FRAGOMEN

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The Hon Jason Wood MP
Assistant Minister for Customs, Community Safety and Multicultural Affairs
Parliament House
Canberra ACT 2600

Via online portal

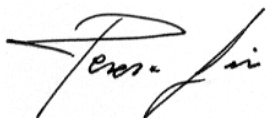
Dear Mr Wood

Submissions: Consultation Report – Migration Agents Instruments Review

Thank you for the opportunity to provide submissions in response to the Consultation Report – *Migration Agents Instruments Review*.

We are pleased to provide these brief submissions to this review. If we can assist with policy development in this area in any other way, please do not hesitate to contact me on (02) 8224 8518 or by email to **tliu@fragomen.com**.

Yours sincerely



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1. ABOUT FRAGOMEN

Fragomen is one of the world's leading global immigration law firms, providing comprehensive immigration solutions to our clients. Operating from over 50 offices in 29 countries (with capabilities in more than 170 countries), Fragomen provides services in the preparation and processing of applications for visas, work and resident permits worldwide and delivers strategic advice to clients on immigration policy and compliance.

In Australia, Fragomen is the largest immigration law firm with over 110 professionals and support staff nationally, including Accredited Specialists in Immigration Law, legal practitioners, Migration Agents and other immigration professionals. With offices in Brisbane, Melbourne, Perth and Sydney, Fragomen assists clients with a broad range of Australian immigration services from corporate visa assistance, immigration legal advice, audit and compliance services, litigation and individual migration and citizenship applications.

Further information about Fragomen, both in Australia and globally, is available at:
www.fragomen.com.

2. RESPONSE TO THE REVIEW

Fragomen supports the Migration Agents Instruments Review and acknowledges the changes which have been made to date which have enhanced the professional standards of Migration Agents and the standing of the Australian migration advice industry. We do believe however, that there remains scope for further change to further lift these standards to create a world class industry.

We have made key comments against each of the three identified themes outlined in the Consultation Report, noting we have only addressed selected items within each theme.

Theme	Reform option	Fragomen comments
Theme 1: A Qualified Industry - Review of mandatory entry qualifications	A review of migration advice industry entry qualifications to commence no sooner than 2023, supported by ongoing monitoring and evaluation.	We support this reform option to enable analysis of a greater cohort size of RMAs and enable adequate assessment / evaluation of the higher knowledge requirements and change of Capstone provider.
Theme 1: A Qualified Industry - English requirements	• Updating the Occupational Competency Standards (OCS) for RMAs to include English language expectations/ requirements and create an associated practice guide, detailing RMA obligations. • Increase the level of English required for registration as an RMA from IELTS 7 (minimum score of IELTS 6.5 in all four components of speaking, listening, reading and writing) to 'proficient' English, which equates to IELTS 7 in all four components or the equivalent under accepted tests. • Expand the number of English language test providers that the OMARA accepts for registration purposes	We support the reform option to increase English proficiency requirements to 'proficient English' given the complexity of migration legislation, policy and procedure. We also support measures to update the OCS to effectively set expectations regarding English language proficiency and to expand access to wider range of English language test providers.
Theme 1: A Qualified Industry - Introducing a provisional licence with a supervision requirement	The introduction of a mandatory 12-month provisional licence for newly registered migration agents. Provisional licensees will operate under the supervision of a fully licensed RMA and provide immigration assistance only with applications to the Department and related matters.	We support the introduction of a mandatory provisional licence and period of supervised practice for new RMAs as we believe that the current entry requirements alone are inadequate to prepare a RMA to competently provide immigration assistance on the full range of matters without any restrictions, mentoring or supervision.

		However, we believe that the proposed 12-month period of supervision is insufficient and should be set at 24 months to harmonise the requirements across RMAs and legal practitioners practising in this area of law. For additional comment, please see section 3.
Theme 2: A Professional Industry – Review of registration requirements	• Strengthen Fit and Proper Person requirements to include bankruptcy checks, spouse and associate details, and checks in departmental systems as part of the initial registration application. • Amend the Act to allow the OMARA to refuse registration in circumstances relating to integrity or criminal conduct. • Reduce regulatory burden by removing the 30-day publishing requirement for first time registrations. • Increase the period of registration from 12 months to 36 months for agents who have not had any substantive complaints or referrals made against them for the five year period immediately before their registration application is assessed. • The OMARA updates its process of character checks for registration applicants to include a coordinated identity verification process and criminal history check for all applicants at the time of initial and subsequent registration.	We support these broad measures to strengthen the Fit and Proper Person test and integrity/criminal conduct checks and reduce regulatory burdens for RMAs. We would support review of the proposed draft to ensure reasonableness and full clarity of the provisions (e.g. Circumstances relating to "integrity").
Theme 2: A Professional Industry – Publishing information on pricing arrangements	That an individual who applies for repeat registration be required to submit an approved form identifying the range of fees charged by the individual across all visa classes, for the preceding	We support this reform option to provide consumers with a single point of reference to access average migration agent fees, more easily undertake market research and as a

	12 months of practice, for the purpose of the OMARA publishing aggregated information on its website.	means of mitigating exploitation of vulnerable consumers by providing a benchmark against which to measure quoted fees. However, we recommend that this also clearly outline that this is *aggregated* and provide guidance as to the factors that may influence the fees charged e.g. due to the experience of the RMA, the complexity of the case, level of service required, urgency etc. This guidance should also recognise the difference in fee models, for example, services charged on a flat fee basis vs hourly rates on time/spent basis.
Theme 2: A Professional Industry – Developing a fidelity fund or other methods for recompense	Do not introduce a fidelity fund, noting the current fiscal and operational environment, industry size, and adequacy of existing consumer protections.	As noted in our submission to the 2020 Discussion Paper – *Creating a world class migration advice industry*, Fragomen supports the introduction of a Compensation Fund which would be funded through a levy imposed at the time of initial or repeat registration of RMAs and from which clients could be compensated if they suffer pecuniary loss due to a default by a RMA because of a dishonest act or omission. This could supplement new powers of a Complaints Commissioner to order compensation and should also be augmented with a higher level of professional indemnity insurance coverage than currently prescribed. Whilst acknowledging the Department's concerns as to implementation costs of an industry fidelity fund due to the 'size and risk profile of the migration advice industry' we note

		the approximate numbers of RMAs (based on 2018 figures) would be comparable to the total legal practitioner numbers in the Australian Capital Territory and South Australia.
Theme 2: A Professional Industry – Introducing a tiering system	Introduce a three-tier system of registration for all RMAs that provides a graduated approach to RMAs' career progression and the provision of immigration assistance before the Minister and the AAT.	Supported, however should a tiered registration be adopted, we recommend a two-tier system of registration. For additional comment, please see **section 4** below.
Theme 2: Enhanced proficiency through Continuing Professional Development	• Use the CPD system to deliver the required training for a tiering system (should a tiering system occur). • Strengthen oversight of CPD, including new quality controls for CPD activities and clarifying CPD provider standards. • Increase the number of compliance audits of CPD providers and make the results publicly available.	We support these measures to utilise the CPD framework to support defined career pathway for RMAs under a tiered registration system (please see our comments in section 4), strengthen quality controls for CPD activities and providers and to clarify the CPD provider standards, including what constitutes 'interactive' elements for a Category A activity. Regarding the potential quality controls as outlined in 2.5.7.2 and specifically the proposal for a Compulsory CPD plan which would require the RMA to consider their educational needs for the year ahead, list the relevant OCS and which would be submitted to the OMARA with registration renewal forms, we recommend that this should only be required as a remedial CPD plan for RMAs who were previously sanctioned. Our view is that this is otherwise placing unnecessary administrative burden on the RMA. Whilst we support the measure to require CPD providers to have a refund policy to enable

		consumers to make informed decisions, we recommend that this is only mandatory for CPD providers who offer CPD activities on a commercial basis.
Theme 3: Combatting misconduct and unlawful activity – Immigration assistance: definition and scope	• Reframe the 'clerical work' exception to require supervision, introduce a definition, rename to 'administrative assistance', and limit the number of supervisees an RMA can supervise. • Address the use of business structures to avoid responsibility for misconduct, including amending the Act to apply to all businesses, and not just individuals, which provide immigration assistance. • Release a factsheet explaining the distinction between general advice and legal advice on the matters under the Australian Citizenship Act 2007. • Remove and clarify certain exemptions for provision of immigration assistance in the relevant sections of the Act. • Replace the terms 'visa applicant' and 'cancellation review applicant' with 'person' in the relevant sections of the Act.	Overall, we support these measures, however submit that reframing of the exception to require supervision and limitation on the number of supervisees an RMA can supervise may have unintended practical consequences for larger and/or high volume migration practices that operate under a model of having a substantial and dedicated team of administrative workers that assist with clerical work across a number of offices and teams. In addition, where the 'clerical work' exception can be more clearly defined and renamed, then it would allow better compliance and enforcement activity, and potentially remove the need to introduce any limitations on the number of supervisees which may otherwise be impractical and assumes that Australian immigration clerical assistance provided by an individual is the only task of that individual. Please refer to our comments at **section 5**.
Theme 3: Combatting misconduct and unlawful activity – Measures to address unlawful and offshore immigration assistance	• Increase consumer awareness of the risks associated with the use of unregistered offshore and unlawful onshore providers of immigration assistance, and encourage the use of the OMARA's Register of migration agents to find and contact an RMA.	We are supportive of these measures to address unlawful and offshore immigration assistance, including unregistered immigration assistance by Education agents, noting the challenges in amending Part 3 of the Act to apply extraterritorially and obstacles at international law in applying enforcement measures offshore.

	• Do not make the OMARA regulatory framework apply offshore. • Do not allow offshore unregistered migration agents to be listed with the OMARA. • Do not introduce categories of persons permitted to be authorised recipients. Instead, ensure departmental delegates have adequate training to identify suspicious authorised recipients, and assess the efficacy of the relevant section of the Act.	We support measures to increase education and awareness in the market regarding offshore representation by persons who are not Registered Migration Agents. We also agree that the following measures should be further examined and progressed as appropriate by the Department: • Make legislative and system changes to allow the Department to accept visa applications only from the applicants, RMAs, unrestricted legal practitioners, or exempt persons. • Introduce an unregistered immigration assistance Public Interest Criterion that could result in a decision to refuse to grant a visa where unregistered or unlawful immigration assistance has been received. • Require visa applicants to attest in a declaration as to whether they have received immigration assistance or other relevant assistance. • Develop risk profiles for individuals, occupations and industries where the risk of unregistered immigration assistance is high, and conduct audits of high-risk visa applications. Please also refer to our comments at **section 5** with respect to the practical restrictions that restricting RMAs to create only one

		ImmiAccount may impose on Sole Practitioner RMAs who are engaged as contractors.
Theme 3: Combatting misconduct and unlawful activity – Penalties for unlawful immigration assistance providers	• Increase financial penalties in section 280(1), and consider increasing financial penalties in sections 312A and 312B from 60 penalty units to 250 penalty units. • Apply penalties to businesses, not just individuals. • Require payment of reparation and commercial gain. • Remove differentiation between fee-for-service and no fee-for-service. • Introduce the ability to apply both financial infringements and/or imprisonment for related offences under sections 281(1), 281(2), 282(1), 283(1), 284(1) and 285(1) of the Act. • Introduce provisions to make it a criminal offence to knowingly provide immigration assistance for the purposes of enabling serious and organised crime.	We are supportive of these measures to enhance the range of options available for imposing liability under legislation and to increase the financial penalties for unlawful immigration assistance, in line with financial penalties for other Australian regulatory regimes such as the legal profession and tax agent services.
Theme 3: Combatting misconduct and unlawful activity – The powers of the OMARA to address RMA misconduct	Amend certain sections in Part 3 of the Act to strengthen OMARA's powers, clarify their scope and remove redundant provisions: There is potential to amend Part 3 of the Act, to: • empower the OMARA to compel the provision of documents under threat of penalty • remove redundant subsections	We are supportive of these measures to strengthen and clarify the scope of OMARA's powers to address RMA misconduct.

	• simplify the information gathering powers and penalties • include provisions to bar RMAs based on fitness and propriety and clarify that the OMARA may bar • agents for complaints received during their period of registration as well as after their registration has lapsed • better reflect that OMARA is part of the Department.	
Theme 3: Combatting misconduct and unlawful activity – Improving compliance with AAT practice directions	Progress existing initiatives to improve compliance in conjunction with relevant recommendations within this report, including the provisional licence under supervision and a tiering system.	We support the recommendation that the Department should continue to monitor and evaluate of the efficacy of the following measures to ensure that ongoing compliance issues can be promptly addressed if they arise: • Provision in the revised Code of Conduct which will provide more emphasis on adhering to professional requirements when representing clients at the AAT. • Developing policy guidelines to be released concurrently with the revised Code which will provide examples and explanations about themes discussed in the Code, including representing clients at the AAT and steps RMAs can take to ensure they assist the AAT and its members to fulfil the AAT's statutory objective. • Improved liaison between the OMARA and the AAT • Tiering/provisional licencing – please refer to below comments at **sections 3 and 4.**

		• Information/education sessions for RMAs involving AAT speakers. In addition to these measures, we recommend a greater focus is placed on merits review in the Graduate Diploma in Australian Migration Law and Practice.
Theme 3: Combatting misconduct and unlawful activity – Establishing an independent regulator	Do not proceed with an Immigration Assistance Complaints Commissioner. Instead, strengthen relevant policies, legislation, processes and procedures to achieve the intention of the recommendation.	As noted in our submission to the 2020 Discussion Paper – *Creating a world class migration advice industry*, Fragomen supports the introduction of a single statutory authority, an Immigration Assistance Complaints Commissioner to handle all complaints relating to both RMAs and individuals who are unregistered, and would be responsible for detecting deterring, disrupting, investigating and prosecuting unregistered practice. The authority should also have conferred upon it, appropriate statutory powers to carry out these functions, including the ability to file injunctions, obtain evidence, compel witnesses to testify and order refunds of inappropriate fees, penalties and/or appropriate compensation. This would be consistent with the approach taken by Canada, which is introducing a College of Immigration and Citizenship Consultants, a new regulator for both immigration and education agents, which will have increased statutory powers as proposed by the JSCOM. The independent body should also be adequately resourced to

		ensure that it can effectively exercise the powers that are conferred upon it, including detecting deterring, disrupting, investigating and prosecuting unregistered practice. We believe these measures will enable stronger enforcement and regulation of the migration advice profession and serve as a deterrent to further address misconduct by RMAs and individuals providing immigration assistance without appropriate registration.

3. THEME 1: A QUALIFIED INDUSTRY - INTRODUCING A PROVISIONAL LICENCE WITH A SUPERVISION REQUIREMENT

Consistent with the recommendations of the Hodges Review and Kendall Review, we support the introduction of a requirement for new RMAs to undertake a period of supervised practice, as we believe the current entry requirements alone are inadequate to prepare an individual to competently provide immigration advice on the full range of matters without any restrictions, mentoring or supervision. However, given the complexity of migration law, we believe that the period of supervised practice should be set at 24 months to harmonise this with the supervisory period for legal practitioners practising in this area of law. This supervisory period is also consistent with the New Zealand regulatory framework. A 24-month period also recognises that for a portion of RMAs, immigration advice and assistance forms just one component of the individual's work and therefore a 24-month period allows sufficient regularity and scope of work being undertaken under supervision

This requirement for supervised practice would provide an opportunity for new RMAs to further develop their skills with appropriate support through supervised practical experience, without exposing consumers to the risk that might flow from having their immigration affairs managed by an inexperienced RMA, and equally without exposing the RMA to the risk of potential litigation or disciplinary action.

As noted, the introduction of supervised practice in this way for RMAs would also align with the requirements imposed on lawyers before they are eligible to obtain an unrestricted practising certificate and would harmonise the requirements across RMAs and lawyers practising in this area of law.

We believe that there would also be benefits in ensuring that the period of supervised practice is supported by an appropriate framework to ensure consistency, integrity and satisfactory achievement of required competency outcomes, similar to the requirements imposed by the New Zealand Immigration Advisers Authority, such that the regulator and consumer can gain confidence as to the competence of the individual before they progress to the next tier, being unrestricted practice.

Additional measures that could be introduced include an independent competency-based assessment administered by the regulator to ensure the RMA has met the required standards for unrestricted practice and this could include repurposing the Practice Ready Program. Such an assessment would cover not only technical knowledge of migration law and policy, but also include procedural aspects, Code of Conduct, ethics and professional practice as well as soft skills such as communication and writing skills. Alternatively, records demonstrating completion of the supervised practice and achievement of prescribed competencies should be required to be submitted for assessment at time of repeat registration (e.g. at the one year and two-year mark), or application for unrestricted registration, and could be subject to further audit and assessment, or conditions being imposed on a RMA's registration, if deemed necessary.

We note that concerns were raised during the review conducted by the Joint Standing Committee on Migration as to the practical challenges that might be faced by newly registered agents in being able to secure this period of supervised practice, given there is a high proportion of sole traders and a relatively low proportion of RMAs with more than 5 years of experience. Some proposed solutions as referenced in the Consultation Report include allowing the provision of supervision via the internet, for example, utilising the Virtual Community of Practice model[1] as an alternative or part of a supervisory arrangement for RMAs, especially for those who are unable to secure a supervisory arrangement as part of their employment (for example, sole traders), with the Report noting that "supervised practice could encompass a range of models, including but not limited to, an employer-employee relationship, or a less formal mentor-mentee structure, an internship or cadetship"[2].

We are of the view that supervision works most effectively in a traditional employee and employer arrangement. Where some or all of the supervision is part of an employment arrangement between the supervisor and new RMA, then consideration could also be given to the regulation of the engagement during this period in terms of minimum remuneration levels. Supervisors should also be prohibited from receiving any form of benefit from the RMA in return for agreeing to a placement. Rather, appropriate recognition could be facilitated for example, through the ability to claim CPD points, or a concessional registration fee.

We would however expect that there would still be a good proportion of those entering the migration profession as a sole trader as is currently the situation. In this case where there would be no employer/employee relationship and instead a less formal supervisor/supervisee or mento/mentee structure, an alternative would be to impose a requirement for these individuals to complete a Practice Management course (described below) before practising as a sole trader, and that there are strict measures to audit and review the supervisory arrangements between a supervisor and the sole practitioner RMA.

Sole Practice

Prior to seeking to practice as a sole trader, we are of the opinion that the RMA would benefit from undertaking and completing a Practice Management Course, similar to the requirement imposed on lawyers who wish to pursue practice as a sole trader or as a principal of a legal practice. Such a course would cover areas such as professional responsibility and ethical practice, financial management and business planning, practice risk management and negligence, marketing and business development, practice management systems, client/operating accounts etc and would ensure that these individuals are well equipped with the necessary skills to run their own practice.

[1] Migration Agents Instruments Review at 1.3.7
[2] Ibid at 1.3.4.2

4. THEME 2: A PROFESSIONAL INDUSTRY – INTRODUCING A TIERING SYSTEM

We iterate our views as expressed in our submission to the *2020 Discussion Paper – Creating a world class migration advice industry* regarding our preference for a two tier, rather than three tier, registration system. Whilst we are supportive of a tiered registration system as outlined above for entrants who hold restricted or provisional registration for an initial period of 24 months before they transition to unrestricted registration, we believe that an additional tiering system (post supervision requirements being met) which further imposes restrictions on the types of cases that a RMA could assist with, or prohibits them from appearing before the Administrative Appeals Tribunal (Tribunal) would present practical challenges for both the RMA and consumers, depending on the migration strategy that might be pursued, and would also impose additional and perhaps impractical administrative burden for the Department, Tribunal and OMARA.

However, recognising the inherent professional development of a RMA during a supervisory period, it could also be the case that RMAs are only able to assist and represent clients at the Administrative Appeals Tribunal and requests for Ministerial Intervention once they have completed their required period of supervised practice and hold unrestricted registration.

We are of the view that instead of additional tiering, the desired outcomes could be driven by a combination of usual consumer and market forces, enhanced coursework in this area as part of the Graduate Diploma in Australian Migration Law and Practice and Capstone assessment, more robust professional standards (including Code of Conduct), and a stronger compliance and enforcement regime.

Additional measures such as displaying a RMA's date of initial registration (rather than date of most recent registration) on the OMARA website may also further assist. Stronger enforcement in situations where RMAs may have demonstrated negligence or lack of competence in certain areas, such as imposition of penalties, disciplinary action, requirement to undertake certain training or imposition of limitations on registration would also further support these initiatives.

5. THEME 3: COMBATTING MISCONDUCT AND UNLAWFUL ACTIVITY – IMMIGRATION ASSISTANCE: DEFINITION AND SCOPE

MEASURES TO ADDRESS UNLAWFUL AND OFFSHORE IMMIGRATION ASSISTANCE

Supervision of clerical work and limitation on number of supervisees

While Fragomen supports the goal of preventing the misuse of the 'clerical work' exception covered by Part 3 of the *Migration Act 1958*, the reframing of the exception to impose limitations on the number of supervisees an RMA can supervise may have unintended practical consequences for larger and/or high volume migration practices that operate under a model of having a substantial and dedicated team of administrative workers that assist with clerical work across a number of local and overseas offices and teams.

In theory, the first supervisory arm of the recommendation is likely to assist in combatting unregistered agents providing immigration advice under the guise of the clerical work exception. However, we are of the view that clear guidelines as to what constitutes 'supervision' will need to be established so that the recommendation does not create an unnecessarily higher level of supervision of clerical staff by RMAs. For instance, in larger migration practices that legitimately operate under structures which include a substantial administration team under a management structure dedicated only to clerical work (predominantly form drafting and drafting templated communications originally prepared by RMAs/legal practitioners), administration staff are generally able to complete this work unsupervised. However, any work that is completed by administrative staff is reviewed by an RMA or legal practitioner, with the RMA or legal practitioner taking ultimate responsibility for the accuracy of information in the forms and communications. The forms are then lodged using the RMA or legal practitioner's ImmiAccount under direction. We believe that this process should meet the proposed supervision requirement. The key component in this process is that the RMA or legal practitioner assumes direct accountability for any information provided to the client and on behalf of the client to the Department.

The second arm of the recommendation placing a limit on the number of clerical workers that an RMA can supervise may cause resource allocation and workflow challenges for larger migration practices. This recommendation assumes that all migration practices are structured in a way that allows for each RMA or legal practitioner to work with the same clerical support workers. In firms such as Fragomen, this is not pragmatic, even though there is clear practical review and supervision of clerical work. Within this business model, the same clerical staff also provide administrative support to other areas of the business that are not within Australian immigration assistance, some of our overseas offices (including within the APAC region) and the firm's internal corporate functions.

Using a centralised and consolidated resource-sharing model, Fragomen allocates "tasks" to its trained clerical staff depending on their individual capacity, meaning that any given Australian RMA or legal practitioner could potentially work with all clerical staff from time to time due to the "task" driven nature of the clerical work. The proposed supervisory limitation for RMAs would force larger and/or high volume providers to allocate and supervise clerical work under a model that restricts each RMA to working with a select group of clerical support workers, rather than under a centralised and efficient capacity-based model.

We submit that by better clarifying the definition and scope of the 'clerical work' exemption, this may alleviate the necessity to impose any specific limit on the number of supervisees. In the alternative and in recognition of the utilization of shared clerical workers in larger migration agencies or firms, we recommend that legal entities that employ at least 10 RMAs or legal practitioners are not subject to any specified ratio or limit on the number of clerical workers that a RMA can supervise.

Limiting access to ImmiAccount

As means of addressing unlawful and offshore immigration assistance, amongst the proposals recommended for further examination by the Department, we support measures to suggestion to strengthen access to ImmiAccount, including:

- making it an offence for an RMA to allow another person to access their ImmiAccount, except a person providing clerical/administrative support to the RMA; and
- introducing an offence for creating an ImmiAccount on behalf of another person, unless an exempt person.

We are, however, concerned that the proposal to limit a RMA from being able to create more than one ImmiAccount and to require them to lodge visa applications for all their clients from that account may have unintended consequences for RMAs engaged as contractors. For a Sole Practitioner RMA who is a contractor to several migration firms as well as running their own practice, it may not be uncommon for them to have their own ImmiAccount for their own clients and to also have an ImmiAccount/s linked to the Organisation ImmiAccount for the migration agency to whom they are contracting (i.e. as a user). In this scenario, there may be legitimate reasons for the RMA to hold more than one ImmiAccount.

Other matters – Code of Conduct

Whilst we note that the Migration Agents Code of Conduct is not within the scope of this review, and has been the subject of a separate review previously, one particular aspect which we believe clients would benefit from is the introduction of increased consumer protection and integrity measures in relation to additional services that RMAs provide for which they may receive a referral fee, commission or other benefit, where such additional service has a material impact on the outcome of the visa application or appeal. In our view, the Code should be strengthened, and additional measures should be introduced such as a prescribed form of disclosure, and a requirement to gain informed written consent of the client, before a RMA can act for a client in such circumstances.