation for three years until March 2003 and to enhance some elements of the framework relating to consumer protection and improving competence and ethical standards in the industry.

4.2.2. This option will allow MARA to continue its operations. It is expected that proposed enhancements will result in improved effectiveness and efficiency in MARA's operations. The extension of current arrangements would have relatively little impact on MARA and other regulatory bodies.

Voluntary Self-Regulation

4.2.3. If voluntary self-regulation were introduced this would have impacts on other regulatory bodies as well as substantial impacts on MARA which would need to wind down its operations. It is difficult to predict the effect on other agencies as:

- it is not possible to predict the level of complaints about agents in a less regulated environment
- it is not possible to predict the number of agents who would choose to be covered by the MIA in a voluntary capacity rather than other industry or professional bodies and
- the number of agents choosing to remain members of the industry body could be affected by future changes to industry policies such as codes of practice and fees and the perceived viability of the industry body.

4.3. Identification of Expected Impacts of the Proposed Options as Likely Benefits and Costs and Effects on Particular Groups

4.3.1. The tables on the following pages have summarised the costs and benefits of the two main options that can be considered for regulation of the migration advice industry: the extension of the current statutory self-regulation framework and moving to voluntary self-regulation. Even though it is acknowledged that voluntary self-regulation is not considered to be a desirable option at this stage, it has been examined in view of the Government's previous decision to move to voluntary self-regulation.

4.3.2. The costs/benefits analysis draws on costs and benefits relating to the administration of the current statutory self-regulation scheme discussed in more detail in the separate report of the review. Costs relating to the voluntary self-regulation are based on the predicted consequences of moving to voluntary self-regulation.

4.3.3. The recent review of the migration advice industry found that statutory self-regulation had achieved its objectives of maintaining and improving consumer protection, competence and ethical standards in the migration advice industry. However, it was noted that there were still substantial concerns about the ethics and conduct of a small segment of the industry. The review commented that if current arrangements continued, it would be expected that there would be an increase in the consumer protection available as procedures relating to mediation, the Conduct Advisory Panel, entry level requirements and continuing professional development were further developed and implemented.

4.3.4. The review also found that statutory self-regulation had not adversely affected competition in the industry, and that the barriers imposed by entry costs and competence requirements were not unduly restrictive in view of the potential impacts on consumers of incompetent advice. The review commented that competition is limited as a result of consumers' inherent lack of knowledge of migration issues and the nature of the migration advice market.

4.3.5. The Department has obtained assistance from consultants Howard Partners to undertake the quantitative costs/benefits analysis. Howard Partners commented that many of the fields in the cost/benefit framework were difficult to quantify in financial terms. It was noted that the limited availability of data at present makes it extremely difficult to quantify costs and benefits at this stage to consumers or business. At present it is only possible to quantify the costs and benefits relating to government.

4.3.6. Howard Partners concluded that without time for the current regime to become fully worked-in, and the consumer and business costs and benefits to be fully assessed, it would be premature to move to voluntary self-regulation on the basis of a formal cost/benefit assessment of this type. They noted that a forward-looking assessment could only be made with any degree of accuracy once the current regulatory regime had been fully established and its cost/benefit impact assessed.

Table 1: Statutory Self-Regulation Benefits and Costs

	Benefits		Costs	
	Description	Estimate (\$)	Description	Estimate (\$)
Consumers	Protection for consumers through complaints mechanisms and mandatory registration	Protects fees paid by consumers: range from nil to over \$100,000, commonly around \$2,500- to \$4,000.	Costs of regulation passed onto consumers Depends on number of clients per agent estimated around 500-1000 clients per agent	Approx \$6-12 per client
	Consumers benefit from competent service	Savings in pain and suffering	Reductions in choice due to minimum standards excluding low cost providers	Cannot guarantee consumers would benefit from reduced costs
	Less mobility in industry means service provided over term of contract		Consumers may be tied to long term contracts	
Business	Industry codes provide framework for ethical practice Less ethical agents required to conform to standards. Greater incentives for ethical behaviour.		Compliance costs include up-front costs, such as costs of qualification, fee, advertising, library. Ongoing costs include registration, professional development, compliance with other standards.	\$2,500 plus training costs. Ongoing costs estimated around \$6,000- less for agents who can share expenses or agents in the voluntary sector
	Agents able to influence policies of industry body to ensure relevant to needs		Less able to directly influence regulatory framework	
Government	DIMA able to influence regulatory setting, take action against unethical practice by unregistered agents Ethical practice results in information to clients and reduces DIMA's processing costs.		Government doesn't receive fee income Costs to DIMA of policy advice and investigation of unregistered practice	Costs of statutory self-regulation to DIMA are estimated to vary between \$200,000 and \$400,000, depending on arrangements with MARA and other issues
Community	More protection in relation to national interest issues		Costs of enforcement higher	Costs to taxpayer minimal per person (around 4 cents)

Table 2: Voluntary Self-Regulation Benefits and Costs

	Benefits		Costs	
	Description	Estimate (\$)	Description	Estimate (\$)
Consumers	<p>Greater competition among agents with potential for fee reduction. May not be passed on</p> <p>Potentially more agents – giving wider choice</p> <p>Professional bodies may compete for coverage and provide more information about services</p>	<p>Could range from nil upwards to around \$60</p> <p>As above</p>	<p>Fringe businesses not complying with regulatory standards</p> <p>“Buyer beware” – ineffective sanctions for non-compliance</p> <p>Redress through courts and tribunals may be costly</p> <p>These costs could be passed onto consumers Potential restrictions on entry by industry bodies collaborating – thus limiting choice and keeping fees high</p>	<p>Costs relate to lost fees around \$2,500-\$4,000</p> <p>As above</p>
Business	<p>Reduction in costs due to reduced compliance; ability to increase returns. Greater flexibility and possibility of extending business scope</p> <p>Agents can belong to preferred industry body</p>	<p>Savings estimated at around \$6,000</p> <p>Around \$500 for non-fee charging agents</p>	<p>Fees could increase for agents who stay in association if association less viable</p> <p>Costs and risks involved in administering a self-regulatory scheme. New professional bodies require “one-off” investments in set up, including staffing and other administrative infrastructure, policy development.</p>	<p>Costs influenced by numbers of members</p> <p>Costs influenced by numbers of members</p>
Government	<p>Reduced costs to DIMA of policy advice and monitoring</p> <p>Reduced costs to DIMA of policy advice and monitoring</p>	<p>\$100,000 to \$400,000</p>	<p>Possible investment in capacity building – training, information, communication, especially if new industry bodies</p> <p>Unethical conduct could result in enforcement action for immigration malpractice and increased processing costs.</p> <p>Other agencies required to assist consumers eg courts, legal professional bodies.</p>	<p>\$100,000</p>
Community	<p>Small savings in cost of enforcement possible</p>	<p>Minimal</p>	<p>May be costs in relation to national interest issues.</p>	

4.4. Identify the Data Sources and Assumptions used in making these Assessments

4.4.1. Data relating to the costs of regulation have been derived from information and estimates and have been informed by discussions with departmental officers and the regulatory body.

4.4.2. Data on registrations collected in the review informed assessments of the extent to which current arrangements and compliance costs were restrictive. This data indicate that 20% of agents were new entrants to the industry in 1998-99. Information on fees charged by unregistered agents supports the assumption that reduction in compliance costs will not necessarily be passed onto consumers. (The Department found in a recent investigation that one unregistered agent charged up to \$40,000.). The estimates of costs for consumers were based on estimates that agents assist 500 to 1,000 clients each year.

4.4.3. The accuracy of some estimates could be improved by survey work in the industry, which would provide an improved basis for future estimate of costs and benefits of regulatory options.

4.4.4. It has been difficult to assess the costs and benefits of voluntary self-regulation due to uncertainty relating to:

- whether Government would require agents to belong to an industry body and if so, whether other bodies would seek to become the industry body
- whether the MIA would continue to be viable
- the level of malpractice that would develop in a deregulated environment
- Government response to any perceived increase in malpractice
- the extent to which any savings in compliance costs for agents would be passed on to consumers and
- whether a less regulated environment would result in reduced fees for consumers.

4.5. Summarise the outcomes for each option listed

4.5.1. Statutory self-regulation provides benefits of protection to consumers, with protection for the community in relation to the integrity of the migration and humanitarian programs. DIMA benefits from improved information to clients and assistance with processing. Agents pay compliance costs, but the regulatory environment is stable with government regulation providing a check on the industry body and helping ensure that entry to the market is not unreasonably restricted. Unethical competitors are liable to have their registration cancelled.

4.5.2. Voluntary self-regulation is likely to provide reduced benefits to consumers, as agents would not be required to comply with competence standards and codes of conduct and agents may not pass on any savings in costs. Agents benefit from potential savings in compliance costs but costs of belonging to an industry body may increase. DIMA could face increased processing costs and increased costs of investigating breaches of legislation.

4.5.3. Key assumptions of this comparison are that:

- clients receive some protection under current arrangements, with unethical practice subject to investigation by MARA for registered agents and DIMA for unregistered agents
- agents providing a lower level of service, with lower competence would enter a less regulated industry
- levels of malpractice would increase in a less regulated environment
- the market will not necessarily reward competent and ethical practice as consumers are not easily able to discriminate between agents before entering a contract and some consumers will be happy to deal with unethical agents if that is seen to improve their chances of success in obtaining a visa.

5. Consultations

5.1. *Who are the main affected parties?*

5.1.1. Affected parties include consumers, agents, the MIA, and other regulatory and professional bodies and Government departments with an interest in consumer issues.

5.1.2. A discussion paper was disseminated to 44 stakeholders as part of the review process, including ethnic community organisations and peak bodies, the MIA and the MARA, bodies representing lawyers, non-fee charging agents, state government departments with responsibility for consumer protection and fair trading issues and statutory review bodies such as the Refugee Review Tribunal and Migration Review Tribunal who can form an overview of agents' conduct. (These are listed at Attachment A).

5.1.3. Views of stakeholders expressed in general correspondence received during the review period were also considered.

5.2. *What are the views of these parties?*

5.2.1. Stakeholders were asked to comment on options for future industry regulation and the performance of the current arrangements of statutory self-regulation. Fourteen submissions were received.

5.2.2. In relation to the issue of future regulation of the migration advice industry, a large number of submissions to the review, including the submission from MARA, commented that the industry was not yet ready for self-regulation. The majority of respondents commented that the existing arrangements should be retained for a period of between two and five years. Submissions generally expressed support for MARA's performance as the industry regulator. MARA commented that the industry was not ready for self-regulation due to:

- the lack of professionalism by a small number of agents
- the lack of coverage by the MIA
- a need for greater community awareness and understanding of the scheme and
- the need to increase cohesiveness within the migration advice industry.

5.2.3. Most submissions commented on the need for greater protection for consumers and proposed extensions of the regulatory framework as well as improvements in administrative procedures to enhance the current protection available. An area which received particular attention was the efficiency of complaints handling processes, including improving accessibility for consumers. Considerable support was expressed for continuing professional development measures to improve agents' competence.

5.2.4. The recommendations of the review and this RIS are generally consistent with the views expressed in submissions.

6. Preferred Option

6.1. Provide a brief summary of each option

6.1.1. This RIS has reviewed regulatory options for the migration advice industry and whether conditions for voluntary self-regulation are met.

6.1.2. The paper finds that statutory self-regulation provides protection for consumers and promotes ethical and competent conduct by agents, protecting the national interest. Costs of compliance do not appear to be unduly restricting entry to the profession and are not unreasonable in view of the consumer protection and national interest issues. Registration data indicate reasonable mobility in the industry.

6.1.3. Voluntary self-regulation was also assessed in view of the government decision to move the industry towards voluntary self-regulation. This was seen to involve risks that to consumers and the national interest as it was considered that there were insufficient economic incentives to provide for voluntary compliance with industry standards.

6.2. What is the Preferred Option and the Main Assumptions supporting this Option and Leading to Rejection of Other Options?

6.2.1. This paper finds that the migration advice industry is not ready for full self-regulation in March 2000 in view of

- 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 one industry body
- the vulnerability of consumers and the significant consumer protection and national interest issues, and
- features of the migration advice industry including the nature of the migration advice transaction and the lack of consumer understanding of the benefits of using a registered/professional agent, which would result in insufficient incentives for good, inexpensive service, including voluntary membership of an industry association.

6.2.2. In view of the analysis of industry characteristics and the very real risks associated with introducing voluntary self-regulation prematurely, this paper recommends that statutory self-regulation should be extended. In order to provide appropriate protection for consumers and the national interest it is recommended that the current framework be continued until at least March 2003.

6.2.3. A 3 year extension would provide time for the proposed changes flowing from the review to be implemented and to [produce an impact on the industry in relation to industry maturity and the development of capability to sustain a voluntary self regulatory regime. Within this period the Department should measure the degree of change in the industry and should undertake a further review of statutory self regulation and the appropriateness of moving to voluntary self regulation while maintaining momentum for change in the industry.

6.2.4. The current review of the industry has been constrained in investigating the effectiveness of statutory self-regulation and the capacity of the industry to move to full self-regulation by the fact that the current arrangements were introduced a little over one year ago. This has not provided time for any significant changes to occur in the market and for the new arrangements to be implemented and developed.

6.2.5. It is noted that any new arrangements require an establishment phase with substantial costs and create uncertainty in the market. Consumer awareness is built up over time.

6.2.6. It is therefore proposed that the extension of statutory self-regulation should be for three years to allow sufficient time for the industry to mature and for appropriate data to be collected to inform a review during the period of the extension.

7. IMPLEMENTATION AND REVIEW

7.1. How will the preferred option be implemented?

7.1.1. The preferred option requires extension of the current statutory framework.

7.1.2. The review of statutory self-regulation recommended enhancements to the existing framework which will require changes to the *Migration Act 1958*, regulations and to the Deed of Agreement between the MIA and Minister for Immigration and Multicultural Affairs.

7.1.3. The extension of the current arrangements will not have impacts on other agencies.

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

7.2.1. The proposed option was strongly supported by stakeholders in submissions to the review and will be easily understood by consumers and agents.

7.2.2. The review of the industry suggests areas for the development of policies and procedures by the industry body, which will improve the information available to consumers, agents and others on the current system. This includes, for example, the development of more objective, consistent and transparent criteria for assessing whether an agent satisfies registration requirements and for the assessment of courses for continuing professional development.

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 discussed earlier in the RIS, compliance costs vary between agents but are estimated to be around \$6,000 per annum for fee-charging agents. Agents working in a company or partnership may reduce costs, including through sharing a professional library and training costs. Non fee-charging agents have reduced costs, as they have reduced registration fees. Members of the industry body and non fee-charging agents are eligible for reductions in fees charged for training by the industry body.

7.3.2. The review of the migration advice industry recommended that fees for migration agents should be set at a level which reflects an independent assessment of the regulation costs to achieve the set objectives and meet regulatory requirements. This would encourage MARA to be efficient in performing its regulatory function and is likely to result in reductions in registration fees for agents. The review also recommended that MARA's payment to DIMA for the provision of support services such as legal advice and similar support should reflect the actual costs involved to DIMA in providing the service, again to produce more efficient operations and reduce costs to agents and the taxpayer.

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 report of the review recommends that the existing regulatory framework be extended for three years, and reviewed within that time. It recommended that to support the move towards voluntary self-regulation, the Department and the MARA should establish a framework of information gathering and monitoring to support a future review of industry. It was noted that this would include setting clear milestones to monitor

- the effectiveness of the changes proposed in the review
- the development of the industry in relation to
 - competence and ethical standards
 - MIA industry coverage and performance in a regulatory role, and
- changes to levels of consumer awareness which could support a less regulated environment.

7.4.2. The review proposed that the need for continued legislative underpinning should be considered in any future consideration of industry regulation. It was noted that despite significant gains in the protection available to consumers over the last decade, the nature of the migration advice industry and of migration advice transactions may mean that there is always an argument for a strong regulatory framework and that it may be difficult for even a committed and capable industry body to work without some statutory support.

ATTACHMENT A**Organisations Invited to Comment on Discussion Paper**

Amnesty International
 Australian Catholic Migration and Refugee Office
 Australian Chamber of Commerce and Industry
 Australian Council of Social Services
 Australian Red Cross Society
 Australian Refugee Association Inc
 Australian Section of the International Commission of Jurists
 Consumer Affairs Division
 Department of Fair Trading
 Ethnic Communities Council of NSW
 Ethnic Council of Shepparton and District Inc
 Federation of Ethnic Community Councils of Australia
 Fremantle Migrant Resource Centre
 Grant-in-Aid Workers Cooperative
 Immigration Advice and Rights Centre
 Immigration Review Tribunal
 Law Council of Australia
 Legal Aid Commission of NSW
 Legal Aid Commission of Western Australia
 Legal Services Commission of South Australia
 Logan and Beenleigh Migrant Resource Centre
 Migrant Resource Centre of Canberra and Queanbeyan
 Migrant Resource Centre of Central Australia
 Migrant Resource Centre of Northern Tasmania
 Migrant Resource Centre of South Australia
 Migrant Resource Centre of Southern Tasmania
 Migration Agents Registration Authority
 Migration Institute of Australia
 Migration Review Tribunal
 National Council of Churches in Australia
 North Eastern Region MRC
 Northern Suburbs Migrant Resource Centre
 NSW Migrant Resource Centre Forum
 Office of Fair Trading and Business Affairs
 Office of the Legal Ombudsman of Victoria
 Office of the Legal Services Commissioner
 Refugee Advice and Casework Service
 Refugee and Immigration Legal Centre
 Refugee Council of Australia
 Refugee Review Tribunal
 South Brisbane Immigration and Community Legal Service Inc
 Townsville Migrant Resource Centre
 United Nations High Commission for Refugees

Victorian Foundations for the Survivors of Torture and Trauma