



2014 Independent Review
of the Office of the Migration
Agents Registration Authority

DR CHRISTOPHER N KENDALL

Final Report

SEPTEMBER 2014

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Senator the Hon. Michaelia Cash
Assistant Minister for Immigration and Border Protection
Parliament House
Canberra ACT 2600

Dear Minister

Review of the Office of the Migration Agents Registration Authority

I am pleased to present you with the Final Report of the Inquiry into the Office of the Migration Agents Registration Authority.

I thank you for retaining me to conduct this Inquiry. I ask that you please note the generous support provided to me by Dr Richard Johnson and Ms Diana Trionfi and their team at the Department of Immigration and Border Protection throughout the writing of this Report.

Please do not hesitate to contact me if you have any questions in relation to the Final Report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Chris Kendall', with a stylized flourish at the end.

Dr Christopher N Kendall
Independent Inquirer
24 September 2014

Abbreviations

AAT	Administrative Appeals Tribunal	MA	Migration Alliance
ACCC	Australian Competition and Consumer Commission	MAIL	Migration Advice Industry Liaison
AFP	Australian Federal Police	MARA	Migration Agents Registration Authority
AMC	Assessment and Moderation Committee	MAREAC	Migration Agent Registration Entrance Advisory Committee
ANU	Australian National University	MAPKEE	Migration Advice Profession Knowledge Entry Examination
APS	Australian Public Service	MARN	Migration Agent Registration Number
AVOs	Authorised Voluntary Organisations	MARS	Migration Agents Registration Scheme
CCC	Course Coordination Committee	MIA	Migration Institute of Australia
CEO	Chief Executive Officer	MLC	Migration Law Committee
CDPP	Commonwealth Director of Public Prosecutions	MOU	Memorandum of Understanding
CLCs	Community Legal Advice Centres	NZIAA	New Zealand Immigration Advisers Authority
COAG	Council of Australian Governments	OLSC	Office of Legal Services Commission
CPD	Continuing Professional Development	OMARA	Office of the Migration Agents Registration Authority
DAC	Departmental Audit Committee	PC	Productivity Commission
DIBP	Department of Immigration and Border Protection	PIC	Public Interest Criterion
DIAC	Department of Immigration and Citizenship	PRP	Practice Ready Program
EC	Executive Committee	PVC	People and Values Committee
ELKAC	Entry Level Knowledge Assessment Committee	RaFC	Resources and Finance Committee
ERG	External Reference Group	RMA	Registered Migration Agent
FOI	Freedom of Information	RRT/MRT	Refugee Review Tribunal/Migration Review Tribunal
HR	Human Resources	RTO	Registered Training Organisation
IELTS	International English Language Testing System	SBSC	Strategic Business Support Committee
ILS	International Law Section	TOEFL	Test of English as a Foreign Language
IT	Information Technology	TTMRA	Trans-Tasman Mutual Recognition Act
LCA	Law Council of Australia	VET	Vocational Education and Training
LIV	Law Institute of Victoria		
MAAR	Migration Agents Activity Report		

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Introduction

Australia's Visa System

Australia operates a universal visa system. In effect, this means that non-citizens travelling to Australia temporarily or permanently require a valid visa or authority to enter and remain in Australia. The operation of the visa system is governed by the *Migration Act 1958* (the Act), related Regulations, policy and case law.

There is considerable demand for an Australian visa. Relevantly, there were 3.9 million visitor visas granted in 2013-14. Australia's permanent migration programme can vary in size annually, but has delivered 190,000 places for the past couple of years. Of those, two-thirds were for skill stream and one-third for family stream applicants.

Australia's visa framework is reasonably complex. Visa application charges are comparatively high and the number of permanent places on offer is relatively scarce compared to demand. The integrity of the migration programme is critical for public confidence and for those who seek to come to Australia as a visa applicant.

Consumers of migration services can be amongst the most vulnerable in the community. Some may have low levels of English language skills. In many cases, migrants or aspiring migrants will:

- have little or no knowledge of the regulatory environment in which migration agents operate;
- be unlikely to understand the difference between a migration lawyer and a 'migration specialist' with no legal training;
- have limited financial resources, but a great willingness to guarantee or pay whatever they can for a visa; and
- have little or no understanding of the laws that apply to them.

In this context, it is not surprising that a profession committed to providing migration advice has developed at a fairly quick pace during the past 20 years. That profession is charged with providing aspiring migrants professional advice on their visa options, application lodgement and management services, and advice and assistance for clients wishing to appeal visa decisions. A sound and trusted profession that is efficiently and effectively regulated is thus critical.

The Migration Advice Sector

The regulation of the migration advice sector has a long history and has been the subject of numerous reviews.

Pre-September 1992: Departmental registration scheme

Prior to September 1992, anyone wanting to practice as a migration agent was required to inform the then Department of Immigration, Local Government and Ethnic Affairs in writing of their intention to do so. Acknowledgement by the Department constituted accreditation. Under this model, there was no monitoring of the migration advice sector.

Issues of concern raised about this scheme were:

- There was evidence of unscrupulous conduct and incompetent advice being given by persons holding themselves out as experts in migration.
- Culturally and linguistically vulnerable consumers were being exploited and asked to pay enormous costs for services that were inappropriate.
- There was a perceived imbalance of power between the adviser and the client.
- Many clients whose primary language was not English were unaware of avenues of redress when poor or unethical service was rendered to them.

September 1992–1998: Migration Agents Registration Scheme

In September 1992, the Migration Agents Registration Scheme (the MARS) was established. Its principal objective was to protect consumers of immigration advice against professional misconduct and to ensure that consumers had access to affordable and quality advice.

The MARS also created the Migration Agents' Registration Board, charged with regulating the migration advice sector. The Board was administered by the then Department of Immigration, Local Government and Ethnic Affairs.

March 1998 to June 2009: Migration Agents Registration Authority

In March 1998, following a review of the MARS that was handed down in March 1997, the then Minister for Immigration appointed the Migration Institute of Australia (the MIA) to assume the role of the Migration Agents Registration Authority (the MARA) as a statutory, self-regulating body.

The aim of the MARA was to “reduce the red tape burden on small business while maintaining consumer protection for people in the community vulnerable to exploitation”.

Key issues that led to the establishment of the MARA included:

- Support from the sector to move towards self-regulation.
- General agreement that sector members needed to meet competency and ethical standards as set by a regulatory body.
- The need for the regulatory body to be able to discipline members who breached the Code of Conduct for registered migration agents.

The MIA was appointed as the MARA to administer the relevant provisions of the *Migration Agents Regulations 1998* (Cth) (Regulations) and to undertake the role of regulator. Among other things, the Regulations included a Code of Conduct.

Two reviews of the Statutory Self-Regulation of the Migration Advice Industry were conducted and reported in August 1999 and September 2002.

Key findings from the 1999 and 2002 reviews included:

- That the regulatory arrangements were yet to reach their full potential in terms of consumer protection and professionalism within the industry.
- That the profession was not ready to move to full self-regulation and that the period of statutory self-regulation be extended.
- That the Department and the regulatory body work together to increase the level of consumer confidence and to decrease the number of complaints.

A third Review of Statutory Self-Regulation of the Migration Advice Profession (Hodges Review) was commenced in 2007 and reported to the government in May 2008.

The Hodges Review spanned a period of 14 months. It was conducted by the Department of Immigration under the guidance of an External Reference Group (ERG). The ERG was chaired by the Hon John Hodges, with the assistance of three others: Mr Glen Ferguson, Ms Helen Friedman and Mr Len Holt.

As part of the inquiry process for the Hodges Review, a Discussion Paper was released in September 2007 inviting stakeholders to make submissions on the profession's readiness to move from statutory self-regulation and other issues in relation to the migration advice profession.

Overall, the Hodges Review found that:

- There was overwhelming opposition to the profession moving to self-regulation.
- The arrangement whereby the MIA operated the MARA had created perceived and potential conflicts of interest resulting in a lack of consumer confidence, such that the government should consider establishing a regulatory body separate from the MIA.
- There was dissatisfaction amongst stakeholders regarding the handling of complaints against migration agents. The Review found that the regulatory body needed additional powers and needed to work in closer cooperation with the Department and other bodies such as the Law Council of Australia (LCA) and the ACCC in order to address these issues.
- There needed to be significant changes made to the entry requirements in order to improve professional standards. Recommended changes included: the Graduate Certificate be replaced by a Graduate Diploma; the English language requirements be increased and newly qualified migration agents be required to undertake a year of supervised practice.
- Legislation relating to migration agents needed to be substantially revised to remove confusion.
- To minimise consumer confusion, lawyer agents should continue to be included in the regulatory scheme, although revisions to the regulatory scheme would provide further concessions to lawyer agents.
- The Continuing Professional Development (CPD) requirements needed to be simplified and streamlined – especially for experienced migration agents with good track records.
- Priority processing should be provided to decision ready applications – whether they are submitted by a migration agent or an applicant directly.

The Hodges Review made 57 recommendations. These recommendations are provided as **Attachment A** to this Report. Importantly, the Review recommended that an independent statutory body with greater powers to protect consumers be established to regulate the profession. It was also recommended that the regulatory framework be strengthened and clarified and that entry requirements be raised.

July 2009 to present: Office of the Migration Agents Registration Authority (the OMARA)

The OMARA has been operating in its present guise for approximately five years. It has operated as a discrete office attached to the Department of Immigration and Border Protection (the Department). This structure was a result of the 2007-08 Hodges Review.

The responsibilities of the OMARA are set out in four pieces of legislation:

- part 3 of the *Migration Act 1958*;
- the *Migration Agents Regulations 1998*;
- the *Migration Agents Registration Application Charge Act 1997*; and
- the *Migration Agents Registration Application Charge Regulations 1998*.

Pursuant to section 317 of the Act, the OMARA has statutory responsibility to do all things necessarily or conveniently done for, or in connection with, the performance of its functions.

The respective roles and responsibilities of the OMARA and the Department with respect to disclosure and use of information are set out in a Memorandum of Understanding dated 16 June 2010. That MOU is provided as **Attachment B** to this Report.

Functions of the OMARA

In accordance with section 316 of the Act, these functions include powers to:

- a. deal with applications for registration as a migration agent;
- b. monitor the conduct of migration agents in the provision of immigration assistance and immigration legal assistance as defined in the Act;
- c. investigate complaints in relation to the provision of immigration assistance by registered migration agents;
- d. take appropriate disciplinary action against registered migration agents or former agents;
- e. investigate complaints about lawyers in relation to their provision of immigration legal assistance, for the purpose of referring appropriate cases to legal professional associations for possible disciplinary action;
- f. inform the prosecuting authorities about apparent offences against Part 3 or Part 4 of the Act; and
- g. monitor the adequacy of any Code of Conduct.

The Migration Agents Regulations further detail the prescribed qualifications for registered migration agents and the requirements for continuing professional development.

Provision of CPD

The OMARA finds its authority in relation to the provision of all CPD activities in section 290A of the Act and Schedule 1 of the *Migration Agents Regulations 1998*. Regulations 9E to 9G outline the OMARA's role in approving CPD activities.

Currently the OMARA undertakes the following activities in relation to CPD:

- consider and decide applications from persons/organisations wishing to become approved CPD providers;
- consider and decide applications for activities to become approved for the purpose of awarding CPD points;
- evaluate the efficacy of particular CPD activities and determine if these activities have been delivered in accordance with the current CPD framework. Apply other specific approval conditions and determine if the CPD provider for that activity has acted in accordance with the current Standard Provider Conditions;
- evaluate the general efficacy of CPD offerings and identify ongoing opportunities for improvement;
- evaluate Approved CPD providers compliance with the current Standard Provider Conditions;
- report; and
- consider and decide applications from organisations seeking to become Authorised Voluntary Organisations for the purpose of awarding CPD points for pro bono activities.

Under the current CPD requirements, all registered migration agents are required to complete approved activities with a minimum value of 10 CPD points per year including one mandatory CPD activity with a minimum value of 1 CPD point per year.

In their first year of registration, agents (with the exception of those who hold a current practicing certificate or those who are a member of a recognised accounting professional body) are required to undertake the Practice Ready Programme (the PRP). This is a practice-oriented workshop designed to provide agents new to the profession with the skills and knowledge needed for practice. The introduction of the PRP was in response to the widely held view that completion of the Graduate Certificate did not fully equip new agents with the requisite skills and knowledge to operate in a competent and professional manner.

Graduate Certificate in Law

Current knowledge requirements for entry to the migration advice profession are specified in section 289A of the Act. Applicants must either hold the prescribed qualifications (an Australian legal practicing certificate), or have completed a prescribed course and passed a prescribed exam within a prescribed 12 month period.

Regulation 5 of the *Migration Agents Regulations* provides, inter alia, as per section 289A(c) of the Act, that the prescribed course and exam, and the prescribed period for completion of a particular course or exam, is the period specified by the Minister in an instrument in writing.

The Graduate Certificate in Migration Law is currently offered by:

- Murdoch University;
- Australian National University (ANU);
- Victoria University; and
- Griffith University.

The regulation of these four university providers occurs via the Migration Agent Registration Entrance Advisory Committee (the MAREAC). The MAREAC is an advisory body established by the OMARA to oversee the course and examination prescribed under section 289A of the Act.

The MAREAC's objectives are to assist the OMARA by:

- a. providing information in relation to graduates' of the Prescribed Course taught by each of the Universities, knowledge of migration procedure for the purposes of section 290(2)(a) of the Act in the event a graduate is an applicant for registration as a migration agent;
- b. overseeing the direction, outcomes and development of the Prescribed Course;
- c. coordinating operational matters across the Universities to ensure, so far as is reasonably practical, a consistent standard and educational outcome for students undertaking the Prescribed Course; and
- d. ensuring, so far as is reasonably practical, a sufficient degree of uniformity, integrity and standards among the Universities with respect to the Prescribed Exam.

The OMARA advised this Inquiry that the intent behind the formation of the MAREAC was to ensure that the OMARA is satisfied that all persons, irrespective of the institution at which they undertake the prescribed course/exam, have the knowledge and professionalism required to give immigration assistance.

The MAREAC operates by consensus, in accordance with an MOU, rather than under legislative powers. Its first meeting was held in December 2010.

Organisational Structure

The OMARA is led by a Chief Executive Officer. Mr Steve Ingram was appointed in that capacity in February 2014.

The CEO of the OMARA is an Assistant Secretary (SES B1) level officer who reports directly to the Secretary of the Department. This is outside the standard structure where an SES B1 officer usually reports to a First Assistant Secretary, who reports to a Deputy Secretary who then reports to the Secretary.

In July 2009 the then Minister appointed an Advisory Board to the OMARA to provide advice and guidance to the CEO.

The Advisory Board is intended to provide advice to the OMARA's Chief Executive Officer in relation to:

- OMARA procedures, policies and strategies;
- setting of organisational directions, priorities and plans; and
- any emerging issues within the sector of relevance to the regulation of migration agents.

The OMARA Advisory Board can also provide advice on broad policy issues relating to the migration advice profession as appropriate, including consumer protection issues.

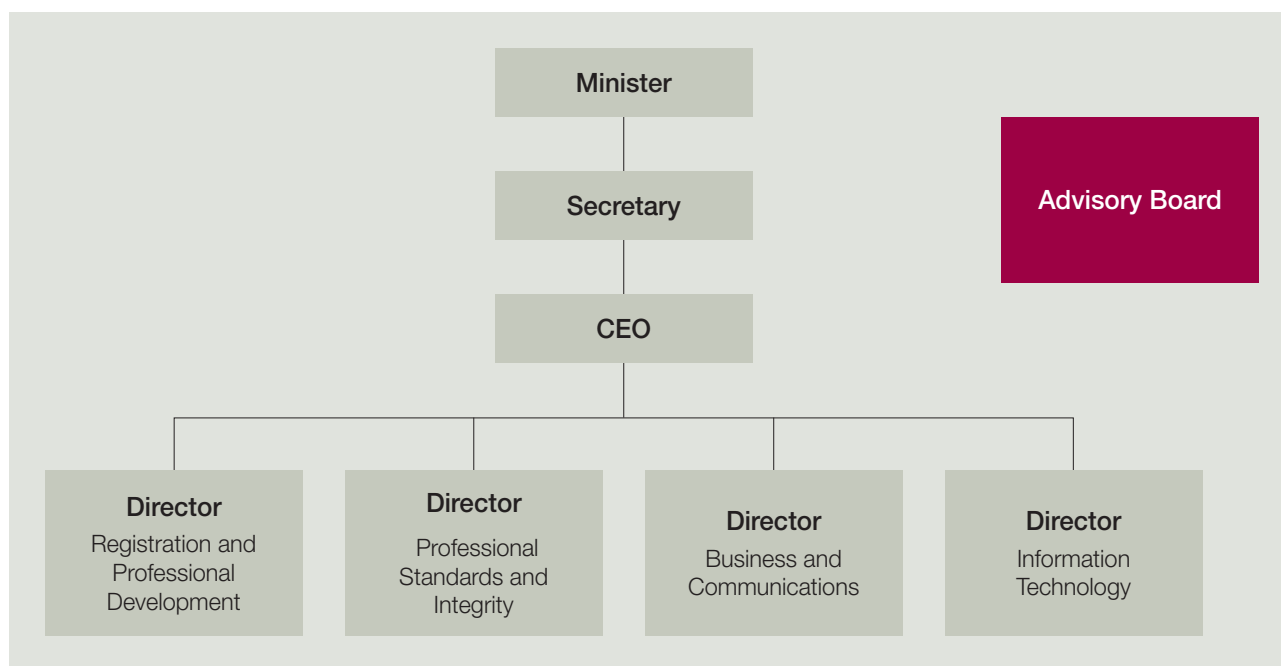
The Advisory Board meets four times a year. While the Chair of the Advisory Board reports to the Minister and the Advisory Board influences the direction and activity of the OMARA, the Board has no authority to direct the CEO or staff to follow a particular course. The Board does not select the CEO. Nor does it approve budgets or have the right of veto on business plans.

In July 2013 the current Advisory Board's membership was extended to 1 July 2015.
The Board's current members are:

OMARA Advisory Board		
Helen Williams AO	Chair	Former Secretary to a number of Commonwealth Departments and former Commissioner of the Australian Public Service and Parliamentary Service
Jenni Mack	Deputy Chair, Consumer representative	
Sonia Caton	Not-for-profit sector representative	Legal practitioner and registered migration agent
Jim McKiernan	Community representative	Former Senator
Glenn Ferguson	Law Council of Australia nominee	Legal practitioner and registered migration agent
Ray Brown	MIA nominee	Registered migration agent
Andrew Holloway	University sector representative	University of Tasmania
Richard Johnson	Departmental representative	Assistant Secretary, Visa Framework & Family Policy
Steve Ingram	OMARA	CEO
Secretariat To The Advisory Board: Bronwyn Killen, OMARA		

Organisational Structure

Overall, the OMARA's organisational chart is as follows:



Budget and Staffing

The OMARA's main offices are located in Sydney. The OMARA's operating budget in 2013 was \$5.65 million. There was a deficit of \$623 000 for this period. The Inquiry was advised that this deficit can be attributed, in part, to approximately \$344 000 in depreciation for which the OMARA is not funded.

As at 30 June 2013, the OMARA employed 32 permanent staff, six temporary staff and two contactors. All staff are employees of the Department and are subject to the same controls and obligations as other staff.

Governance arrangements covering the OMARA are an amalgam of mandated Australian Public Service requirements, Departmental of Immigration and Border Protection structures and measures unique to the OMARA.

The mandated Australian Public Service (the APS) controls are those required of any government agency covered by the *Public Service Act 1999*. Staff are obligated to abide by the APS Values and Employment Principles including the APS Code of Conduct and are subject to the controls available under those provisions. The OMARA is also covered by the *Public Governance, Performance and Accountability Act 2013* as the primary legislation governing the use and management of Commonwealth resources.

The general Departmental governance structures applying to the OMARA include the key agency governance committees:

- Executive Committee;
- Resources and Finance Committee;
- Departmental Audit Committee;
- Strategic Business Support Committee; and
- People and Values Committee.

The OMARA uses the Departmental finance, procurement, legal, HR, property and general IT (email, storage, record-keeping) systems and is required to abide by the internal controls and protocols applying to those systems or services.

The CEO and staff of the OMARA also engage in all the NSW Departmental staff and governance fora, such as the State Executive, Directors' and APS6 meetings. The OMARA is also a party to the state based staffing coordination and training committees.

Where the OMARA varies significantly from the rest of the Department is in relation to the following areas:

Procurement and maintenance of registration-specific IT systems

While the OMARA uses the Departmental IT platform for general systems access, email and storage of information, it has a stand-alone web-site and processing system called SIMBA for administering the registration scheme.

The Inquiry was advised that the standard Departmental governance applying to procurement of the OMARA IT services is limited to the generic procedural, financial and legal aspects for any contract or tender. Within the broader Department, IT procurement goes through a specialist division where additional layers of assessment and approval identify business needs and determine whether the proposed systems will meet requirements. Governance controls of a similar specialist nature did not apply to the SIMBA system under development in the OMARA. The Inquiry was advised that in such a small organisation, that level of expertise does not exist and while some assistance was provided through contractors, the governance applied in the Department was not applied here.

Administration Website and IT system

As noted above the OMARA administers a separate website and integrated database system, SIMBA. The following functions are managed by the OMARA Business and Communications section and sit outside the normal Department governance framework for these functions:

- approval of content that goes up on the OMARA website; and
- assignment of access levels within SIMBA for OMARA staff.

Recordkeeping

The Department's approved corporate recordkeeping system is the electronic system known as TRIM. Apart from use of TRIM for some office functions, SIMBA is, in effect, the recordkeeping system for the OMARA registration scheme. The Inquiry was advised that SIMBA might not be fully compliant with government recordkeeping policy requirements.

Probity

The OMARA undertakes additional probity measures including annual updating of conflict of interest declarations for staff and annual probity reviews by independent reviewers. In addition, S.321A of the Act prescribes restrictions around the disclosure of information by the OMARA staff to the Department. The Inquiry was also advised other sections of the Department have this restriction. An annual review of the application of this section of the Act has been undertaken, but in the absence of a full and detailed audit (including IT logs), the review relied largely on self-assessment and observation.

Privacy and FOI

The Inquiry was advised that the Department is unclear at this stage as to whether or not the OMARA is to be treated as part of the Department or a separate entity in relation to privacy guidelines and FOI requests. Advice on this issue is under consideration. In the interim, OMARA issues its own privacy guidelines on its website but FOI requests are handled by the Department.

Public reporting and parliamentary scrutiny

The OMARA produces an annual report on its operations and finances for tabling in the parliament and for public scrutiny. Section 322(1) of the Act requires production of an annual report, when the regulator is operated by the Migration Institute of Australia as an industry body. This section is not binding on the OMARA. However, the Inquiry was advised that the OMARA has continued to produce annual reports since 2009 to reinforce its visibility and independence.

Where the regulatory function is within the Department, section 322(2) still requires a report to parliament. However, this forms part of the Department's annual report. The OMARA already contributes a section on its activities for the Department's annual report, duplicating parts of the separate OMARA report.

The OMARA can also be required to attend Senate Estimates in its own right to answer questions. Traditionally, the OMARA has attended during hearings on the broad portfolio, but separately from the rest of the Department, although the policy area sits within the Department.

An overview of the effectiveness of these governance structures is provided in the chapters that follow.

Terms of Reference for this Review:

A Review of the OMARA

On 24 June 2014, the Assistant Minister for Immigration and Border Protection, Senator the Hon. Michaelia Cash, announced via media release that the government had commissioned an independent review of the OMARA. The media release read as follows:

Migration agents' regulator to be reviewed

The Office of the Migration Agents Registration Authority (OMARA) as an industry regulator will be the subject of an independent review, Assistant Minister for Immigration and Border Protection, Senator the Hon. Michaelia Cash said today.

Minister Cash said the review is consistent with the government's commitment to de-regulation.

"The review will examine and report on the OMARA's organisational capability and challenges, as well as the quality and effectiveness of its internal controls and governance," the Minister said.

"It will also examine the regulatory framework and powers of the OMARA to determine if they are still appropriate and identify opportunities to reduce regulatory burden."

The review will be undertaken by Perth barrister, Dr Christopher N Kendall, who sits on the executive of the Law Council of Australia, is a Commissioner with the Insurance Commission of Western Australia, and was formerly a Commissioner with the Law Reform Commission of Western Australia.

Dr Kendall will provide a final report to the Assistant Minister in early September 2014.

The Assistant Minister also advised that the following Terms of Reference would guide the Inquiry:

Terms of Reference

Independent review of the Office of the Migration Agents Registration Authority

The government has commissioned an independent review of the Office of the Migration Agents Registration Authority (OMARA).

The review will examine and report on the performance of the OMARA as the industry regulator, its organisational capability and challenges, and the quality and effectiveness of its internal controls and governance.

Consistent with the government's commitment to de-regulation, the review will examine and report on the most appropriate organisational structure for regulating the immigration advice sector in order to protect consumers.

It will also examine the regulatory framework and powers for the OMARA to assess if they are still appropriate and identify opportunities to reduce regulatory burden.

Conduct of the review

The review will be conducted by an independent reviewer, appointed by the Assistant Minister for Immigration and Border Protection.

The independent reviewer will be supported by a secretariat from the Department of Immigration and Border Protection.

In conducting the review, the reviewer will consult with stakeholders.

The final report will be submitted to the Assistant Minister for Immigration and Border Protection.

The review will be conducted with a view to reporting in early September 2014.

Consultation Process

On 24 June 2014, the Department emailed or called stakeholders to advise them of the Assistant Minister's announcement and the above Terms of Reference. These stakeholders included:

- the OMARA;
- the OMARA Advisory Board members;
- the Law Council of Australia;
- the Migration Institute of Australia; and
- the Migration Alliance.

On 24 June 2014, a link to the Assistant Minister's announcement and the Terms of Reference were also published on the Department's website via the Agents Gateway under 'News and Updates'.

Dr Christopher Kendall's role as Independent Inquirer officially commenced on 29 June 2014.

On 30 June 2014, a call for submissions was published on the Department's website.

On 22 July 2014, the Department emailed the legal service providers in each state inviting them to make a submission to the Inquiry.

All interested persons and groups were advised that written submissions were to be received by Sunday 27 July 2014. As noted below, some submissions were received after this date.

Submissions Received

Written Submissions

The Inquiry received written submissions from the following persons or organisations:

Name	Date received
Alan Collett, Managing Director, Go Matilda	08/07/2014
Alan Izadfar	13/07/2014
Alan Izadfar	06/09/2014
Dr Christopher Robert White, Migration Plus Network	27/07/2014
Helen Cook, Educational Testing Service	25/07/2014
Ernst & Young	27/07/2014
Eva Wagner, German Lawyer	27/07/2014
Eva Wagner, German Lawyer	18/08/2014
Eva Wagner, German Lawyer	20/08/2014
Fragomen	29/08/2014
Geoff Bowyer, President, Law Institute of Victoria	28/07/2014
Glenn Ferguson, Managing Director, Ferguson Cannon	25/08/2014
Individual (name withheld on request)	27/07/2014
Individual (name withheld on request)	01/08/2014
Individual (name withheld on request)	02/08/2014
Individual (name withheld on request)	06/08/2014
Juliette Vrakas	28/07/2014

Name	Date received
Law School, Griffith University	26/07/2014
Law Council of Australia	01/08/2014
Law Council of Australia	22/08/2014
Michael Wall and Philip Duncan, KPMG	06/08/2014
Malcolm Crang and Mark Dunphy, Hall & Wilcox Lawyers	21/07/2014
Mark Glazbrook, Managing Director, Migration Solutions	05/08/2014
Migration Alliance	25/07/2014
New South Wales Legal Services Commissioner	25/07/2014
Queensland Legal Services Commission	29/07/2014
Sonia Caton, the OMARA Advisory Board – Not for Profit	27/07/2014
Sonia Caton, the OMARA Advisory Board – Not for Profit	18/08/2014
The Migration Institute of Australia	25/07/2014
Two former colleagues from the OMARA (no names provided)	27/07/2014
Victoria Legal Services Commissioner	23/07/2004
Victoria University	29/07/2014

Interviews

The Inquiry also conducted interviews or teleconferences with the following individuals or groups:

30 June	Office of the Migration Agents Registration Authority (OMARA) Steve Ingram, CEO	Interviews in Canberra
14 July	Law Council of Australia Erskine Rodan, Chair, Migration Law Committee Anne O'Donoghue, Steering Group Member, Migration Law Committee Mary Hanna, Steering Group Member, Migration Law Committee Murray Downs Nicole Eveston Emma Hlubucek	Interviews in Melbourne
	Migration Institute of Australia (MIA) Angela Chan, National President Wayne Parcell, External Director John Hourigan, ACT Chapter Secretary Bronwyn Markey, Professional Support Manager	Interviews in Sydney
15 July	Office of Migration Agents Registration Authority Steve Ingram, Chief Executive Officer Dora Chin-Tan, Director Business Communications Glenda Hutch, Director Registration and Professional Development Debra Radjenovic, Director Professional Standards and Integrity	Interviews in Sydney
	Migration Alliance Liana Allan, Secretary Christopher Livingston, Convenor John Finlay, Registered Migration Agent	
18 July	Chair, Advisory Board to the OMARA Helen Williams AO	Teleconference
21 July	Griffith University Kate van Doore, Programme Coordinator	Teleconference
	Victoria University Rodger Fernandez, Professor in Migration Law Philip Tang, Coordinator Legal Programmes	
	Fragomen Sydney Ms Cherie Wright, Special Counsel, Accredited Immigration Specialist with Fragomen, Head of Professional Practice	
22 July	KPMG Michael Wall, National Leader, Immigration Services Philip Duncan	Teleconference
	Advisory Board to the OMARA Helen Williams AO – Chair of the OMARA Advisory Board Jenni Mack – Deputy Chair, Consumer representative Ray Brown – MIA nominee Andrew Holloway – University representative Glenn Ferguson – LCA nominee Sonia Caton – Not for profit representative (Refugee and Immigration Legal Services) Richard Johnson – Department of Immigration and Border Protection	

23 July	Australian National University Marianne Dickie, Sub-Dean, Migration Law Programme ANU Legal Workshop, ANU College of Law	Teleconference
	Legal Services Commission Victoria Michael McGarvie, Commissioner and CEO Legal Services Board Katherine Murdoch, Investigations Office and LSC's Liaison Officer for OMARA	
	Ernst and Young Katie Malyon, Executive Director Wayne Parcell, Partner Peter Papadopoulos, Director Alex Kaufman, Manager	
24 July	OMARA Advisory Board Member Jenni Mack, Deputy Chair, Consumer representative	Teleconference
	Murdoch University Kirstein Fentiman Associate Professor Marianne Kenny	
25 July	Office of the Legal Services Commissioner NSW Jim Milne, Acting Commissioner James Dunn, Acting Assistant Commissioner (Complaints) Lynda Muston, Assistant Commissioner (Legals)	Teleconference
	Advisory Board Member Glenn Ferguson, Law Council of Australia nominee	
28 July	Holding Redlich, Melbourne Maria Jockel	Teleconference
29 July	Department of Immigration and Border Protection Garry Fleming, FAS, Migration and Citizenship Policy Division Jim Williams, FAS, Visa and Offshore Services Richard Johnson, AS, Visa Framework and Family Policy Branch	Interviews in Canberra
4 August	Ministry of Business, Innovation and Employment, New Zealand Jocelyn Mikaere, Assistant Manager, Visa Services Immigration New Zealand	Teleconference
5 August	Fragomen New Zealand Karen Justice, Principal	Teleconference
6 August	Department of Immigration and Border Protection Nigel Muir, Manager, Operational Integrity Victoria,	Teleconference
11 August	Immigration Advisers Authority – New Zealand Catherine Albiston, Acting Registrar, Migration Advisers	Teleconference
13 August	MRT- RRT Colin Plowman, Registrar Jonathan Willoughby-Thomas, Director, Policy and Client Delivery	Teleconference

The Inquiry has reviewed all written submissions received and reflected on all conversations between it and interested persons or groups. The Inquiry has also analysed in detail all legislation relevant to this Inquiry and any information provided by the OMARA in relation to its internal workings, governance issues and regulatory framework.

The Inquiry thanks all those who presented evidence to it. Their time and assistance is very much appreciated.

Inquiry Timeframe

This Inquiry was conducted within a relatively short timeframe of three months.

The Inquiry is satisfied that all persons and organisations wanting to provide information to the Inquiry have been given sufficient opportunity to do so. No concerns were raised with the Inquiry in relation to the period of time allocated to provide comment. Any requests for extension of time were provided without hesitation.

All submissions have been carefully considered and used to write this Report and make recommendations.

Issues Identified and Discussed in this Report

A number of central issues and areas were consistently raised during discussions with those interviewed by the Inquiry and in written submissions received by the Inquiry. These have been broken down and will be analysed in this Report under the following chapter headings:

Chapter One:	Introduction
Chapter Two:	Overview of the Migration Advice Profession in Australia
Chapter Three:	The Regulation of Lawyers
Chapter Four:	Registration
Chapter Five:	Continuing Professional Development
Chapter Six:	Entry Qualifications
Chapter Seven:	Disciplinary Regime and Sanctions
Chapter Eight:	Questions of Independence: the OMARA's Relationship with the Department of Immigration and Border Protection

Key Findings and Issues Noted by the Inquiry

Chapter Three: The Regulation of Lawyers

The Inquiry finds that dual regulation of lawyers risks confusing those seeking migration assistance and imposes an unjustified burden on lawyer agents who, as lawyers, are already subjected to one of the strictest regulatory regimes of any profession in Australia.

The Inquiry notes that no other country now requires lawyers to be registered as migration agents. Indeed, some strictly forbid it. The Inquiry has not been provided with any evidence by anyone that suggests that the situation in Australia in relation to lawyers acting as migration agents is so different from these countries to justify Australia continuing down a path of dual regulation.

In relation to consumer risk and confusion, the Inquiry notes the concerns raised by the MIA in relation to access to indemnity funds, insurance coverage for lawyers and the inability of legal regulators to effectively prosecute agents who fail to adhere to the standards expected of them – all concerns that, in the opinion of the Inquiry, arise from the distinction in the *Migration Act* between “migration assistance” and “migration legal assistance” in the Act.

The Inquiry rejects, however, the MIA's claim that, in light of these concerns, consumers may be without protection if dual regulation is discontinued, finding instead that any inequities caused by the Act's distinction between migration assistance and migration legal assistance will be addressed once lawyers are removed from the current regulatory scheme and the Act is amended accordingly.

The Inquiry also sees no reason why wholesale national legal profession reform is needed before dual regulation can cease. The Inquiry accepts on the evidence before it that sufficient regulatory standards exist in each state and territory to ensure consistency and consumer safety across the board.

Overall, the Inquiry rejects the argument that lawyers must continue to be regulated by both the OMARA and the relevant legal regulators in each state and territory. The costs of dual regulation for lawyers are onerous and competent lawyers are arguably discouraged from engaging in a legal practice area much in need of solid legal representation. This fails to benefit anyone.

In this regard, the Inquiry supports amendments that mimic the New Zealand legislative model, whereby lawyers would be prevented from registering as migration agents - instead being regulated solely by the relevant legal regulator.

Chapter Four: Registration

Registration Fees

The Inquiry notes the concerns expressed by all those who provided an opinion on this issue, the overriding concern being that current registration fees are high when compared to other professional registration fees. The Inquiry did not receive any submissions or information that adequately justified the current rate for registration fees.

The Inquiry also accepts the concerns raised in relation to the costs imposed on community migration advisors.

Annual Re-Registration Requirements

In relation to re-registration, the Inquiry notes the heavy administrative burden imposed on agents having to register every year.

Registration Filing Dates

The Inquiry accepts the concerns raised in relation to varied registration dates

Corporations and other Business Entities

Like the Hodges Review before it, the Inquiry notes that while a very significant portion of migration agent businesses are operated by sole practitioners, a number of businesses operate under different structures and involves the employment of registered migration agents by other agents or other individuals.

The Role of the OMARA as the body Responsible for Registration

The Inquiry notes the suggestion that the OMARA be stripped of its role in the regulatory process and the suggestion that either the MIA or the MA be charged with the registration of migration agents, leaving the OMARA to focus its resources on investigation and discipline.

This Inquiry notes that this submission, if accepted, would invite the same conflict of interest concerns that were addressed by the Hodges Review, which found that at least a perception of a conflict of interest exists in the MIA operating the MARA. A number of submissions indicated concerns that actual conflicts of interest existed and had influenced MARA decisions and activities. The Review concluded that these views are of considerable concern and have the potential to, or already have, significantly undermined public confidence in that arrangement.

The Inquiry also finds that this suggestion fails to appreciate that registration cannot be easily segregated from investigation and discipline. The Inquiry notes the concerns expressed by the OMARA that the main issue associated with registration is the lack of power the OMARA has to obtain information from other agencies relevant to the question of whether an applicant is not fit and proper or not a person of integrity. As the OMARA is not a law enforcement agency (it has no criminal sanctions or powers to enforce a pecuniary penalty), information held by other agencies is protected by the Privacy Act and other legislation. The OMARA has received criticism for not acting in certain matters to protect consumers, yet it has not been able to do so for lack of access to the evidence required.

The Inquiry is not convinced that this issue can be addressed by a body (like the Migration Alliance and the MIA) that is completely segregated from the Department. Rather, this issue is best addressed by ensuring that the OMARA is better able to access information that is currently not available to it under the current regulatory scheme.

Chapter Five: Continuing Professional Development

Despite recognising the considerable work done by the OMARA, almost all submissions received by the Inquiry expressed concerns with the proscriptive nature and lack of flexibility of the current CPD model used for migration agents and the OMARA's role in the regulation of how CPD providers should be teaching.

In considering these submissions, the Inquiry agrees that there is significant scope to reduce the level and prescriptiveness of the regulatory framework currently governing CPD provision.

The Inquiry accepts that the current CPD system for migration agents is overly regulated by the OMARA – a body without specialist knowledge in continuing education or the provision of high quality teaching programmes.

The Inquiry accepts the concerns of some who made submissions to it that the OMARA has effectively taken on the role of a micro-manager in an area outside of its core expertise and that the current regulatory system in relation to CPD finds no equivalent elsewhere in Australia or overseas.

While there is clearly a role for the OMARA to play in determining who can offer CPD and what core subject areas should be offered to ensure consumer protection, the Inquiry rejects any suggestion that the OMARA needs to continue micro-managing how CPD programmes are structured, taught and assessed.

The Inquiry is of the view that the system currently used by the OMARA in relation to CPD is anti-competitive and likely to stifle innovation.

A preferred framework would be one whereby the OMARA determines:

- e. who can offer CPD within an open and competitive market of service providers (and when the right to be a CPD provider can be withdrawn); and
- f. the core competency areas that agents should be required to undertake. However, the regulation of those CPD providers (ie, the regulation of how CPD activities should be taught and structured) should be left to market forces.

The Inquiry notes that this is a model used by many of the legal service regulators in Australia.

The Inquiry commends the approach to CPD used by the Legal Practice Board in Western Australia and other Australian legal service providers. These regulatory systems allow competent CPD service providers to enter the market and essentially leave it to those who use these services to determine who will succeed in a more competitive and innovative environment.

Chapter Six: Entry Qualifications

The Inquiry finds that the entry qualifications imposed on migration agents are inadequate. The sector services persons who may be socially and legally vulnerable. These persons deserve and require a high standard of professional service. The best way to ensure that this is offered is through the provision of strengthened educational and professional training.

The submissions received by the Inquiry (both written and in face to face or via phone interviews) tend to focus on four areas.

1. The adequacy of the current Graduate Certificate in Australian Migration Law and Practice

Numerous submissions to the Inquiry question the professional adequacy of the current Graduate Certificate. Some suggest that the course content and structure do not adequately prepare migration agents for practice in an area that is legislatively and socially complex. Others note the linguistic and cultural vulnerabilities of those most likely to seek the assistance of migration agents and query whether those graduating from a six month preparatory course possess the skills needed to ensure top quality advice and assistance to persons who are often vulnerable. This has led some to suggest that the current Graduate Certificate should be replaced with a 12 month Graduate Diploma and that there be greater flexibility more generally in relation to how students are taught.

The Inquiry is of the view that a longer, more extensive programme of study will address many of the concerns raised throughout this chapter.

The Inquiry also accepts that the current requirement that applications for registration must be made within one year of completing the Prescribed Course is unnecessarily restrictive.

2. The OMARA's monitoring of the Graduate Certificate's Four Service Providers

It was suggested by some making submissions to the Inquiry that the OMARA's role in the provision of the Graduate Certificate programme is too prescriptive and arguably intrusive. It was suggested that while the OMARA should dictate the "type" of subjects that need to be taught to migration agents in training, the way in which those subjects and courses are taught would be best left to those who are experts in the provision of higher education programmes: qualified university academics.

The Inquiry agrees.

The Inquiry accepts the concerns raised by the four university providers that no other industry so extensively regulates not only what can be taught, but more importantly, how that subject matter should be taught. The Inquiry did not receive any information that convincingly made the case that the current university providers will fail to do what was required of them if they are left to teach according to the standards set by their own highly regarded academic institutions.

3. Calls for a Post-Certificate Period of Restricted Practice/Supervision

In addition to calls for reform in relation to the type of entry course required, numerous submissions called for the addition of a period of restricted practice/mandatory supervision for non-lawyer migration agents after they have completed their university entry requirements.

The Inquiry again accepts the findings of the 2007-08 Hodges Report that a period of mandatory supervision will do much to raise the standards of new migration agents.

The Inquiry accepts that the industry will need to take steps to ensure that students are, as much as possible, able to find practitioners who are willing to supervise them and that appropriate safeguards are taken to ensure that these students are not in any way exploited. The Inquiry notes that a similar system exists in relation to legal practitioners.

4. Calls for a Capstone Exam

Also relevant to the quality and professionalism of new graduates is the suggestion raised in some submissions that graduates who have completed the newly required Graduate Diploma and the required one year supervision period also be required to sit a Capstone Exam covering all areas of migration law and practice.

The Inquiry accepts that this would be a valuable addition to the entry requirements imposed on non-lawyer migration agents.

In that regard, the Inquiry is persuaded by the stand alone assessment model suggested to it by the OMARA. This option would introduce an independent and nationally consistent competency based assessment that applicants for initial registration would need to pass to satisfy the knowledge requirement for registration purposes. It would be a stand-alone assessment, de-linked from the prescribed course, designed to achieve consistency in both the examination conditions and in the marking applied to all candidates. Eligibility for sitting the assessment could be the successful completion of the Prescribed Course and completion of the minimum period of supervised practice. Attaining competency in the assessment would then be a requirement for registration purposes – the final element for a person qualifying as a fully registered migration agent.

Chapter Seven: Disciplinary Regime and Sanctions

In the majority of discussions with stakeholders and interested persons or organisations, the Inquiry was advised that the current Code of Conduct is verbose, unclear and, as a result, problematic.

Having reviewed the Code in detail, the Inquiry agrees. Without a significant re-write, there is a considerable risk that consumers will not be protected from inappropriate behaviour and that agents will not fully understand what is and what is not expected from them.

The Inquiry also notes the concerns raised about the flow of information between the Department and the OMARA in relation to investigations and alleged poor conduct. The Inquiry agrees with these concerns and queries how consumers can be protected when the OMARA is unable to readily provide information to the Department that might assist the Department investigate serious allegations of misconduct. The current framework inhibits or risks inhibiting much stronger cooperation between the OMARA and other parts of the Department. Both entities are working towards similar ends but the current legislative framework makes this unnecessarily difficult.

The Inquiry was advised that under the current legal framework the OMARA has limited powers to address agent behaviour before serious breaches occur. The powers it does have do not necessarily allow for a proportionate response across the range of behaviours. In less serious matters, the OMARA can counsel or request an agent to change their behaviour but has limited powers to enforce that request. The next option open to the OMARA is the significant step of suspending or cancelling registration. This is less than ideal and has implications for consumer protection because it means that the OMARA has to wait for a serious indiscretion or repeated bad behaviour before moving past an initial response.

Where there is serious non-compliance the OMARA can set conditions on a caution or suspension decision. However, the conditions are only in effect while the caution or suspension is in effect.

In the case of a caution, if the agent does not meet the conditions, the only consequence is that the caution remains in effect on the register but there is no impediment to practice.

In the case of suspension, there is no power to set conditions that persist after re-entry to the profession, for example supervisory arrangements.

While the agent is suspended, they remain on the register and obtain automatic re-entry to the profession once the suspension conditions are met, without further hurdles such as re-registration.

As explained to the Inquiry by the OMARA, the ineffectiveness of these conditions is significant.

Similarly, there is no power for the OMARA to set conditions for entry to the profession upon registration or re-entry on re-registration. This applies not only to serious non-compliance (integrity deficiency, serious and repeated breaches of the Code of Conduct), but also to non-compliance with objective requirements such as the maintaining of a client's account, PI insurance, and a professional library. Currently, the only option is to attempt to resolve the non-compliance informally (if possible) and if not, to issue a natural justice notice and refuse registration. The latter is a burdensome process in terms of evidence and resources, leaving consumers exposed while a matter is resolved and often leaving agents frustrated.

The Inquiry received further evidence that the lack of power to set conditions on registration is particularly acute where an agent has a history of complaints that have been dealt with informally with recommendations of corrective action. In these circumstances, the only way the OMARA can respond to failures to correct practices is through monitoring or another complaint, and then ultimately by issuing a sanction. Until or unless an agent reaches the sanction "tipping point", a growing number of consumers could be exposed to poor practices.

The Inquiry received evidence that in the case of complaints or disciplinary action, the most effective regulatory tool would be a flexible power to impose conditions or requirements that were not dependent on a disciplinary decision such as a caution or suspension. Investigations leading to disciplinary decisions can often be protracted and resource intensive and do not necessarily result in altering behaviour, but are aimed at keeping unfit agents out of the profession.

The Inquiry was advised that for registration a possible model for consideration would be:

- in the case of non-compliance with objective requirements identified through either monitoring or complaints handling activities, to impose an enforceable condition upon the current registration. The condition would require that this deficiency be rectified within a defined period or prior to a subsequent application for re-registration. Should there be no rectification, the next application for re-registration would not be approved on the grounds that the enforceable condition had not been met;
- in the case of serious non-compliance, a condition could be imposed such as requiring supervision by an experienced agent for a defined period, with an obligation to provide a report from the supervisor at the next registration anniversary. At the next registration date the report would help determine whether to continue the supervisory condition, should the agent be re-registered; and
- in the case of repeated and continuing infringements, the cumulative nature of enforceable conditions could trigger a sanction decision in advance of a re-registration consideration.

The Inquiry agrees that changes of the sort proposed above would be beneficial. The power to impose conditions would have the effect of reducing the regulatory burden on the OMARA and on agents by shifting more focus to proactive prevention, rather than reaction to complaints. Such a power would bolster and support monitoring activity by the OMARA. It is expected that over time the use of such powers would limit and reduce the expansion of the complaints/disciplinary caseload and thereby reduce the burden on agents to respond to complaints. It would also raise professional standards and allow the OMARA to respond more promptly and appropriately to consumer concerns.

This model could be introduced along the lines of the current system, whereby decisions taken by the OMARA to refuse registrations under section 290 of the Act (which the Inquiry has been advised are rare) are reviewable by the AAT. Adopting such an approach will balance the need for a more agile and calibrated set of regulatory powers with that of accountability, while ensuring that there is an independent review process for those affected by the OMARA's decisions in relation to registration.

The Inquiry notes that the OMARA does not have the power to award costs or order restitution for consumer disputes. This sets it apart from other sectors such as the legal profession for example, where the national reforms allow for binding awards to be made up to \$10,000 for cost disputes and \$25,000 for other matters. The OMARA can respond where costs are not “reasonable” with a conciliation process that has led to clients being refunded money. However, this is a voluntary process relying on the goodwill of consumers and agents and the OMARA has no power to make binding decisions.

In cases where conciliation is not successful, the OMARA is able to refer consumers with a fee dispute to the state based consumer tribunals allowing them to pursue matters without incurring significant costs. Should a consumer take a case to the state tribunals seeking resolution of a fee dispute, this does not preclude the OMARA from taking action over the related behaviour.

The Inquiry was advised that there is an argument for the OMARA to take on this role on the basis that many consumers are vulnerable and come from a non-English speaking background. It would also provide more of a “one-stop-shop” for consumers.

The Inquiry agrees that this option would better protect consumers.

The Inquiry also shares the concerns raised by stakeholders about the OMARA playing the role of both investigator and prosecutor in relation to more serious breaches that might ultimately result in an agent being stripped of the right to practice for a period of up to five years. The Inquiry has not been made aware of any other professional body with similar powers.

In these more serious cases, the Inquiry considers there to be considerable merit in allowing the Administrative Appeals Tribunal to operate as a disciplinary body first hearing, rather than simply as a review tribunal for decisions in relation to issues of registration.

In that regard, the Inquiry is persuaded that a more transparent and fair system is one akin to the independent tribunal system used by legal service regulators in Australia. Legal regulators in Australia usually refer matters of unsatisfactory professional conduct or professional misconduct to a Disciplinary Tribunal.

In Western Australia, for example, while the Legal Practice Complaints Committee initially investigates complaints against lawyers and makes a determination about whether to prosecute a lawyer for misconduct, the hearing of these prosecutions occurs before a Supreme Court Justice in his or her role as President of the State Administrative Tribunal.

While the Inquiry supports the OMARA's continued role as the chief investigator in relation to agent conduct, and has recommended that the OMARA be furnished with more flexible powers in relation to the awarding of costs and the imposition of conditions associated with registration and re-registration, the Inquiry agrees that decisions in relation to serious misconduct resulting in suspension or restricted practice should be heard by an independent legal tribunal like the Administrative Appeals Tribunal.

Chapter Eight: Questions of Independence: the OMARA's Relationship with the Department of Immigration and Border Protection

The existing regulatory model, in which the OMARA is a discrete office attached to the Department, is a legacy of the decision made in 2009 to remove the role of regulator from the industry stakeholder peak body, the Migration Institute of Australia.

The Inquiry finds that the current hybrid arrangement does not deliver the best results for the efficient and effective regulation of the migration advice sector. Nor does it satisfactorily resolve some of the important issues identified by the 2007-08 Hodges Review.

Despite there being little or no support for ongoing industry self-regulation (which all key stakeholders consider to have failed), some submissions to this and the Hodges Review expressed a preference for the creation of an "independent statutory body".

In relation to this issue, the Hodges Review noted that:

"...an independent statutory body for the migration advice profession would be regulating a relatively small profession" and "very small organisations have economy of scale issues that can make them unsustainable" (at page 25).

This Inquiry agrees with this assessment. Given the relatively small size of the migration advice profession, the creation of an independent statutory body to perform the role of the OMARA would be unsustainable.

Importantly, the Inquiry finds that the economy of scale issues identified in the Hodges Review in 2008 are all the more acute today. The Inquiry notes, in particular, the recommendations made in this Report -- specifically, the recommendations to significantly decrease the size of the sector (removing lawyers from the scheme will reduce its size by around one third) and limit the scope of the activities currently being regulated by the OMARA (for instance, CPD and current entry qualifications).

The Inquiry does not accept calls made by some stakeholders for the creation of an independent statutory body. The Inquiry is of the opinion, however, that the current hybrid model does need to be amended. This is because the operation of the OMARA as a discrete office attached to, but not fully operating as a normal business unit of, the Department has:

- only partially resolved the economy of scale issues discussed above; and
- maintained certain operational barriers that purport to uphold the OMARA's independence but that, in effect, inhibit the development of more robust consumer protection measures.

Taking these points in turn, the hybrid model has given rise both to duplication of effort for the OMARA for some administrative functions (ie., governance measures including probity reporting, FOI, Privacy provisions) and an inability for the OMARA to capitalise on potential administrative efficiencies by using or leveraging Departmental resources and capacities (such as its IT systems and resources). As a small office, it is inefficient for the OMARA to provide these services by itself.

Equally problematic is the fact that OMARA operates under restrictions the rationale for which is difficult to understand or justify.

Whether considered from the point of view of consumer protection or maintaining public confidence in the integrity of Australia's migration programme, there is a regulatory continuum across the migration advice arena.

The risks faced by consumers in this field need to be identified and mitigated as part of an integrated regulatory strategy. Under the current hybrid model, the division of responsibilities between the OMARA and the Department fragments the approach taken and, in the Inquiry's opinion, risks inhibiting the development and implementation of an integrated strategy.

It is essential for consumer protection outcomes that there be timely and effective cooperation between the OMARA and the different areas of the Department responsible for the investigation of alleged unregistered practice or criminal conduct by registered agents.

The Inquiry finds, however, that the location of the OMARA as a discrete office attached to the Department, and operating under various information sharing restrictions, inhibits or makes it more difficult to develop a strategically-integrated approach to regulating the intertwined risks present within the migration advice sector.

The Inquiry finds that the current hybrid model, which was a compromise framework created to alleviate the concerns of some stakeholder about independence, has given rise to a less than, rather than the most, optimal situation by:

- engendering a lack of clarity for clients, stakeholders and members of the public concerning the roles, responsibilities and functions of the OMARA and the Department;
- preventing the OMARA from fully realising the administrative efficiencies and benefits that should flow from operating as part of a large Department; and
- acting as a dampener on information sharing and the leveraging of capabilities and assets that can be directed at reducing risks in the sector and on its fringes.

A review of all of the submissions received by the Inquiry reveals that when discussing “independence” or “where the OMARA should be located” those querying the effectiveness of the current model seem, primarily, to be concerned with:

- the Department’s role in disciplining migration agents;
- what many perceive as too great a role by the OMARA in relation issues best left to other entities; and
- whether the Department would play too great a role in the industry were the OMARA more fully integrated into the Department.

The Inquiry notes that concerns in relation to serious disciplinary matters are valid. Perception does matter and it is less than ideal to have the OMARA both investigating and ultimately hearing and making determinations about serious disciplinary breaches that might ultimately result in an agent being denied the right to practice. The Inquiry has recommended that this issue be addressed by allowing the Administrative Appeals Tribunal to adjudicate serious disciplinary matters after an initial information gathering stage and investigation by the OMARA.

The Inquiry has also accepted that the OMARA plays too great a role in relation to the regulation of CPD and in relation to the regulation of the educational entry qualifications for migration agents. In that regard, the Inquiry has recommended that the OMARA’s role be significantly reduced.

The Inquiry has also recommended that lawyer agents be removed from the current regulatory scheme, such that they now be regulated solely by the relevant legal service regulators throughout Australia.

The Inquiry is of the view that, should these recommendations be implemented, the end result will be a more stream-lined OMARA that can, quite comfortably, sit within the Department. The benefits of such a system can be summarised as follows:

- a centralised system for the sharing of information and expertise;
- an educational structure that allows those persons and entities who are best equipped to provide high quality educational training to do so without unnecessary interference from a government body that was never designed to have expertise in this area; and
- costs savings of the sort that result from a more stream-lined administrative structure, with said costs savings potentially able to be passed on to migration agents via reduced registration fees.

In these circumstances, the Inquiry does not accept that there is need for the adoption of a separate Independent Immigration Commission of the sort adopted in the United Kingdom. This would add a further layer of regulation to an industry that, based on the submissions received by the Inquiry, seems keen to avoid regulation and multiple layers of bureaucracy.

Finally, in addressing concerns about public perceptions of independence, the Inquiry accepts that the current Advisory Board plays an important role in that regard. The Inquiry believes that the Advisory Board or some similar body can continue to play an important role in the future but that its role should be clarified and better promoted to those who will look to it to ensure that there is significant community input to the OMARA as it seeks to best address the needs of migration agents, while, importantly protecting consumers of this significant branch of Australian migration law and practice.

List of Recommendations

The Inquiry makes 24 recommendations in relation to the regulation and powers of the OMARA. These appear throughout each chapter of this Report and provide as follows.

Chapter Three: The Regulation of Lawyers

Recommendation 1

The Inquiry recommends that lawyers be removed from the regulatory scheme that governs migration agents such that lawyers:

- cannot register as migration agents; and
- are entirely regulated by their own professional bodies.

Chapter Four: Registration

Registration Fees

Recommendation 2

The Inquiry recommends that the current registration and re-registration fees be reviewed to determine if they can be set at a rate comparable to other professional bodies.

Recommendation 3

The Inquiry also accepts the concerns raised in relation to the costs imposed on community migration advisors and recommends that a further fee reduction be investigated to cater for the specific financial needs of community migration advisors.

Annual Re-Registration Requirements

Recommendation 4

The Inquiry finds that the burden associated with annual re-registration could be alleviated if agents of “good standing” (i.e. those with an unblemished record for a continuous period of five years) were able to avail themselves of a faster renewal process relying upon self-declaration, rather than the provision of evidence that they continue to meet re-registration requirements. The Inquiry recommends that appropriate amendments be made to ensure that this occurs.

Recommendation 5

The Inquiry also recommends that agents with an unblemished record for a continuous period of five years should be registered for a further period of three years, rather than annually thereafter.

Registration Filing Dates

Recommendation 6

The Inquiry recommends that all registration applications be lodged and finalised by a particular date within the calendar year. This will provide further certainty to the registration process and offer cost savings to the OMARA through the prospect of allocating resources appropriately to deal with bulk application caseload processing.

Corporations and other Business Entities

Recommendation 7

The Inquiry recommends that, in order to ensure that the clients of all businesses are protected, the relevant legislation, practices and policies that govern migration agents should apply to all business structures.

The Role of the OMARA as the Body Responsible for Registration

Recommendation 8

The Inquiry recommends that appropriate legislative measures be implemented to ensure that in determining the appropriateness of a candidate's registration, the OMARA has access to all of the evidence it requires to make such a determination.

The Trans-Tasman Mutual Recognition Act

Recommendation 9

The Inquiry recommends that further analysis be undertaken by the Department and its New Zealand counterpart to ensure that the respective schemes in both countries are applied as closely as is possible so that they reinforce each other's integrity objectives.

Chapter Five: Continuing Professional Development (CPD)

Recommendation 10

The Inquiry recommends the creation of a more open and competitive market-based framework for the provision of CPD. In such a framework, the role of the OMARA will be significantly reduced and generally restricted to:

- determining the eligibility of a firm or organisation to provide CPD services – noting that, beyond having to meet defined criteria, the type and number of service providers that can operate should be determined by the market;
- setting the requirements for registered agents to complete CPD learnings in core competency areas, noting that this should be structured to allow greater flexibility and variance in the learning offered; and
- monitoring compliance by registered agents with CPD requirements, preferably as part of the re-registration process for migration agents.

Chapter Six: Entry Qualifications

The Adequacy of the Current Graduate Certificate in Australian Migration Law and Practice

Recommendation 11

The Inquiry recommends that the current Graduate Certificate be replaced with a Graduate Diploma in Migration Law and Practice.

Recommendation 12

The Inquiry recommends that the time period for registration after completing the Prescribed Course be extended from one year to five years.

The OMARA's Monitoring of the Graduate Certificate's Four Service Providers

Recommendation 13

The Inquiry recommends that while the OMARA should continue to determine who should be permitted to offer the Prescribed Course and what core subject areas must be offered, the OMARA should play no role in dictating how those courses are to be run, assessed and structured. Appropriate legislative amendments should be made to ensure that this occurs.

Calls for a Post-Graduate Certificate Period of Restricted Practice/Supervision

Recommendation 14

The Inquiry recommends that migration agents (non-lawyers) be required to undertake a period of one year mandatory supervision with an already registered migration agent following completion of the Prescribed Course.

Recommendation 15

The Inquiry recommends that during this period of supervision, agents (having successfully completed the Prescribed Course and met any other conditions required for initial registration) must be registered by the OMARA as 'restricted' or 'limited' practitioners.

Calls for a Capstone Exam

Recommendation 16

The Inquiry recommends that the OMARA tender for the development of a stand-alone Capstone Exam, which should ultimately be prescribed in a legislative instrument. This prescribed examination should be a stand-alone assessment de-linked from the Prescribed Course or any of the service providers currently offering the Prescribed Course.

Recommendation 17

The Inquiry recommends that final registration as a migration agent be dependent on:

- completion of a newly required Graduate Diploma as the Prescribed Course;
- completion of a 12 month period of supervised practice once the Prescribed Course has been successfully completed; and
- the successful completion of a Capstone Exam to be written after the completion of the 12 month period of mandatory supervision.

Chapter Seven: Disciplinary Regime and Sanctions

Recommendation 18

The Inquiry recommends that the Department undertake a detailed consultation with interested parties to determine how best to address concerns in relation to the scope and content of the Code of Conduct and, after said consultation, amend the Code as then deemed feasible and appropriate.

Recommendation 19

The Inquiry recommends a review of the legislative powers that govern the exchange of information between the OMARA and the Department to ensure that consumers are better protected.

Recommendation 20

The Inquiry recommends that a system of early resolution in relation to complaints be investigated and implemented. It is recommended that this involve providing the OMARA with the power to impose conditions or requirements that may affect registration. Said power should not, however, extend to providing the OMARA with powers in relation to serious disciplinary decisions that might result in a suspension. The Inquiry is of the view that serious disciplinary decisions that might result in a suspension should be the purview of an independent body (see Recommendation 22).

Recommendation 21

The Inquiry recommends that necessary changes be made to the *Migration Act 1958* and the *Migration Agents Regulations 1998* to confer on the OMARA the power it needs to award costs, where deemed appropriate.

Recommendation 22

The Inquiry recommends that the Department determine what legislative changes are required to invest the Administrative Appeals Tribunal (AAT) with the powers it requires to adjudicate allegations or serious misconduct that might ultimately result in suspension of a migration agent or restricted practice and that the AAT ultimately be given the powers it needs to do so.

Chapter Eight: Questions of Independence: the OMARA's Relationship with the Department of Immigration and Border Protection

Recommendation 23

The Inquiry recommends that the OMARA's position within the Department be fully consolidated so that it is entirely and unequivocally part of the Department.

Recommendation 24

The Inquiry recommends that some form of independent reference group continue to play an active role as an advisory body to the OMARA.

2

Overview of the Migration Advice Profession In Australia

Introduction

As outlined in Chapter One of this Report, the provision of migration advice in Australia is a regulated activity that falls under the purview of the Office of the Migration Agents Registration Authority (the OMARA). With the exception of exempt persons under the *Migration Act 1958* (the Act) only individuals registered as migration agents with the OMARA can legally provide immigration assistance and charge a fee for doing so.

To be eligible to become a registered migration agent (RMA), an applicant must be an Australian citizen or permanent resident and meet a range of requirements for registration. Overall, applicants must prove that they:

- meet specific knowledge requirements;
- are an Australian citizen, permanent resident or a New Zealand citizen holding a special category visa;
- are a person of integrity/are of good character;
- are over 18 years of age; and
- hold professional indemnity insurance of at least \$250 000.

Complaints about migration agents are managed and investigated by the OMARA and the Department. The OMARA is responsible for addressing complaints about a migration agents' adherence to the Code of Conduct for registered migration agents (Code of Conduct). The Department is responsible for addressing complaints about unregistered practice as well as criminal conduct by RMAs.

The OMARA also approves and monitors all Continuing Professional Development (CPD) programmes for the industry and is active in monitoring the educational entry requirements provided by the four universities that provide the six month Graduate Certificate in Migration Law that all RMAs are required to pass before being allowed to practice as an RMA.

As reported in the Migration Agents Activity Report for the period April to June 2014 (the MAAR), the number of registered migration agents in the profession is 5212. Of these, 367 are non-commercial agents. 1673 hold legal practicing certificates.

The growth patterns in the profession remain fairly steady at approximately 5.0 per cent per annum since the establishment of the OMARA on 1 July 2009, although the composition is changing slowly to a slightly larger percentage with legal practicing certificates. Since July 2009, this has risen from just over 27.0 per cent to nearly 32.0 per cent of the total number of RMAs.

The areas where registered migration agents are most active are in the lodgement of 457 Temporary Work (Skilled), Employer Sponsored, Business Skills and Refugee/Protection visas.

Key statistics in relation to the industry (as reported in the Migration Agents Activity Report April to June 2014) can be summarised as follows:

- total population of registered migration agents is 5212;
 - 7.0 per cent of RMA's operate on a non-commercial basis;
 - 93.0 per cent are commercial agents;
 - 43.9 per cent operate their primary business as a registered sole trader;
 - 45.1 per cent are female and 54.9 per cent are male;
 - the average age is 44.4 years;
 - 1673 (approximately 32.0 per cent) have, or have held, a legal practicing certificate;
 - 74.3 per cent of registered migration agents have never had a complaint made against them in their entire career; 25.71 per cent have had a complaint made against them;
 - approximately 40 per cent of registered migration agents have less than four years' experience;
 - 34 per cent approximately have four to 10 years' experience;
 - 26 per cent approximately have more than 10 years' experience;
 - NSW (at 39.3 per cent) has the greatest concentration of resident registered migration agents followed by Victoria at 27.6 per cent, Queensland at 13.4 per cent and Western Australia at 9.7 per cent; and
 - 18 agents (0.3 per cent) have entered via the Trans-Tasman Mutual Recognition Act (TTMRA) pathway.
- As at 30 June 2014, there were 121 Australian RMA's registered in New Zealand under the TTMRA.

Some of these statistics are further detailed in the following graphs:

Number of Registered Migration Agents at 30 June 2014

	Number	%
Total number of registered migration agents	5212	
Agents operating on a commercial basis	4845	93.0%
Agents operating on a non-commercial basis	367	7.0%
Agents with legal practicing certificates	1673	32.1%
Agents registered under the TTMRA	18	0.3%

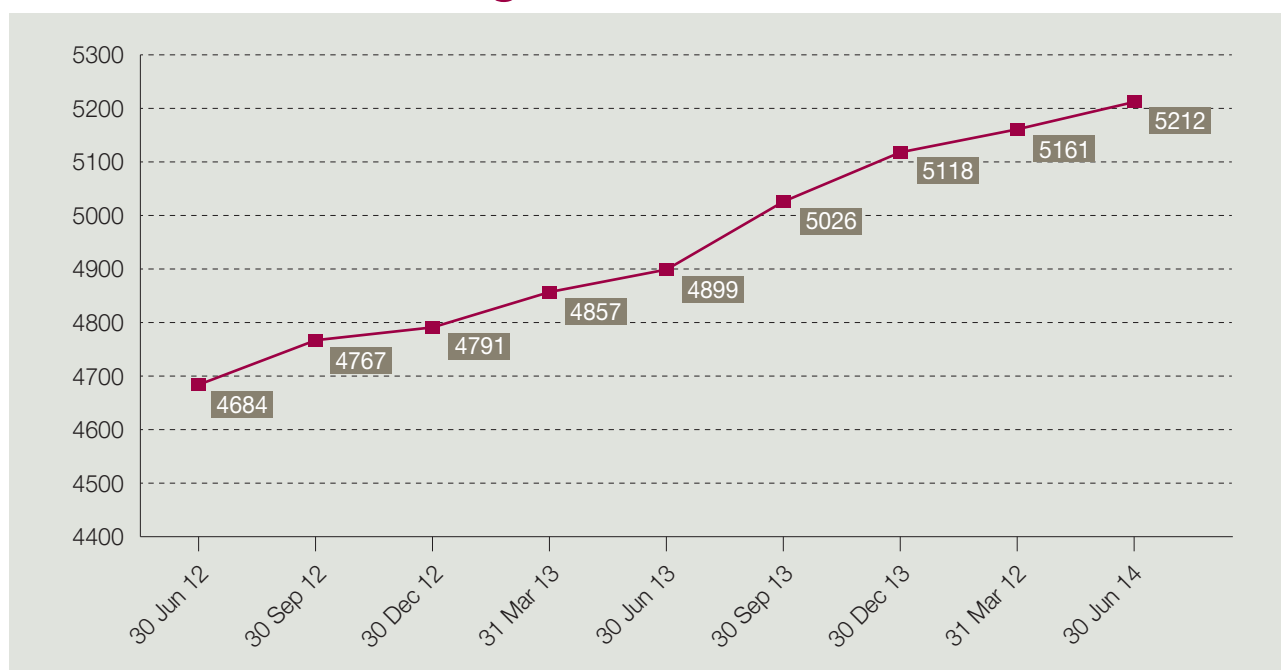
Source: OMARA Migration Agents Activity Report (April to June 2014)

Geographic Distribution of RMAs as at 30 June 2014

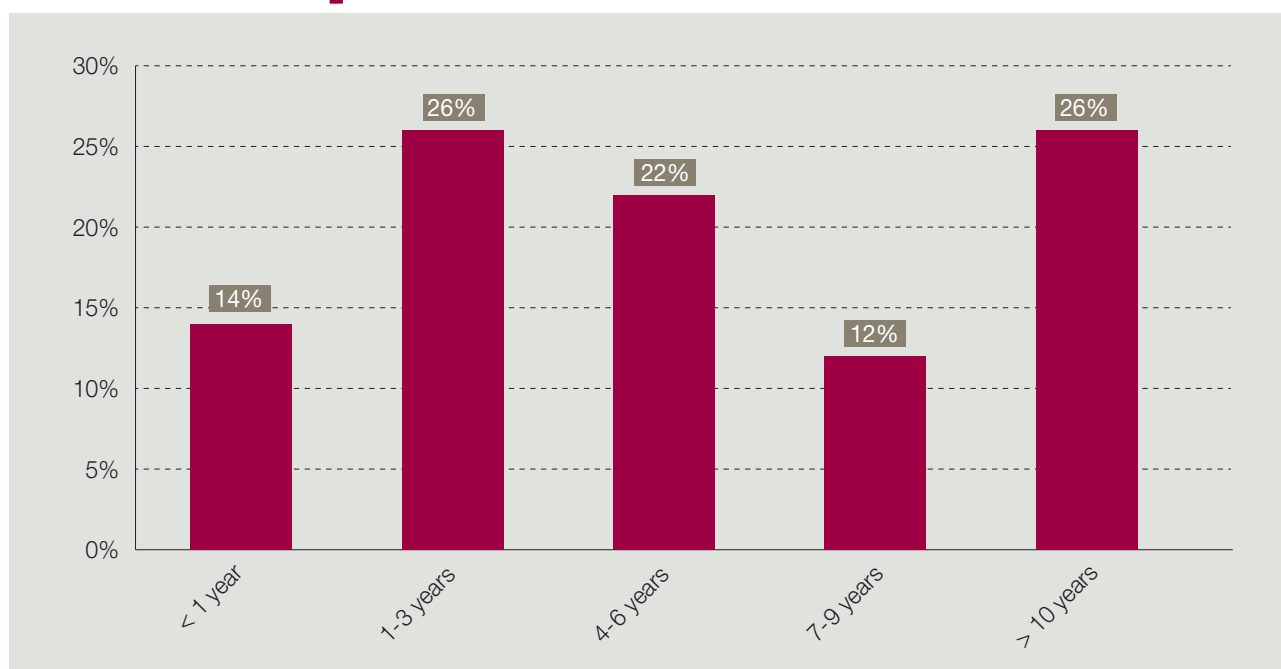
	Number	%
New South Wales	2050	39.3%
Victoria	1439	27.6%
Queensland	697	13.4%
Western Australia	506	9.7%
South Australia	201	3.9%
Northern Territory	18	0.3%
Australian Capital Territory	78	1.5%
Tasmania	23	0.4%
Overseas	200	3.8%
Total	5212	100%

Source: OMARA Migration Agents Activity Report (April to June 2014)

Growth of the Migration Advice Profession



Time in the Migration Advice Industry - Years of Experience of RMAs



Key Stakeholders

The industry is currently represented by three bodies:

- the Migration Institute of Australia (the MIA);
- the Law Council of Australia (the LCA); and
- the Migration Alliance (MA), which was formed as an alternative to the MIA in 2009 when the regulation of migration agents moved from the MIA's control to the OMARA.

The Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. It was established in 1933 and is the federal organisation representing approximately 60,000 legal practitioners nationwide.

Within the LCA, the Migration Law Committee (the MLC) is the primary point of contact for the Department on migration agent related matters. The MLC is a component of the International Law Section of the Law Council. The MLC is currently chaired by Erskine Rodan OAM. The MLC is active in providing specialist advice to the LCA on immigration matters and in making representations to the Department and the government more broadly.

The LCA is represented on the OMARA Advisory Board and attends the Migration Advice Industry Liaison (MAIL) meetings hosted by the Department. The MLC also represents the Law Council as an observer at a number of forums, including at the Australian Human Rights Council meetings discussing the current Australian policy of offshore processing in Nauru and Papua New Guinea.

The Migration Institute of Australia

The MIA was established in 1992. It was appointed to act as the Migration Agents Registration Authority between 1998-2009.

The MIA currently consists of five branches representing all states and territories and a national executive. The National President is Angela Chan. Kevin Lane is the Chief Operating Officer.

RMA membership is by nomination. A fee of \$1215 is charged for membership (commercial) with a \$55 joining fee applying to all new Member (commercial) applications. As at 30 June 2014, there were 2301 RMA members. Of those, 771 (or approximately 30 per cent) of its members hold a Legal Practising Certificate.

The MIA is represented on the OMARA Advisory Board and attends the MAIL meetings hosted by the Department. The MIA is also an active provider of CPD courses.

Migration Alliance

The MA was formed in July 2009 as an alternative RMA representative body to the MIA.

The MA is run by a national executive. The current Convenor is Christopher Levingston. The MA's Secretary is Liana Allan.

Unlike the MIA, membership is free to anyone who attends an MA sponsored event or registers on the MA website. The MA advises that it currently has 4200 RMA members. The organisation does not keep records on how many of its members hold legal practise certificates.

The MA is not represented on the OMARA Advisory Board or at MAIL meetings. Members do, however, attend Client Reference Groups hosted by Departmental state offices. The MA also has quarterly meetings with the Assistant Secretary of the Visa Framework and Family Policy Branch.

The Inquiry is grateful to all three bodies for their considerable assistance throughout the course of its investigations.

In relation to the above, the Inquiry notes that the OMARA itself engages extensively with key stakeholders and the public and has fostered strong relationships with a variety of federal and state government agencies, consumer groups and other entities relevant to its functions. This includes the MIA, the LCA, the MA, the law societies in various states, the Migration and Refugee Review Tribunals, Legal Services Commissioners, the Office of Fair Trading and Consumer Trader and Tenancy Tribunal (NSW) and other legal and regulatory bodies. The OMARA also participates in the Conference of Regulatory Offices and the recently formed Community of Practice of Commonwealth regulatory agencies. It also meets periodically with the Tax Practitioners' Board to discuss regulatory practice.

In the international arena, the OMARA participates in a Regulators' teleconference with counterparts in the UK, Canada, New Zealand and the US organised under the auspices of the Five Country Conference Informal Working Group on Immigration Advisers. It has forged a particularly strong relationship with the New Zealand Immigration Advisers Authority (NZIAA) with the focus of engagement on harmonisation of standards between the equivalent occupations.

3

The Regulation of Lawyers

Introduction

As at 30 June 2014 there were 1673 migration agents with legal practicing certificates in Australia. This equates to approximately 32 per cent of all practicing migration agents.

Under section 280 of the *Migration Act 1958* (Act), it is an offence of strict liability for a person who is not a registered migration agent to provide “immigration assistance”. Section 276 of the Act broadly defines immigration assistance as advice or assistance in relation to a visa application, or preparation of a visa application.

Section 277 of the Act clarifies that lawyers are not required to be registered as migration agents if providing “immigration legal assistance”, essentially defined as litigious immigration matters before a court.

As explained by the 2007-08 Hodges Report, the definitions of “immigration assistance” and “immigration legal assistance” in the Act have long been seen as confusing and problematic. In practice, it is often difficult to determine whether the assistance being provided by lawyers is immigration assistance or immigration legal assistance.

Overall, it is fair to say the net effect of the confusion caused by the current regulatory framework is that any lawyer practicing in the area of migration law is required to be registered with the OMARA if she or he purports to use knowledge of, or experience in, migration procedure to provide advice to applicants regarding visa or review applications.

Dual Regulation

The Inquiry received many submissions in relation to the status of lawyers who act as migration agents. Most addressed what is commonly referred to as “dual regulation”. This term was best summarised by the Law Council of Australia (the LCA) in submissions to the 2007-08 Hodges Review, wherein the LCA argued:

... Australian lawyers practicing migration law are effectively required to register as migration agents. Under the current scheme, it is practically impossible for a lawyer advising on migration issues to provide legal services in this area without being required by law to register as a migration agent. This has the practical effect that lawyers are subject to 2 separate schemes of regulation – the comprehensive legal profession regulatory framework and the migration agents’ registration scheme.

The extent to which lawyers are affected by two schemes of regulation is clear on a number of levels, as detailed below.

Lawyers who register and pay their registration fees to the relevant state or territory legal professional body are subject to regulation by that body. The requirement to be registered with the OMARA and pay the attendant registration charge that lawyer agents are thus subject to regulation by their professional legal body and the OMARA. Paying two sets of registration costs means they are also subject to dual registration.

The *Migration Agents Registration Application Charge Act 1997* and the *Migration Agents Registration Application Charge Regulations 1998* set out the legislative framework for applying a registration application charge. The charges are as follows:

Type of Registration	Registration Charge
Initial registration: commercial or for-profit	\$1760
Initial registration: non-commercial or non-profit	\$160
Re-registration: Commercial or for-profit	\$1595
Re-registration: non-commercial or non-profit	\$105

There is no reduction of the registration application charge for lawyers for any of these listed categories. All agents must re-register annually. Lawyers are also responsible for the cost of their legal practicing certificates. These are also paid annually. In Western Australia, by way of example, lawyers pay approximately \$1000 for their legal practicing certificate. Their fidelity insurance can cost between \$3300 and \$5700, depending on the type of legal practice.

Lawyers are, however, exempt from completing the Graduate Certificate in Australian Migration Law and Practice and from meeting the English language requirements for registration as an agent. These requirements are deemed to have been met as a consequence of successfully completing a recognised law degree. Further, holders of a legal practicing certificate who have indemnity insurance for their legal business do not have to meet OMARA indemnity insurance requirements. Re-registering lawyer agents, all of whom are bound by the relevant CPD requirements imposed by the legal service regulators in each state and territory, are able to claim four points of continuing legal education against the 10 points of continuing professional development also required by the OMARA.

The disciplinary procedures applied to lawyers also differ from non-lawyer migration agents, again arising from the distinction between the Act's definition of immigration advice and immigration legal advice. Where the complaint involves a registered lawyer-agent, the threshold issue is whether the conduct constitutes immigration assistance or legal advice. If the conduct is not immigration assistance then the complaint is referred to the relevant legal services regulator.

It is possible for lawyer-agents to give immigration assistance, and with the same client give extensive legal advice or representation before the courts. The former conduct is within the OMARA's jurisdiction and subject to its investigation. The latter conduct is referred to the relevant state or territory legal services regulator. Where conduct is within the OMARA's jurisdiction, the process for investigating and sanctioning lawyer-agents is the same as that for non-lawyer agents.

This situation has resulted in a series of MOU's between the OMARA and the various state legal services commissions/legal practice board clarifying the need for information sharing and each entity's obligations in relation to the referral of complaints and consultation. A copy of the MOU between the New South Wales Legal Services Commission and the OMARA is provided at **Attachment C** to this Report by way of example.

International Comparisons

Canada, the United Kingdom and New Zealand have comparable registration schemes for migration agents. While registration requirements vary across these countries, none of them require lawyers to be registered in order to provide immigration advice or assistance. Australia is thus the only country to require migration lawyers to be regulated as migration agents in order to practice in this area.

Section 7 of the New Zealand *Immigration Advisers Licensing Act 2007*, for example, defines "immigration advice" as:

using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward.

While broadly similar to the definition used in Australia, the New Zealand legislation is not subject to the distinction between "immigration assistance" and "immigration legal advice" that appears in the Australian *Migration Act*. Rather than requiring migration lawyers to be subject to dual regulation, lawyers are specifically prohibited from applying for a licence under section 12(6) of the *Immigration Adviser Licensing Act 2007*. According to the New Zealand Immigration Advisers Authority's website:

The Immigration Advisers Authority will not accept licence applications from either lawyers or non-lawyer employees of law firms.

In a submission to the 2007-08 Hodges Review, the New Zealand Ministry of Labour explained that the decision to exclude lawyers from the migration advisers regulatory framework was made on the basis that:

- a. the legal profession regulatory scheme would provide appropriate protection for clients using lawyers;
- b. that inclusion in the scheme would involve unnecessary compliance costs; and
- c. that including lawyers would cause confusion and dissatisfaction amongst consumers arising from having two avenues of complaint.

The 2007-08 Hodges Report

As explained in the Hodges Report, the inclusion of lawyers in the regulatory scheme for migration agents has long proven contentious. Relevantly, following the establishment of the MARS in 1992, the Law Council of Australia and other interested parties challenged the constitutional validity of the MARS insofar as it regulates legal professionals. In *Cunliffe v the Commonwealth* (1994) 124 ALR 120, the High Court found by majority of 5:2 that regulation of lawyers within the migration agents' registration scheme was within the Commonwealth's constitutional legislative power.

As explained in the Hodges Report, the purported reason for including lawyers in the regulatory scheme post-1992 "was to achieve consistent standards of professional conduct and quality of service within the migration advice profession."

It is fair to say that the regulation of lawyers as migration agents has remained controversial and the subject of much debate and extensive lobbying from those who argue that the regulation of lawyers under the current scheme amounts to a system of unnecessary dual regulation.

The Hodges Report did not recommend the removal of lawyers from the current Australian regulatory scheme, noting as follows:

After initial discussions with the External Reference Group, it was determined that further consultation was needed with key stakeholders. A meeting was subsequently held with representatives from the LCA and the MIA to further analyse the arguments for and against the inclusion of lawyer agents in the regulatory scheme and obtain further information on key issues.

In its consideration of this issue, the Review concluded that while many of the arguments for and against the continued inclusion of lawyer agents could be the subject of ongoing dispute, it was clear that the inclusion of lawyer agents provided clarity to consumers.

Ultimately, the Hodges Review recommended (with External Reference Group member Glen Ferguson dissenting) that lawyer agents continue to be included in the revised regulatory scheme.

2010 Productivity Commission

Some two years later, on the issue of dual regulation, recommendation 4.2 of the Productivity Commission report (entitled *Annual Review of Regulatory Burdens on Business: Business and Consumer Services* (12 October 2010)) provided:

The Australian Government should amend the Migration Act 1958 to exempt lawyers holding a current legal practicing certificate from the requirement to register as a migration agent in order to provide 'immigration assistance' under section 276. An independent review of the performance of these immigration lawyers and the legal professional complaints handling and disciplinary procedures, with respect to their activities, should be conducted three years after an exemption becomes effective.

Submissions Received

Of the written submissions received by the Inquiry, nine specifically discussed the issue of dual regulation. Of these, six were opposed to the continuing regulation of lawyers by the OMARA. Three supported continued regulation by the OMARA. Of the three main stakeholders relevant to the issue of the regulation of migration agents, the Law Council of Australia opposed dual regulation; the Migration Institute of Australia supported dual regulation; and Migration Alliance made no comments or suggestions in relation to the issue.

Some submissions to the Inquiry called for the complete removal of qualified lawyers from the OMARA regulatory scheme. In these circumstances, lawyers would not be permitted to register as migration agents and would not be regulated by the OMARA. All disciplinary actions and all ongoing educational requirements would be imposed by the relevant state and territory legal regulators.

Others indicated that lawyers should not be “regulated” by the OMARA (i.e., charged registration fees, disciplined or required to undertake OMARA monitored CPD programmes) but that lawyers should still be permitted to register and advertise as migration lawyers.

Others argued that lawyers should remain under the umbrella of the OMARA and regulated in the same manner as non-lawyer migration agents “due to the complexity of migration law and practice generally”.

Submissions Opposing the Dual Regulation of Lawyers

Law Council of Australia

The LCA, the nation’s peak legal body, has consistently been the strongest opponent of dual regulation. As explained in the Hodges Report, the LCA claims, and has always claimed, that because lawyers are extensively regulated by their own profession in relation to the provision of legal assistance, lawyers should not also be required to be registered by the migration advice profession for the provision of immigration assistance.

The Inquiry was greatly assisted by two submissions received from the LCA dated 1 August 2014 and 22 August 2014. These submissions build on previous LCA submissions in relation to the regulation of lawyers as migration agents, which the Inquiry also received from the LCA. These previous submissions were:

- a submission dated 12 November 2007 to The Hon Ms Teresa Gambaro MP, titled “2007-2008 Review of the Statutory Self-Regulation of the Migration Advice Profession”;
- a submission dated 20 April 2010 titled “Annual Review of Regulatory Burdens on Business: Business and Consumer Services” to the Productivity Commission;
- a letter dated 15 June 2010 to Mr Warren Mundy, Associate Commissioner, Productivity Commission, titled “Supplementary Submission re Annual Review of Regulatory Burden on Business”;
- a letter dated 10 August 2010 to Mr Warren Mundy, Associate Commissioner, Productivity Commission, titled “Annual Review of Regulatory Burden on Business”.

Overall, the LCA argues that the legal profession is one of the most regulated industries in Australia and that existing legal profession regulation is generally consistent across all states and territories. In addition to requiring what is generally a five year university degree for legal practice, the regulatory regime for legal practitioners in all Australian jurisdictions includes:

- a. personal suitability requirements for admission to the profession;
- b. a mandatory 18-month to 2-year period of supervised practice (followed, in a number of jurisdictions, by practical examinations) before permitting any legal practitioner to practise unsupervised (i.e. establish their own practice or act as a principal in any firm);
- c. personal suitability requirements for the granting and annual renewal of practicing certificates;
- d. the ability of the legal regulators in each state and territory to immediately cancel, suspend or vary practicing entitlements or conditions in response to instances of misconduct, bankruptcy, or commission of certain offences;
- e. mandatory continuing professional development;
- f. mandatory professional indemnity insurance;
- g. ethical and other professional responsibilities;
- h. trust money and trust accounting regulation, including provision for external intervention;
- i. fidelity cover – noting that in NSW, dual regulation has effectively resulted in the loss of fidelity cover for clients of immigration lawyers who provide “immigration assistance” (discussed further below);
- j. complaint mechanisms for consumer and disciplinary matters, and a range of consumer remedies – including, in some cases, formal disciplinary proceedings before judicial officers;
- k. legal practitioners remain at all times officers of the court and are thereby subject to the inherent supervisory and disciplinary powers of the court; and
- l. rules of professional conduct that are nationally consistent.

The LCA's primary position is that imposing a second legislative and regulatory regime on top of the system already imposed on lawyers produces a number of complexities, uncertainties, duplications, costs and undesirable outcomes for lawyers and consumers.

Migration Assistance v Migration Legal Assistance

In relation to the legislative distinction between “immigration assistance” and “immigration legal assistance”, the LCA notes that lawyers have a duty to provide comprehensive legal advice to their clients which addresses all relevant legal issues. The LCA submits that a fundamental problem created by the migration agent regulatory scheme is that lawyers who are not registered are not legally permitted to provide legal advice on a range of immigration issues, regardless of the circumstances in which those issues arise or the lawyer's experience and capacity to do so. The LCA argues:

Section 280 of the Act prohibits a person who is not a registered migration agent from giving immigration assistance. The Act defines immigration assistance as assisting a visa applicant by:

- *providing assistance to them in the preparation of an application;*
- *offering them advice in relation to an application; or*
- *assisting them to prepare for proceedings before a court or review authority such as the Migration Review Tribunal in relation to a visa application.*

However, lawyers are permitted to give ‘immigration legal assistance’ if they act for or represent a

visa applicant in relation to proceedings before a court or give advice to a visa applicant in relation to a visa application which is not for the purpose of the preparation or review of the application.

It is confusing for lawyers that the Act prohibits them from providing legal advice in relation to a visa application or in relation to the review of that application conducted before a Tribunal, but permits them giving that same advice when identical issues arise in court proceedings.

There is also considerable confusion for lawyers, whose primary practice is not migration law and who consequently choose not to register as agents, as to whether they will be in breach of the Act if they provide any immigration advice or assistance in the context of a different scheme of regulation.

This confusion is difficult to reconcile with a solicitor's duty to provide comprehensive legal advice to their clients which addresses all relevant legal issues. For example, if an immigration issue, such as the need to lodge a visa application, arises in the process of a non-agent lawyer giving advice on a family law matter, unless the lawyer is registered as a migration agent the client will be unable to obtain the comprehensive, strategic advice they require. This conflict can arise in other contexts, such as employment matters, where an in house solicitor explains an employment contract to a foreign employee who is sponsored by the company to live and work in Australia.

The LCA notes that in these situations the system imposes an unjustified burden on a client who requires advice on immigration issues arising from some other matter by requiring him or her to seek out another solicitor or agent who is registered with the OMARA. The LCA argues:

Clients are currently protected by legal profession conduct rules which require a lawyer to inform a client of their relevant experience in a particular area of law. A client has a choice between funding an advice from counsel or a specialist agent, or allowing the lawyer time to research into the unfamiliar area of law in order to provide advice on the matter. Often a client will have a preferred and trusted lawyer. It is undesirable that lawyers, who seek to provide basic migration law advice to clients in these circumstances, are required to cause additional delays and expense to their clients by commissioning advice from another practitioner who is registered.

By virtue of their admission, lawyers are recognised as qualified to practise, interpret and apply the law. Assisting clients to prepare documentation that complies with prescribed legal Regulations is a legal task which no practicing lawyer should be restricted from providing. The Act prevents a lawyer from assisting a client in preparing a visa application by, for example, checking to ensure that the application complies with the legal rules and Regulations relating to the lodgement of visa applications. The Law Council submits that this is an untenable restriction on the practise of lawyers. In effect the regulatory provisions prevent a lawyer from assisting clients to ensure compliance with a relevant law.

Other areas of concern raised by the LCA in relation to dual regulation include:

- a. legal practitioners must pay both practicing certificate fees and migration agent registration fees in respect of the same regulated activity;
- b. confusion for consumers as to their entitlements and avenues to obtain compliance with regulatory requirements and redress in relation to immigration services provided by legal practitioners. This confusion may extend to whether certain professional obligations exist, including client legal privilege, trust accounting, coverage by fidelity funds and professional indemnity insurance, not to mention the level of competence that might be expected of those with legal or non-legal qualifications to provide immigration assistance services;
- c. the prospect of legal practitioners being subject to up to three separate complaints handling processes in

relation to the same alleged conduct (with the prospect of separate complaints handling processes by the legal services regulator, the OMARA and the state and territory fair trading offices, or equivalents);

- d. an apparent need for memoranda of understanding between the OMARA and the legal profession regulatory bodies as to complaints-handling and referrals;
- e. two sets of mandatory annual continuing professional development obligations; and
- f. two sets of conduct obligations – legal profession rules of professional conduct as embodied in the Australian Solicitors' Conduct Rules and the Code of Conduct for Registered Migration Agents.

Each of these topics has been analysed in detail by the LCA in the various submissions received by the government since 2007.

Mandatory CPD

In relation to the imposition of a second tier of CPD, the LCA outlined the following concerns in 2010:

The CPD burden for migration lawyers under dual regulation is a major disincentive to practicing in this area. Continuing professional development of lawyers is required by State and Territory Bar Associations and Law Societies. It is a condition of renewal of a lawyer's practicing certificate each year that the lawyer undertakes 10 hours or more of CPD over the calendar year in relation to their various areas of practise. In some jurisdictions it is mandatory for lawyers to complete a certain number of hours in ethics, trust accounting, and equal opportunity. A lawyer who fails to meet CPD requirements will lose the right to practise.

OMARA requires that migration lawyers undertake 10 hours of CPD either with MIA or another OMARA appointed provider. This adds to the overall CPD burden on lawyers, who are also required to undertake CPD in other areas of practise.

For example, a lawyer whose practice involves 70 per cent civil litigation, 20 per cent criminal law and 10 per cent migration advice may appropriately apportion 10 hours of CPD according to those values. The additional burden imposed by the OMARA requires that lawyer to spend an extra 9 hours on CPD, such that lawyers who choose to practise as migration lawyers may have to complete up to 19 hours of CPD.

The burden of additional CPD both financially (CPD course costs range from \$100 - \$300 per hour) and in terms of time lost in billable hours is a major disincentive for lawyers to practise migration law.

Disqualification of clients from the protection of the Law Societies' fidelity fund and professional indemnity insurance coverage

The Law Council argues that dual regulation has implications in relation to consumer protection that would be avoided if lawyers were removed from the regulatory umbrella of the OMARA.

The LCA notes, for example, that clients of legal professionals in NSW are directly impacted in relation to any claim they might otherwise have had on the fidelity fund or their lawyer's professional indemnity insurance policy.

Under all State and Territory Legal Profession Acts, legal professionals are required to contribute to a fidelity fund by way of a compulsory levy included in the practicing certificate fee. Legal professionals are also required to hold a very high level of professional indemnity insurance (PII) cover, of up to \$2 million (compared with only at least \$250,000 for migration agents).

These indemnity schemes benefit clients as follows:

- a. In the event of a defalcation of trust monies by the lawyer, a client is entitled to indemnity from the fidelity fund, while the Law Society will pursue the practitioner for reimbursement along with any other sanctions for misconduct.
- b. In the event of a finding of negligence against a law practice in the provision of legal advice or assistance, any subsequent award of damages to the client will be paid by the law practice's PII insurer.

The LCA notes that, following recent findings by the NSW Administrative Decisions Tribunal and NSW Supreme Court, "immigration assistance" as defined in the Act has been interpreted as falling outside the definition of migration legal assistance. In *Portale v Law Society of NSW (No. 1) (LSD)* [2003] NSWADTAP 56, it was held that conduct falling within the definition of 'immigration assistance' was effectively removed from the ordinarily broad concept of 'business conducted by a solicitor'. *Portale* was decided under the *Legal Profession Act 1987* (NSW) and this position has been qualified by the enactment of the *Legal Profession Act 2004* (NSW). The Inquiry was advised that the present position under *Law Society of New South Wales v Jayawardena* [2008] NSWADT 187 (4 July 2008) is that "a person who is a lawyer holding a current practicing certificate and who provides immigration legal assistance and who is also a registered migration agent, becomes subject to the disciplinary powers of the OMARA and the disciplinary powers under the *Legal Profession Act 2004*."

The LCA explains that this situation has arisen:

... despite the fact that conduct, such as filling in forms and preparing review applications, is common to every other area of administrative legal practice, which continue to be covered by fidelity funds. The Law Council understands that the removal of the distinction between "immigration assistance" and "immigration legal assistance" would provide an opportunity for the Law Society to reconsider its previous position and provide greater certainty to consumers.

Professional Indemnity Insurance

Under dual regulation, consumers are also likely to be confused as to whether they are covered by their lawyer's professional indemnity insurance policy. For example, in a submission to the 2007/08 Review, the New South Wales Office of the Legal Services Commissioner observed that:

LawCover will reject any claim in relation to a legal practitioner providing migration assistance, as current legislative definitions dictate that this does not constitute 'legal work' and thus could potentially represent a grave lacuna in that practitioner's insurance coverage.

As a further consequence of this, the Law Council has been advised that NSW barristers are best to obtain separate insurance cover if they choose to register as a migration agent, creating a major disincentive for NSW barristers to accept briefs in immigration matters. The result, according to the LCA, is a strain on the workloads of barristers who work in this area and a corresponding drain on the capacity of non-profit migration and refugee resource centres to find suitable representation or assistance in court proceedings.

The LCA considers that removing lawyers from the scope of the current legislative distinction between migration assistance and migration legal assistance would reduce any uncertainty as to whether clients are covered by their lawyer's professional indemnity insurance policy.

Double Jeopardy and Regulatory Gaps

The LCA also submits that, as a result of applying two regulatory schemes, immigration lawyers can be subject to "double jeopardy" or may altogether avoid disciplinary action necessary to preserve the integrity of the legal profession due to blurred lines of regulatory responsibility.

"Double jeopardy" refers to the legal principle that protects a person from trial or punishment twice for the same

offence, on the same facts and evidence. “Double jeopardy” is used in this context to refer to the potential for investigation and disciplining of an immigration lawyer, concurrently or consecutively, by two regulatory authorities for the same conduct.

As explained by the LCA:

Immigration lawyers are subject to two codes of conduct, being the Legal Profession Conduct Rules in each jurisdiction and the Code of Conduct for registered migration agents. Accordingly, immigration lawyers may be subject to two separate investigations into the same conduct, two separate disciplinary proceedings and two punishments. For example, if a client complains to the Law Society or Legal Services Commissioner about certain conduct by an immigration lawyer, which is duly investigated and dealt with under legal profession regulation, the client may also lodge a complaint with the OMARA (or the OMARA may acquire knowledge of the investigation in some other way), prompting a secondary OMARA investigation into the same conduct.

Alternatively, an immigration lawyer may engage in conduct which affects his or her professional standing and fitness to hold a practicing certificate, but which was committed in circumstances where the lawyer was deemed to have been providing so-called “immigration assistance”. On this basis the OMARA might commence an investigation into the conduct and de-register the agent or apply some other penalty. However because the legal services regulator has not been advised, the immigration lawyer is able to continue operating a law practice until such time as the matter is brought to the legal services regulator’s attention. At this point in order to discharge its statutory functions, the legal services regulator will investigate the conduct and take appropriate action, notwithstanding the fact that disciplinary action has already been taken, because the previous sanction has had no impact on the lawyer’s right to practice law – thereby prosecuting the same conduct twice.

Further, to the extent that some differences exist in the regulatory environment for the legal profession or migration agents, immigration lawyers have the capacity to argue that their conduct fell under whichever scheme is likely to be more favourable in the circumstances. The lawyer might argue that they were providing “immigration assistance” rather than “immigration legal assistance” because the OMARA will investigate the conduct and may not refer the matter to the legal services regulator if it is deemed to relate to “immigration assistance”.

In such circumstances, the most serious consequence of the OMARA’s disciplinary action might be de-registration as a migration agent. However, the loss of a legal practicing certificate has significantly greater professional consequences for a lawyer than de-registration as a migration agent. This is because a lawyer who is only deregistered as a migration agent can continue to practice law in other fields (or even continue to carry on a limited immigration law practice). However a lawyer-agent who has his/her legal practicing certificate cancelled will be unable to practice either as a lawyer or an agent because registration as a migration agent is contingent upon either holding a legal practicing certificate or satisfying other requirements.

This highlights a fundamental problem with dual regulation: those subject to two schemes of regulation covering the same conduct can be investigated and punished twice for the same ‘offence’, or might avoid professional consequences altogether.

Client Legal Privilege

The LCA further advises that when clients seek advice from a person who is deemed to be a lawyer, they are entitled to assume that client legal privilege applies to their communications. The requirement for lawyers to register and hold themselves out as “agents”, alongside non-lawyers, creates the potential for confusion – particularly in cases where non-lawyer agents attempt to hold themselves out as legally qualified.

The LCA advises that:

Removing the illusory distinction between immigration assistance and immigration legal assistance, as well as only requiring non-lawyers to register as agents, would reduce the risk that a client may erroneously assume they are covered by client legal privilege.

Negative Impact on Provision of Services to Those Most in Need

The LCA also argues that another impact of dual regulation for lawyers is that many lawyers will simply refuse to practice as migration agents. This, the LCA argues, impacts negatively on the migration advice industry by:

- precipitating ‘brain drain’ from Community Legal Advice Centres (CLCs); and
- reducing the number of migration lawyers willing and able to advise and receive instructions from clients.

In relation to the drain on community legal advice centres, the LCA submits as follows:

CLCs generally have significant trouble attracting experienced practitioners who are willing to provide pro bono legal advice to migrants. This problem is exacerbated by a severe “brain drain” of specialist migration lawyers, who cease practicing due to frustration with the oppressive regulatory scheme.

The Law Council is advised that dual regulation of migration lawyers has had substantial negative effects on both the number and quality/experience of legal counsel available to CLCs. CLCs, such as the Refugee Advice and Casework Service, generally rely on the generosity of registered migration lawyers, whose donation of time and experience is integral to the quality of advice and service available to migrants, who are often unable to afford to pay for private legal advice.

The vast majority of those who are willing to provide legal advice in this capacity have limited experience or must be closely supervised by RACS staff because they are not registered. This substantially restricts the amount and the type of work which may be performed by practitioners who generously donate their time and stretches the resources of CLCs considerably.

The problem is exacerbated when matters are referred to the Federal Court for review. While a barrister does not need to be registered as a migration agent to assist with judicial review proceedings, for ethical and practical reasons a barrister needs the assistance of a solicitor to run a case.

While a solicitor technically does not need to be registered to provide immigration legal assistance, a client will, for example, require a visa to stay in Australia while the case is on-going. This will require the giving of immigration advice by a registered agent. For practical reasons, an instructing solicitor will almost inevitably need to be registered as a migration agent in order to provide comprehensive legal advice to the client.

These factors combine to significantly disable the capacity of CLCs to adequately brief lawyers and provide comprehensive legal advice and services to migrants.

This submission mirrors an earlier LCA submission wherein the LCA argued:

Impact on the legal assistance sector

The immigration pro bono and legal assistance sector relies heavily on the benevolence of legal practitioners, who are willing to donate their time and expertise to help migrants in need of advice and assistance. Usually, pro bono work is carried out by students, young lawyers or more senior retired or semi-retired lawyers, assisting in refugee and migration legal services after hours, in addition to their ordinary paid employment and busy personal lives.

There are some concessions offered to lawyers working in the non-profit sector, including reduced registration fees. However, the cost and administrative trouble involved with becoming registered as a migration agent has been identified as the single most important factor inhibiting the supply of willing lawyers to the non-profit immigration advice sector and restricting the services those bodies are able to provide.

This is because legal professionals can provide pro bono legal assistance in any other area of legal practice, without being subject to onerous registration requirements in order to generously donate their time, skills and experience to vulnerable refugees and migrants.

The shortage of qualified immigration lawyers is reflected across the migration advice sector. The OMARA reports that in March 2010 only 1167 of the 4476 registered migration agents held a legal practicing certificate. Given there are over 55,000 lawyers currently practicing in Australia and roughly 16,000 new law graduates each year, the small number of lawyers specializing in immigration law is remarkable and clearly undermines the capacity of the legal assistance sector to provide immigration and humanitarian services to refugees and other vulnerable migrants.

Shortage of Practitioner Agents Able to Assist Migrants

The LCA notes that vast numbers of applications are made to the Migration and Refugee Tribunals and to the Federal Courts each year challenging decisions made by the Immigration Minister and the Department.

The shortage of available counsel caused by the withdrawal of lawyers from a migration agency work thus presents a significant problem for migrants and for courts:

In particular, the shortage of practitioner agents with court experience affects the operation of the Tribunals and the Courts by increasing the length and cost of proceedings. The shortage of practitioner agents increases the likelihood of poor or unfounded applications being made on behalf of applicants because of the significant pressure placed on practitioner agents to act on short notice.

The Law Council is advised that, while an applicant may experience significant difficulty in obtaining legal representation from the relatively small pool of registered migration lawyers, the Government respondent faces no such problem because the Minister will never require immigration assistance and is thus not restricted to retaining a practitioner who is a registered agent.

This creates a fundamental power imbalance between the Government, which has vast financial resources and few restrictions in the proceedings, and migrants, whose resources are comparatively meagre and who face considerable restrictions as well as potentially devastating consequences in the event that their interests are not properly represented.

Overall, the LCA calls for the immediate exclusion of lawyers from Australia's migration agents' registration scheme.

Ernst and Young

Ernst and Young is Australia's second largest immigration service provider. The organisation represents some of the world's largest businesses as well as hundreds of medium and small businesses from industry sectors including engineering, telecommunications, finance, property development, insurance, shipping, banking, professional services, retail and recruitment.

In its written submissions to the Inquiry and in telephone conversations with the Inquirer, Ernst and Young was generally of the view that lawyers should not continue to be regulated by the OMARA and that most elements of dual regulation had negative consequences for lawyers and those they seek to assist:

It is submitted that dual regulation should only apply to legal practitioners in a more limited manner than at present. Decreasing the cost of professional standards and integrity monitoring through developing a clear framework for referring complaints concerning the conduct of migration agents who are lawyers to the appropriate legal services regulator could relieve the burden for lawyers.

While legislative change would be required to give effect to this recommendation, the benefits that may flow from such a change could be widespread. To some degree, the cost of dual compliance is currently passed onto consumers in the form of higher advisory fees, without any guarantee that this double layer of administrative burden fosters higher standards or realises better consumer protection outcomes.

Furthermore, removing legal practitioners from the OMARA's regulatory framework would decrease costs of legal practice and enable the OMARA to focus its attention upon a smaller and more distinct cohort of advisers, namely registered migration agents.

Interestingly, Ernst and Young argued that in the absence of a fully realised and consistent national legal profession, consideration should be given to relieving the OMARA of the burden to regulate the conduct of only those lawyers who fall within the scope of a national legal profession scheme. Referring to the newly passed Legal Profession Uniform Law, to which only New South Wales and Victoria are signatories, Ernst and Young explained its position as follows:

The Legal Profession Uniform Law provides for acceptable professional disciplinary standards to be maintained and consistently applied in relation to Australian legal practitioners. Enabling legal practitioners covered by that scheme to opt out of the OMARA scheme may also have the concomitant effect of providing a further incentive for those state and territory jurisdictions outside the national legal profession scheme to enter the scheme and thereby achieve the Commonwealth's national legal profession reform agenda.

Ernst and Young also recommended that all lawyers offering immigration assistance should continue to be registered, but with an appropriate organisation such as The Migration Institute of Australia, rather than the OMARA.

Law Institute of Victoria

In a detailed submission to the Inquiry, the Law Institute of Victoria (LIV), like the LCA, calls for the *Migration Act* to exempt lawyers holding a current practicing certificate from the requirement to register as a migration agent.

The LIV provides the following background in information in relation to the current regulatory scheme:

The Migration Agents Registration Scheme was implemented by the federal government in 1992 by the Migration Amendment Act (No 3) 1992 (Cth). The decision to include practicing lawyers in the scheme had the effect of prohibiting lawyers from doing that which they could previously do; providing immigration assistance, unless registered. The rationale for bringing lawyers within the scheme was not a concern about their qualifications, knowledge, skills or experience. Rather, it is clear from the Second Reading Speech that the concern was that complaints against lawyers were not being dealt with by the self-regulatory model then in existence “with adequate timeliness or vigour”.

This concern is now irrelevant given that the legal profession is no longer self-regulating and in light of the independent, impartial and accessible system for managing complaints against legal practitioners administered, in Victoria, by the Legal Services Commissioner. Furthermore, the Second Reading Speech made it clear that there would be a review of the regulation of lawyers in the scheme after a two year period and that there would be a close dialogue with the legal profession.

We note that a review of the scheme was undertaken in 1997 but a close dialogue with the profession did not eventuate.

We submit that the rationale for regulating lawyers within the scheme no longer applies and therefore only imposes additional regulatory burden for no public gain; the very definition of red tape.

The LIV then notes the qualifications of legal practitioners as follows:

Legal profession admission requirements require a higher standard of qualification

Law graduates have four to five years of high-level university training to gain their Bachelor of Laws degrees (often combined with another discipline) as well as the completion of supervised legal training or a practical legal training course to obtain admission as a lawyer. In Victoria, law graduates are expected to complete a work experience component as part of their practical legal training course or within their supervised legal training. For example, at the College of Law, students are required to complete either 75 days of work experience under an approved supervisor, or 25 days of work experience plus a Clinical Experience Module.

Newly admitted practitioners are subject to supervised legal practice for 18 months if, in order to qualify for admission, the practitioner completed practical legal training via supervised working training. If the newly admitted practitioner completed other practical legal training such as a Graduate Diploma in Legal Practice, the supervised legal practice period is two years (section 2.4.18 of the Legal Profession Act 2004 (Vic) (the Legal Profession Act) and the Legal Services Board Supervised Legal Practice Policy).

By way of contrast, a non-legally qualified person who wishes to practise as a migration agent is required only to undertake a six month course to obtain a Graduate Certificate in Australian Migration Law and Practice to be registered in accordance with section 289A of the Act.

When added to existing legal profession regulation, all of the above, the LIV argues, affords adequate consumer protection:

Legal practitioners are subject to a significant degree of regulation in comparison with migration agents. This includes trust accounts, which are subject to annual independent auditing. Legal practitioners in Victoria are required to deposit part of their trust account funds into a statutory account administered by the Legal Services Board. The balances of legal practices' trust accounts are regularly monitored and a copy of the trust account must be forwarded to the Legal Services Board directly from the bank itself. There are strict rules governing the disbursement of trust account funds and in the application of these funds to costs. Legal practitioners also have rigorous cost disclosure requirements (see Part 3.4 of the Legal Profession Act).

All of these requirements are designed to provide the highest possible protection to clients. They are not matched by the requirements of OMARA. By way of example, we note that the OMARA has recently conducted a review of the client accounts of registered migration agents. Migration lawyers were not included in the review. In almost half of the client account statements reviewed, the OMARA identified at least one area of potential concern, ranging from minor administrative oversight to potentially more significant concerns. The more significant concerns included withdrawals that did not appear to be client related such as payments for operating and personal expenses, balance in debit (in one case by over \$10,000) and immediate withdrawal of the money deposited.

In addition, the Legal Profession Act imposes strict obligations on legal practitioners in all areas of practice. For example, legal practitioners are required to pay an annual legal practicing certificate fee and other professional costs, such as professional indemnity insurance (see s.3.5.2 of the Legal Profession Act). All legal practitioners who hold a Victorian legal practicing certificate are required to complete ten hours of continuing professional development (CPD) activities every CPD year even if the holder practises interstate or overseas (see Continuing Professional Development Rules 2007). The CPD year runs from 1 April to 31 March. There are four compulsory units that must be completed in the year: ethics; professional skills; substantive law; and practice management and business skills. Accredited specialists must complete a total of 12 CPD Scheme units between 1st April 2013 and 31st March 2014 to maintain their accreditation. Eight of the 12 units must be in the accredited specialist's area of specialisation.

Although a particular CPD session can, depending on the subject matter, contribute to satisfying both the practicing certificate and OMARA CPD requirements, the practical effect is that migration lawyers focus most of their CPD on migration law and, in the process, may deskill in other areas of law. This can act as a disincentive to lawyers practising in migration law and may reduce consumer protection for legal services generally.

A number of lawyer representative bodies, including the LIV, operate an Accredited Specialisation scheme for immigration lawyers. To be eligible for accredited specialisation in immigration law under the LIV's programme, legal practitioners must (a) have five years' experience in full-time practice and a substantial involvement in the area of specialisation, and (b) sit comprehensive assessment tasks in three areas covering interviewing techniques, a written examination on all aspects of immigration law, and a take-home examination covering a factual scenario common in day-to-day practice. In contrast, registered migration agents can use the title "immigration law specialist" without having to undergo specialist training equivalent to that of the LIV's Accredited Specialisation scheme in immigration law.

The LIV (as well as the Law Council and other law societies) has member-based committees dedicated to migration law. The LIV's Migration Law Committee is made up of experienced immigration law practitioners who meet regularly with government bodies, including Department of Immigration and Border Control representatives and representatives of the Migration Review Tribunal. The LIV's Migration Law Committee also responds to invitations to comment on proposed changes to law, and prepares submissions on existing law. Many of the Committee members are accredited specialists in immigration law and present high-level CPD seminars. Information about immigration issues is regularly disseminated to the legal profession through the LIV and its networks.

Finally, the LIV notes that the dual regulation of lawyer agents is financially onerous and a disincentive to young legal practitioners:

Lawyer migration agents in Victoria pay an OMARA registration fee and a practicing certificate fee, seminar fees for Legal Profession Act CPD requirements and seminar fees for OMARA CPD requirements. The LIV submits that it is in the interests of the migration advice industry to encourage law graduates to practise in this area of law. However, dual regulation is a significant disincentive for young legal practitioners to practise in the area of migration law.

Hall and Wilcox Lawyers

The Inquiry also received a very useful submission from Mark Dunphy and Malcolm Crang of Hall and Wilcox Lawyers. This submission echoes the sentiments expressed above by the LIV and provides as follows:

We believe that the current regulatory framework creates a significant disincentive for lawyers to practice in the area of migration law. One argument proffered for dual regulation is that migration law is constantly revised, and subject to unique complexities that are not present in other areas of law. While there can be little doubt that migration law is ever changing, we do not believe that this is sufficient justification for requiring migration lawyers to be subject to additional regulation. All lawyers are required to have sufficient knowledge of their practice area, or else run the risk of engaging in unqualified legal practice. It is submitted that there is no basis for distinguishing migration law from any other specialist area of legal practice, where lawyers are required to stay up to date with legislative changes.

The requirement for migration lawyers to be registered is peculiar to this area when assessed against other legal specialisations. For example, although family law is clearly a discrete area requiring detailed and up-to-date knowledge, a lawyer who chooses to practice in family law is not subject to any additional regulation. Nor is such a lawyer required to attend additional training, beyond the Continuing Professional Development (CPD) requirements imposed by their practicing certificate.

Criticising the Hodges Review's decision not to exclude lawyers from dual regulation, Hall and Wilcox then submit:

The Hodges review cited "clarity to consumers" as the justification for retaining dual regulation. On the contrary however, it is submitted that if immigration lawyers were regulated in the same manner as all other legal professionals, there would be considerably less confusion.

Highlighting the particular cost and administrative burdens imposed by dual CPD and registration obligations, Hall and Wilcox continue as follows:

... dual regulation can cause confusion among lawyer agents, who are subject to different dates for renewal of their practicing certificates and OMARA registration. While legal practicing certificates are renewed on a fixed date each year (regardless of when the practitioner was first granted their practicing certificate), the deadline for OMARA reregistration is determined by the date the individual was originally registered.

This means that in many cases, a lawyer agent's "current" practicing certificate is only valid for a matter of months when they are required to reregister with OMARA. Accordingly, many lawyer agents are subject to the unnecessary and laborious requirement of providing OMARA with a copy of their practicing certificate twice each year.

It has been argued that dual regulation ensures that lawyer agents maintain relevant knowledge. We are of the view that it is the role of all lawyers, regardless of the area they choose to practice or specialise in, to ensure that they are aware of legislative changes. Like many professions, lawyers maintain currency of knowledge by satisfying CPD requirements. In this regard CPD is not unique to migration agents, and we believe that the additional CPD obligations imposed on lawyer agents are unnecessary given that legal practitioners already meet similar requirements regardless of whether or not they are registered as a migration agent.

Furthermore, the requirement to pay an initial OMARA registration fee of \$1760 and an ongoing re-registration fee of \$1595 per year serves as a major financial disincentive for lawyers seeking to practice in this area. For migration lawyers who already cover the significant costs of continuing legal practice, including practicing certificate renewal, insurance, professional memberships and CPD, OMARA registration fees represent a major cost for little benefit.

Hall and Wilcox then discuss the conflicts that arise from dual regulation in relation to a lawyer's duties to her or his clients:

It is submitted that the burden of additional regulation serves only to frustrate legal practitioners, who already owe fiduciary duties to their clients, as well being subject to comprehensive regulation of their fitness to practice, trust accounting and CPD.

In our view, there is significant overlap between legal practitioners' own professional duties, set out in state legislation governing legal practice, and the obligations of migration agents under the OMARA Code of Conduct. Indeed, as lawyers already have duties to avoid conflicts of interest and unauthorised profits through their fiduciary obligation to their clients, we believe many aspects of the Code of Conduct are already covered by the various legal professional conduct and practice rules, albeit at a higher standard.

It is submitted that there is also the potential for certain obligations of lawyer agents under the Code of Conduct to conflict with their duties to their clients and as officers of the court. For example, Code of Conduct provisions requiring lawyer agents to provide the Department with relevant information in relation to visa applications could, in certain circumstances, conflict with a lawyer's own duty of confidentiality and the client's legal professional privilege.

The submission received from Hall and Wilcox concludes that because lawyers are already comprehensively regulated by their own profession, it is unfair and ultimately unnecessary for additional regulation to be imposed by another non-legal body.

Queensland Legal Services Commission

The Queensland Legal Services Commission submitted a series of case studies, demonstrating the extent to which the inclusion of lawyers in the migration registration scheme risks undermining consumer protection. These case studies merit repeating here as they mirror concerns raised by the LCA in relation to the risks associated with the Act' distinction between "migration assistance" and "migration legal assistance" and client vulnerability.

The QLS Commission writes:

Legal practitioner migration agents promote themselves as offering more effective services because they are legal practitioners and able to provide additional advice and services -- not just those limited to the services under the Act and Regulation. However, when a problem or complaint occurs the legal practitioners deny they are providing any legal services.

Equally troubling is the QLS Commission's statement that it is loath to prosecute some questionable conduct because of this legislative distinction:

The Commissioner has not taken disciplinary proceedings against any legal practitioners providing migration legal services because of the way migration work is defined in the Act 1958. It has acted as a barrier to proving a legal practitioner's conduct has been unsatisfactory because of the additional onus of proving the work was done in connection with the practice of law. The practical effect of the Act 1958 has been to provide legislative assistance to legal practitioners to disputing their activities constitute the performance of legal work. Accordingly, only where a practitioner's conduct could be characterised as professional misconduct there would be greater prospects of success for the prosecution of disciplinary charges.

These concerns are supported by the following de-identified complaint histories provided by the QLS Commission:

Complaint 1

The legal practitioner migration agent traded using the business name "McGarvie Migration Lawyers".

Mr McGarvie promoted his business using the words "Australian migration law specialists since 1982".

Mr McGarvie's letterhead and business "get up" gave the impression:

- *He held a practicing certificate as an unrestricted principal to trade using the name McGarvie Migration Lawyers; and*
- *he held specialist accreditation from the Queensland Law Society.*

Mr McGarvie's entry on the OMARA website gave the impression he was an unrestricted principal acting in his law practice, McGarvie Migration Lawyers. A later entry on the OMARA's website was for "McGarvie Migration".

The investigation revealed:

Mr McGarvie only possessed an employee practicing certificate, which entitled him to practice under the supervision of another principal and for the legal practice (Sunstate Conveyancing Lawyers). It did not entitle Mr McGarvie to engage in legal practice as an unrestricted principal given he had not completed the practice management course, and did not hold the correct certification.

The OMARA website indicated Mr McGarvie was a legal practitioner practicing as McGarvie Migration Lawyers (then McGarvie Migration). His practicing certificate only entitled him to practice as a consultant lawyer for Sunstate Conveyancing Lawyers and not in his own right as McGarvie Migration Lawyers.

Mr McGarvie only performed “relief” work at Sunstate Conveyancing Lawyers when the principal was unavailable to sign documents.

The Commission concluded that Mr McGarvie’s conduct in describing his business as “McGarvie Migration Lawyers” in the absence of holding a practicing certificate as an unrestricted principal was in contravention of sections 24 and 25 of the LPA and in contravention of the Queensland Law Society Administration Rule 2005, and in contravention of s18 of the Australian Consumer Law.

Mr McGarvie provided an undertaking to cease promoting himself as a legal practitioner.

Complaint 2

The legal practitioner migration agent was a partner of a law firm, Mudpack Lawyers.

Mudpack Lawyers provided costs disclosure in accordance with the Legat Profession Act 2007 (Qld), and entered into a costs agreement with Miss Blunt (AA’s fiancé) in terms standard to those suggested by the Queensland Law Society.

The work the subject matter of the costs agreement was to “prepare submission letter to Minister for Immigration for Permanent Residence of AA. Where it becomes apparent that further work (beyond that scope of the legal work) is required, we will write to you to inform you that the additional work is necessary). We will set out the scope of the additional work and will provide an estimate of fees for the additional work.”

The Agreement attached a copy of the OMARA brochure entitled “Information on the Regulation of the Migration Advice Profession”.

The agreement was for the payment of professional fees as a fixed fee in the amount of \$7500 plus expenses (\$375) and exclusive of GST. A tax invoice was raised for work performed in the amount of \$8662.50.

Work was performed preparing statements in support of AA’s claim for Permanent Residence, and a letter drawn to the Department. The Department determined (of its own accord) to undertake two reviews of AA’s case.

The client had specifically requested and provided instructions for the law practice to write to the Minister requesting ministerial intervention on the grounds of “hardship to an Australian family”. The law practice failed to address this issue in its correspondence with the Department, and sent the letter it drew and raised the tax invoice.

Ms Blunt complained to the LSC about the law practice’s failure to follow instructions principally on the basis as a matter of contract she had not received the services the firm had contracted to provide.

The first issue in response raised by the law practice was that the work being performed was not provision of legal services. This was interesting because the migration agent partner had delegated some of the work to a junior lawyer and the costs agreement was drawn pursuant to the LPA.

The migration agent partner was invited to provide some form of consumer redress; but declined to do so.

Ultimately, because a decision needed to be made about the state of the performance of the costs agreement the Commissioner had to dismiss the complaint. Ms Blunt was provided with information about the process for setting aside costs agreements at the Queensland Civil and Administrative Tribunal.

Complaint 3

The legal practitioner migration agent, Mr Mercedes, was a partner of a law firm, Mercedes Lawyers.

Mercedes Lawyers provided costs disclosure in accordance with the Legal Profession Act 2007 (Qld), and entered into a costs agreement with Mr Tractor in terms standard to those suggested by the Queensland Law Society.

The work the subject matter of the costs agreement was to make an application for a new sponsor and to pursue a 457 visa application.

Although the process was complicated, and often sponsor's applications are rejected, the Department favourably processed the company's application; but required provision of one document. The Department forwarded several emails to Mr Mercedes requesting provision of the document.

Mr Mercedes failed to supply the document notwithstanding the fact Mr Tractor had provided it to Mr Mercedes by email some 4 weeks earlier with the original being provided by post and received several days later. Mr Tractor spent approximately \$7000 on Mr Mercedes fees, and then a further \$10,000 attempting to appeal the decision.

Mr Mercedes had failed to deliver the services contracted under the costs agreement because he failed to supply the Department with the document integral to the application. The Department confirmed in correspondence the only reason the application had been refused was for the missing documentation.

Mr Tractor complained to the OMARA and Mr Mercedes was investigated, his conduct found wanting. He received a formal warning.

The OMARA were unable to broker any form of consumer redress. Mr Mercedes offered \$1000 notwithstanding Mr Tractor's loss. A complaint was then made to the LSC.

Mr Mercedes firstly raised the issue that the work he performed was not "legal work". Eventually, after investigation by the Commission he increased his offer to resolve the complaint. Whilst the complainant remained unhappy (because the resolution was some \$12,000 less than the amount he had spent) it was an increase on the \$1000 offer achieved by the OMARA and he accepted the offer.

Complaint 4

On about 11 February 2014 Mr Royce trading as Royce Lawyers & Migration Consultants entered into a retainer agreement in compliance with the Migration Agents Regulations and the Legal Profession Act (Old) with Ms Dodo.

The agreement detailed the work performed “in respect of your fiancé application for a Visa Sub Class 300 Prospective Marriage”. The services were detailed in the agreement as:

- to advise you and your fiancé of the criteria for a Visa Sub Class 300 based on your relationship;*
- to provide you advices as to the list of documents required;*
- to provide you with all statutory forms for the application;*
- to organise your medicals and x-rays;*
- to provide you with drafts of statutory declarations;*
- to assist you in the preparation of statutory declarations in support of your application;*
- to provide you advices in respect of the documents;*
- to certify any copies of documents which your require to be submitted;*
- to prepare submissions in support of the application;*
- to prepare, lodge the application and supporting documents with the Department office overseas;*
- to monitor the application and provide advices in respect of same;*
- to monitor the matter and advice (sic) on further requirements; and*
- to do all matters and things necessary within the time limits prescribed.”*

The agreement fixed the fees at \$3630 (inclusive of GST). The fees were payable after issue of the initial letter of advice.

On 18 February 2014 Mr Royce issued a standard letter of advice detailing the statutory requirements for a Prospective Marriage Visa Subclass 300, and enclosing copies of all the documents necessary for Ms Dodo to complete with her fiancé. The fees were paid by electronic funds transfer on 18 February 2014.

In late March Ms Dodo advised Mr Royce her fiancé had died in a motor vehicle accident and there was no need to proceed. Ms Dodo had not received any further communication from Mr Royce, or provided him with any documents for his consideration.

Mr Royce initially refused to refund any of the fixed fee retainer stating the terms of the retainer meant it was not refundable in the event of termination and he had “provided for you the complete pathway for a valid and successful application and [because she terminated the Retainer Agreement] rely on clause ... to decline your request to refund the retainer fees to you.

There was no suggestion on the part of the legal practitioner migration agent the agreement was in fact frustrated by the death of her fiancé, and as he had not completed any further work beyond the initial standard form letter the majority of the services had not been provided so the contract had not been discharged by performance.

A complaint was made to the Commission. The first issue raised by the legal practitioner migration agent was that the “matter was outside of the jurisdiction of the Legal Services Commission as it did not involve me acting as a Solicitor; but as a Migration Agent under the Migration Agents Regulations”. Following intervention by the Commission a refund of \$820 was achieved.

Submissions Supporting Dual Regulation of Lawyer Agents

The Migration Institute of Australia

The most vocal supporter of the continued dual regulation of lawyers has been the Migration Institute of Australia.

In a detailed submission to the Inquiry, the MIA writes:

The MIA believes there is a need for lawyer migration agents to continue to be registered as migration agents together with non-lawyer migration agents. The complexity of Australia's migration law and policy demands that all those who practice in the area should be registered to provide advice. There is also a need to ensure consistency in terms of consumer protection for the public when they are receiving advice on immigration matters, whether it be from lawyer or non-lawyer registered migration agents.

Elsewhere, the MIA states that, having conducted a survey of its membership, the following statistics emerge:

Members Survey Responses

83.97 per cent of respondents said that lawyer migration agents should be registered and 70.51 per cent said that registration should be by the same body that registers non-lawyer migration agents.

The thrust of the MIA submission is that without dual regulation the government will not be able to protect vulnerable persons seeking migration assistance:

The argument that there is a need to deregulate the migration profession, through the excision of lawyers from the current registration system with the OMARA, as they are already regulated through their own State Law Societies, does not address the greater need for the government to ensure that they protect a very vulnerable group of the public. The need for registration of both lawyers and non-lawyers to provide migration advice came about as a result of many reports and public outcry about people being cheated by unscrupulous migration "agents", over whom the government had little or no control. There is still a strong need to protect people seeking migration advice from people holding themselves out as being competent to provide this advice.

The MIA also expresses concern about what it terms the "significant number of complaints" the OMARA receives about lawyers, noting:

According to the 2012-13 OMARA Annual Report, 1658 registered migration agents (33.8 per cent) hold, or have held, a legal practicing certificate. The number of lawyers seeking registration as migration agents has steadily increased since 2001 as there is a need for lawyers to find other areas of revenue for their dwindling practices as work in worker's compensation, personal injury and conveyancing dries up.

Figure 3: Number of registered migration agents with legal qualifications, 2000-01 to 2012-13

In 2012-13, the OMARA received 93 complaints concerning 68 registered migration agents holding a legal practicing certificate. This represents 22.9 per cent (93 of 407) of all complaints received and 24.5 per cent of all registered migration agents who were the subject of complaints (68 of 277).

This is a significant number of complaints against lawyers when considering that these lawyers have been required to demonstrate that they have sound knowledge of migration practice and procedure in addition to holding their legal practicing certificate before they could be registered by the OMARA.

This, in turn, leads the MIA to conclude that lawyers should, in fact, be more regulated (not less) via the imposition of additional training run by organisations like the MIA:

The MIA is concerned that there are very few lawyers who have undertaken the Accredited Migration Specialist course through their Law Societies. The figures for accredited migration specialists are:

State	No of Accredited Migration Specialists
New South Wales	35
Victoria	34
Queensland	6
Western Australia	0
South Australia	0
Northern Territory	0
Australian Capital Territory	0
Tasmania	0

This figure demonstrates that if lawyers were removed from the current system of registration through the OMARA, the Department of Immigration, consumers and other stakeholders could not rely upon receiving a consistent quality of service from those lawyers who have not been required to either demonstrate that they have sound knowledge of migration practice and procedure or undertake specialist studies in migration law.

Lawyers should demonstrate that they have undertaken courses as an Accredited Migration Specialist course, the MIA Immigration Essentials for Lawyers course, the Graduate Certificate in Australian Migration Law and Practice courses or the MIA Practice Ready Programme.

The MIA would further argue that as immigration is such a specialised area of law, lawyers who wish to enter into this area should also be required to undertake the MIA Practice Ready Programme. Although on the one level, lawyers are trained to read legislative instruments, etc., they are not trained in the practice and procedures of migration policy. Further if lawyers were not required to be registered, it is questionable whether they would subscribe to either LEGENDcom or to LexisNexis to maintain their professional library in this area.

In relation to education, the MIA concludes:

Lawyers are not required to complete the Graduate Certificate in order to register as migration agents. They must instead hold a legal practicing certificate.

As most lawyers do not study migration law in their law degree, it is possible for someone with a legal practicing certificate to be registered as a migration agent without demonstrating any knowledge of Australia's complex migration law and policy.

The number of complaints against lawyer migration agents is sufficiently high enough to require lawyers to undergo education in Australian migration law, policy, practice and procedure before they are allowed to practise in this area.

The MIA recommends that there should be compulsory education in Australian migration law and policy for lawyers who wish to become registered migration agents.

The MIA submission then turns to an analysis of the recommendations of the 2010 Productivity Commission and the government's responses to those recommendations. The MIA analyses these recommendations as follows:

In August 2010, the Productivity Commission (PC) made the following recommendation in its report entitled Annual Review of Regulatory Burdens: Business and Consumer Services:

PC recommendation 4.2

The Australian Government should amend the Act 1958 to exempt lawyers holding a current legal practicing certificate from the requirement to register as a migration agent in order to provide 'immigration assistance' under section 276. An independent review of the performance of these immigration lawyers and the legal professional complaints handling and disciplinary procedures, with respect to their activities, should be conducted three years after an exemption becomes effective.

Government Response: Noted

"The Government recognises the importance of maintaining the protection of a particularly vulnerable client group and remains concerned that there has not been a consistent approach by the legal profession within Australia to the provision of immigration assistance. The Law Council of Australia (LCA) has previously advised that in New South Wales immigration assistance is not considered to be legal work subject to New South Wales legal services regulators. The LCA has also previously advised that professional indemnity insurers may not cover migration agent work undertaken by barristers. While other jurisdictions have not adopted this position, the LCA has advised that it is open for them to do so.

COAG has agreed in principle to settle reforms to legal profession regulation and has asked Attorneys-General to finalise the details of a reform package. Once this has been implemented, the Government will consider whether this recommendation can be adopted, giving regard to the national structure of the legal profession and whether the Government's specific client protection objectives are adequately dealt with."

In its submission to the Inquiry, the MIA writes that a number of issues arise from the above:

The Law Council of Australia (LCA) has previously advised that in New South Wales immigration assistance is not considered to be legal work subject to New South Wales legal services regulators.

There are currently Memoranda of Understanding (MOUs) between the OMARA and the Legal Services Commissioners of Victoria, New South Wales, Queensland and Western Australia which allow an exchange of information on matters of concern between the OMARA and the LSCs. These allow the OMARA to refer complaints against lawyer agents to the legal services commission.

The legal services commissions, however, do not regard the provision of immigration assistance as the provision of legal services. According to the 2012-13 OMARA Annual Report, 0.5 per cent of all complaints handled by the NSW Legal Services Commissioner were for migration matters. 24.5 per cent of complaints to the OMARA related to the provision of immigration assistance by lawyers.

The number of matters cross referred to either OMARA or the LSCs is not of a significant number to engender public confidence in the system. For example:

Of the 93 complaints received by OMARA in 2012-2013:

- six were referred by the New South Wales Legal Services Commissioner
- two were referred by the Victorian Legal Services Commissioner
- two had the New South Wales Legal Services Commissioner marked as an 'interested party', as the OMARA had already received a similar complaint
- two had the Victorian Legal Services Commissioner marked as an 'interested party', as the OMARA had already received a similar complaint.

The OMARA referred four complaints to the legal regulators in New South Wales and Victoria, as the complaints related to the provision of immigration legal assistance by registered lawyer agents.

This means that the OMARA dealt with 89 of the 93 complaints received during the 2012-2013 year.

It is interesting to note that the LSCs referred more cases to the OMARA than the OMARA to the LSCs.

The MIA then raises concerns that Law Cover may not cover lawyers who require professional indemnity insurance when dealing with migration assistance as it only covers those areas considered to be "legal services". The MIA concludes:

This in itself is problematic for lawyers as it begs the question of how will lawyers be covered by professional indemnity insurance? How will the consumer be protected if they want to sue and recover damages for negligent behaviour or advice provided by a lawyer?

The MIA has been advised by its insurance broker that lawyers who do not have to be registered to provide immigration assistance could potentially still obtain professional indemnity insurance for their provision of immigration assistance but with difficulty. The professional indemnity insurers would need to reassess the risk assessment of lawyers (who were no longer registered but still provided migration advice) as the insurer would need to be assured that the lawyer was competent in the field of providing immigration assistance. Currently that assurance is there by virtue of their registration as migration agents. Without registration, that assurance would not necessarily be provided simply by providing evidence of a law degree or a legal practicing certificate.

Costs for such professional indemnity insurance would be likely to change from the current settings. This may also impact on the professional indemnity insurance premium for non-lawyer registered migration agents resulting in a possible additional financial burden imposed on some 70 per cent of the migration profession.

Consumer protection demands that lawyer migration agents are guaranteed to have the appropriate knowledge to provide immigration assistance and the appropriate professional indemnity insurance. It is clear to the MIA that, in the interest of consumer protection, lawyers providing immigration assistance should be dual regulated.

Finally, the MIA addresses the status of the National Legal Profession Reform, arguing that until it has been fully implemented, any discussion of de-regulation in relation to lawyers is premature:

The Government noted in its response to the Productivity Commission recommendation that:

“the Government will consider whether this recommendation can be adopted, giving regard to the national structure of the legal profession and whether the Government’s specific client protection objectives are adequately dealt with.”

It appears that only NSW and VIC are moving forward with the proposed model. The Legal Profession Uniform Law Application Bill 2014 (NSW) passed without amendment in the NSW Legislative Council on 13 May 2014. In terms of when the new Scheme will commence, the Second Reading Speech indicated that the Scheme would start once the uniform rules are in place and that is not expected to occur until 1 January 2015. Uniform Rules are being developed in the second half of this year. The proposal is dependent upon the other States and Territories adopting the Model but there is no firm commitment whether the other jurisdictions will adopt the Model in its current form. In October 2012, the Attorney General of Queensland stated that QLD would not participate. To date, SA and WA have been particularly vociferous in their opposition and have maintained that they may seek exemptions (by making local Regulations) from the Model or possibly not adopt the Model at all. NT, ACT and TAS are also not committed to the Scheme at this stage.

Arguably, it would be safe to say that:

- the Model is in its infant stages and is scheduled to commence only in VIC and NSW sometime after 1 January 2015;
- there is no guarantee (indeed it is highly unlikely) whether it will be adopted in all jurisdictions uniformly; and
- it is likely that it will only be adopted by some (not all) jurisdictions outside NSW and VIC (with the likelihood of local exemptions applying).

This leads the MIA to conclude as follows:

The legal profession is not capable of guaranteeing consistent and uniform professional standards until such time that there can be a guarantee that all states and territories will implement the National Law Reform Agenda without exceptions.

There is a need to continue registration of lawyers as migration agents to keep public confidence in the system that currently exists for providing migration services to the public.

All of the above leads the MIA to recommend as follows:

MIA recommendation

The MIA recommends that migration agents with legal practicing certificates should continue to be regulated by the same body migration agents without legal practicing certificates.

The MIA believes that from a consumer protection point of view it would be a most unsatisfactory situation for this Review to recommend that lawyers no longer be required to be registered with the OMARA. If this worst possible scenario were to occur, the MIA makes the following recommendation:

MIA Recommendation

The MIA recommends that if lawyers are excised from the jurisdiction of the OMARA that this be delayed for a period of two years. During this time, lawyers who wish to provide either immigration assistance or immigration legal advice will be required to undergo an entry level course to ensure they have the basic skills to provide specialist advice in immigration. Entry level courses may include the Accredited Migration Specialist course or a specialist course designed by the MIA which would cover its Immigration Essential for Lawyers plus a Practice and Procedure component.

Dr Christopher White, Migration Plus

In his submission to the Inquiry, Dr Christopher White of Migration Plus raises concerns similar to those outlined by the MIA. Dr White writes as follows:

It is essential for protection of the profession and its professional standards that all practicing Migration Agents meet the same standards for initial and ongoing registration. It would be a significant retrograde step to succumb to the pressure of the Law Society to remove registration for Lawyer Migration Agents.

I say this with the greatest respect to my professional colleagues; however, I have employed both lawyer and non-lawyer agents and had experience with both. Even the lawyer agents we have employed have openly stated that they knew “nothing” about migration law and practice until they completed the registration requirements and they, without obligation, undertook the Graduate Certificate programme. They recognised that without it they did not have the knowledge to practice. Quite frankly it was also apparent that this was the case.

Just as auditors, tax agents, financial planners, insolvency practitioners, etc must dual register for their specialties so should Migration Agents.

Lawyers may become qualified as such with absolutely no formal or informal education or training in Migration Law, which is recognised as the second most complex law in Australia to tax law, and it would be ludicrous for them to practice without meeting registration requirements and ongoing CPD in that specialty.

There should be just one universal standard for migration agents. Although I could clearly avoid meeting components of my migration CPD requirements due to my other professional standings I do not do this and do not think it appropriate. The current CPD requirement is minimal in any event.

Michael Wall and Philip Duncan, KPMG

Similar sentiments are expressed by Michael Wall and Philip Duncan of KPMG, who write:

Currently, lawyers are required to be registered by OMARA to offer migration advice. If the objective of the regulatory scheme is to ensure that those people giving migration advice to members of the public are reasonable competent, we see no reason why lawyers should not be part of the scheme. There is no requirement to have studied migration law to become a lawyer.

Removing this requirement would have the obvious immediate result that lawyers who have no previous experience and had undertaken no study in migration law would be able to offer migration advice to consumers on an ad hoc basis. It is difficult to see how this would have a positive outcome for consumers. The current situation requires legal practitioners to make some small commitment to practicing in the area, rather than ‘dabbling’ in it. We understand that lawyers also need separate registration to operate as tax agents.

Although there is an obvious overlap of expertise, migration advice is sufficiently different to legal practice to justify separate regulation. The analogy we would draw is that electrical engineers are not able to operate as electricians, despite the overlap of expertise.

Discussion and Recommendation

The Inquiry notes that the 2007-08 Hodges Report recommends that lawyers should continue to be regulated by the OMARA because dual regulation of the sort that now exists “offers clarity to consumers”.

While it is arguable that this may have been the case in 2007 (although this Inquiry makes no determination in that regard), this Inquiry is not of the view that consumers are now better protected as a result of the dual regulation of lawyers.

On the contrary, the Inquiry finds that dual regulation of lawyers risks confusing those seeking migration assistance and imposes an unjustified burden on lawyer agents who, as lawyers, are already subjected to one of the strictest regulatory regimes of any profession in Australia.

The Inquiry notes that no other country now requires lawyers to be registered as migration agents. Indeed, some strictly forbid it. The Inquiry has not been provided with any evidence by anyone to suggest that the situation in Australia in relation to lawyers acting as migration agents is so different from these countries to justify Australia continuing down a path of dual regulation.

In relation to consumer risk and confusion, the Inquiry notes the concerns raised by the MIA in relation to access to indemnity funds, insurance coverage for lawyers and the inability of legal regulators to effectively prosecute agents who fail to adhere to the standards expected of them – all concerns that, in the opinion of the Inquiry, arise from the distinction in the Migration Act between “migration assistance” and “migration legal assistance” in the Act.

The Inquiry rejects, however, the MIA's claim that, in light of these concerns, consumers may be without protection if dual regulation is discontinued, finding instead that any inequities caused by the Act's distinction between migration assistance and migration legal assistance will be addressed once lawyers are removed from the current regulatory scheme and the Act is amended accordingly.

In relation to the ability of the relevant legal regulators to prosecute lawyers, the Inquiry accepts the conclusions of the LCA in its response to the Department's analysis of the 2010 Productivity Commission:

If immigration lawyers were excluded from the MARS, the basis for the current practice by the OLSC, would disappear. Put simply, there could be no basis for an interpretation that immigration lawyers were intended to be regulated by the OMARA. Therefore, the OLSC would resume regulatory control over all conduct by lawyers, including ‘immigration assistance’ – as is the case in all other jurisdictions.

... if immigration lawyers were regulated in the same manner as all other legal professionals, there would be no confusion. Complaints against lawyers would be directed to the Legal Services Commissioners, whilst complaints against agents would be dealt with by the OMARA. Consumers could direct their complaints according to whether they had retained the services of an agent or a lawyer (a relatively simple distinction), rather than on the basis of whether their agent or lawyer was providing “immigration assistance” or “immigration legal assistance” within the meaning of s 276 and 277 of the Act.

In discussions between the Inquiry and the NSW Legal Services Commission, the Commission was asked:

If lawyers who provided advice on immigration were no longer required to register with the Office of the Migration Agents Registration Authority, and to avoid doubt, the definition of immigration legal assistance was removed from the Act, would the investigation and discipline of all complaints and allegations fall within the jurisdiction of the commissioner?

The Commission responded as follows:

In short, yes. In the circumstances you have described, we cannot foresee any jurisdictional difficulties from an investigative or disciplinary perspective.

In relation to concerns about consumer access to fidelity funds and personal indemnity insurance for lawyers, the Inquiry again notes that submission of the LCA to the 2010 Productivity Commission as follows:

... people who seek immigration assistance from an immigration lawyer in NSW are not protected by the Law Society of NSW's fidelity fund. The Law Council is advised that if lawyers were excluded from dual regulation, the fidelity fund would cover all assistance provided by immigration lawyers.

The LCA was again asked by this Inquiry whether concerns raised about access to fidelity funds and professional indemnity insurance also cease to be an issue if lawyers were removed from the current regulatory scheme for migration agents and if the distinction between "migration assistance" and "migration legal assistance" ceased to exist statutorily. In response, the LCA advised:

The Law Council submits that the easiest and most effective way of resolving these concerns would be to repeal section 277 of the Act, which defines "immigration legal assistance", and to expressly exclude Australian legal practitioners from the requirement to register with the OMARA in order to provide "immigration assistance".

The Inquiry was also greatly assisted in this regard by a submission received from Mr Glenn Ferguson, a former member of the External Advisory Committee for the 2007-08 Hodges Inquiry, who wrote as follows:

As someone who has practised in this area for nearly fifteen years and is Accredited Specialist I think I have a very sound understanding of the issues. I should also point out that during my career I have been involved in professional standards issues and chaired the Solicitors Queensland professional standards committee, continue to Chair Lexon Insurance (the professional indemnity insurer for Queensland legal practices), been involved in the Queensland Fidelity fund committee and whilst on the Executive and as President of the Law Council had carriage of the National legal profession project I think I can speak with some authority on this.

The confusion in my opinion is solely due to the uncertainty that surrounds the definition of "immigration legal assistance". It is an unnecessary and quite frankly archaic burden to all practitioners in this area, both lawyers and registered agents. If it was removed I see no impediment to all Australian Legal Practitioners being covered and answerable to their relevant legal service commissioner or relevant statutory authority as far as professional conduct is concerned. In fact all jurisdictions have detailed Memorandums of Understandings with the OMARA to my knowledge. It should be noted that most Legal Service Commissioners and relevant statutory schemes have considerably more power to resolve consumer related issues than does OMARA.

As for the aspect of professional negligence regarding immigration legal advice it is treated no differently from other specific areas of legal practice such as intellectual property, taxation law, finance law etc. The level of cover offered by lawyers far exceeds that offered by registered agents.

Again the removal of the definition of "immigration legal assistance" will put this beyond doubt.

Finally in relation to access to the Fidelity fund. You may be aware this arises from the confusion around the definition and the fact lawyers have to register as agents. I recall this was an issue that arose in New South Wales. If lawyers were performing immigration legal work and as we know subject to the much higher ethical and professional standards required in legal practice I can see no impediment to their clients being covered by their respective fidelity scheme. There is no such scheme for registered agents to my knowledge.

I am very confident that if lawyers were excluded from the regulation scheme the level of consumer protection that follows when dealing with an Australian Legal Practitioner would be comprehensive and far more than can be offered by a Registered Agent.

Further, the Inquiry notes its conversation with the Victorian Legal Services Commission on 23 July 2014 and, in particular, questions directed to the Commission about its ability to deal with all migration related complaints and investigations should lawyers cease to be regulated by the OMARA.

The Inquiry accepts that the Commission's workload will increase if deregulation occurs and that resources will need to be allocated internally by the Commission to better understand and address complaints relating to the provision of migration services (an admittedly specialised and complex area of legal practice). The Inquiry is not of the view, however, that the Victorian Legal Services Commission (or indeed any of the other legal service regulators in Australia that are charged with investigating and disciplining lawyers) is incapable of doing what is required. This too was the conclusion advanced by the NSW Legal Services Commission, when it was asked the same question by the Inquiry.

The Inquiry further notes that the Victorian Legal Services Commission did not address this issue in its formal written submissions to the Inquiry, calling instead for the complete removal of lawyers from the current regulatory scheme. Nor were similar concerns about capability and resourcing raised by any of the other regulators who will assume full disciplinary regulation of lawyers should the dual regulation of lawyers cease.

These bodies deal with a wide variety of often complex pieces of legislation and sophisticated legal practice areas on a daily basis. The Inquiry sees nothing in relation to migration law and practice that requires it to be removed from scrutiny by these bodies – all of whom are well managed and who have consistently performed at a very high level.

In relation to the argument raised by the MIA that lawyers generally do not have sufficient training to adequately practice in immigration practice, the Inquiry again notes the arguments made by the LCA in its submission to the 2010 Productivity Commission Inquiry:

The fact that immigration law and policy is "complicated" is a poor basis upon which to suggest dual regulation is justified, particularly when non-lawyer migration agents are subject to a lesser standard of regulation than lawyers. Lawyers engage in many complicated areas of legal practice; however immigration lawyers are the only legal practitioners in Australia subject to dual regulation.

The Inquiry accepts this analysis, noting the various submissions it has received outlining the extensive educational and admission requirements already imposed on lawyers.

Lawyers practice in many areas that are highly complex. They do so with the knowledge that if they are negligent or unprofessional they will be subject to some of the strictest and harshest disciplinary procedures and professional sanctions in the country.

The argument raised by the MIA rather assumes that lawyers without any knowledge of migration law will start to practice in the area of immigration law if lawyers are exempt from registering as migration agents. There is no evidence to support this assumption. The Inquiry has no reason to believe that lawyers without any understanding of immigration law and practice will now flood the market (any more than lawyers without an understanding of patent law are likely to start practicing in this area) without first undertaking additional training to teach them what they need to know to avoid sanction.

Those wanting to practice migration law will still be able to take advantage of the many university-based and CPD educational offerings of the sort outlined by the MIA. To not do so, given the disciplinary umbrella that will cover all legal services should dual regulation cease, would be professionally unwise.

The MIA seems to base its concerns about a lack of ability on statistics concerning complaints, arguing that an unusually high number of complaints to the OMARA relate to lawyer agents.

The MIA accurately notes that lawyer-agents represented 33.8 per cent of RMAs according to the 2012-13 OMARA Annual Report, and that in 2012-2013, 24.5 per cent of complaints to the OMARA were in relation to conduct by lawyer-agents. What the MIA does not note, however, is that of this total, no lawyers were actually sanctioned by the MIA. This is evidenced by the following chart:

Complaints resulting in a sanction outcome, 2011-12 and 2012-13

Outcome	2011-12		2012-13	
	Number of agents	Number of complaints	Number of agents	Number of complaints
Cautioned	5	7	3	4
Suspended	2	3	2	2
Cancelled	5	19	5	37
Barred	7	47	2	27
Total	19	76	12	70

Hence, in 2012-13 the OMARA sanctioned 12 registered migration agents (involving a total of 70 complaints) for significant and serious breaches of the Code of Conduct, including the registered migration agent not being a fit and proper person to be registered or otherwise not a person of integrity.

By comparison, 19 registered migration agents were sanctioned in 2011-12. Relevantly, none of the 12 sanction decisions in 2012-13 involved a registered migration agent who held a legal practicing certificate.

It is clear to the Inquiry that the effectiveness of any complaints management system relies on agents making clients aware of the avenues available to them. As the Annual Report makes clear, no agent with a practicing certificate was sanctioned in 2012-13. The Inquiry is of the view that the number of complaints about lawyers could arguably reflect greater transparency of process from lawyer agents, whose own professional standards require considerable lawyer-client transparency. There is no reason to believe that the statistics available offer a higher level of concern from clients who were represented by lawyer agents.

The MIA also suggests that “the failure” of the *National Profession Act* to include states other than New South Wales and Victoria evidences a lack of consistent standards for lawyers throughout Australia.

The Inquiry does not accept this conclusion, again preferring the analysis raised by the LCA in its response to a similar line of reasoning by the Department in 2010:

The Law Council queries why it is necessary for DIAC to wait until the national scheme for legal profession reforms is finalised. The Law Council cannot understand why DIAC does not recognise the comprehensive system of legal professional regulation that already exists to regulate lawyers. All lawyers are subject to comprehensive legal profession regulation in respect of any area of practice; and all clients of lawyers already have recourse to legal professional complaints handling and disciplinary systems, regardless of where they are in Australia.

The Law Council submits only minor differences exist between legal profession laws and statutory rules across all jurisdictions. The present drive by the Council of Australian Governments toward uniform national legal profession regulation is aimed at simplifying legal profession regulation and establishing a seamless national market for legal services. High standards of consumer protection exist already in legal profession regulation throughout Australia.

The Inquiry sees no reason why wholesale national legal profession reform is needed before dual regulation can cease. The Inquiry accepts on the evidence before it that sufficient regulatory standards exist in each state and territory to ensure consistency and consumer safety across the board.

Overall, the Inquiry rejects the argument that lawyers must continue to be regulated by both the OMARA and the relevant legal regulators in each state and territory. The costs of dual regulation for lawyers are onerous and competent lawyers are arguably discouraged from engaging in a legal practice area much in need of solid legal representation. This fails to benefit anyone.

This leads the Inquiry to support the observation of the Productivity Commission in its 2010 draft Report that:

...there appears to be an absence of firm evidence to support the position that an exemption of lawyer migration agents from the Migration Agents' Registration Scheme would be likely to result in reduced protection for clients of those agents.

In this regard, the Inquiry supports amendments that mimic the New Zealand legislative model, whereby lawyers would be prevented from registering as migration agents - instead being regulated solely by the relevant legal regulator.

Accordingly, the Inquiry recommends as follows.

Recommendation 1

The Inquiry recommends that lawyers be removed from the regulatory scheme that governs migration agents such that lawyers:

- cannot register as migration agents; and
- are entirely regulated by their own professional bodies.

4

Registration

Who Must Register

Under the *Migration Act 1958* (Act) anyone providing immigration assistance must be registered with the OMARA. As discussed in Chapter Three of this Report, this includes lawyers holding a legal practicing certificate who wish to provide immigration assistance.

The initial registration charge for all migration agents is \$1760 for commercial or for-profit migration agents and \$160 for applicants seeking to work as non-commercial or not for profit migration agents.

Once an application has been lodged and the charge paid, the details of the applicant must be listed on the OMARA website for at least 30 days to allow anyone to lodge an objection to the registration. The OMARA cannot consider the application until this prescribed notice period has finished. The OMARA is required to consider all objections made and provide an opportunity for the applicant to respond prior to considering the application.

In considering an application the OMARA assesses if the applicant meets a number of requirements, including evidence that the applicant:

- holds a current legal practicing certificate or has completed the Graduate Certificate in Australian Migration Law and Practice;
- has achieved either an International English Language Testing System (IELTS) score of 7 or an Internet-based Test of English as a Foreign Language (TOEFL) score of 100 (undertaken not more than two years before making an application). An applicant is exempt if:
 - they hold a legal practicing certificate or have successfully completed Secondary school studies to the equivalent of Australian Year 12, with a minimum of four years study at secondary school or equivalent and a Bachelor degree or higher degree, with a minimum of three years equivalent full-time study; or
 - schooling was undertaken and completed in Australia, Canada, Ireland, New Zealand, South Africa, the United Kingdom and/or the United States; or where the applicant was living in a country or countries where English was the language of instruction at their school.

- holds a professional library and a subscription to LEGENDcom or LexisNexis;
- has completed a National Police Check with the Australian Federal Police and has a current National Police Certificate; and
- holds at least \$250,000 of professional indemnity insurance.

The OMARA must also be satisfied that the applicant:

- is an Australian citizen, permanent resident or a New Zealand Citizen holding a special category visa;
- is over 18 years of age;
- has not been refused registration within 12 months of applying;
- has not had a previous registration cancelled within five years of applying;
- has not been previously barred from registering unless the barred period has expired;
- has not had a previous registration suspended unless the suspension has expired;
- is a fit and proper person to give immigration assistance;
- is a person of integrity; and
- is not related by employment to someone who is not a person of integrity.

Registration is only granted on an individual basis.

Re-Registration Requirements

Registered migration agents must apply for re-registration annually. The registration charge is \$1595 for commercial or for-profit migration agents and \$105 for applicants seeking to work as non-commercial or not for profit migration agents.

An applicant for re-registration must complete an on-line form by updating the information provided in their previous registration form. They are also required to:

- Provide details regarding pricing and payment options available to clients.
- Declare they are a fit and proper person. If they have been subject to sanctions, criminal proceedings, subject to an inquiry or investigation or become insolvent, they must declare this and provide relevant written evidence with the application.
- Complete the Practice Ready Programme during their first year of registration or a total of 10 points of Continuous Professional Development within the year of registration. Holders of a current legal practicing certificate can count four points of continuing legal education towards the required OMARA total.

Applicants then electronically sign a declaration that the information provided is a true and accurate record.

The Trans-Tasman Mutual Recognition Act 1997 (TTMRA)

Under the TTMRA migration agents registered in New Zealand or in Australia are able to apply for registration in the partner country. In granting registration under the TTMRA the receiving registration authority (the New Zealand Immigration Advisers Authority (NZIAA) or the OMARA) accepts that the applicant has met the requirements for registration by virtue of meeting registration requirements in the applicant's country of origin.

The NZIAA has a licensing scheme for people giving immigration advice, thereby establishing equivalencies. The terminology differs in that New Zealand "licenses advisers". Australia, on the other hand, "registers agents".

The OMARA informed the Inquiry that it has been advised the TTMRA has precedence, such that some requirements set out in the *Migration Act* for Australian registered migration agents do not apply to New Zealand licenced advisers wishing to practice in Australia.

As at 30 June 2014 there were 18 New Zealand licensed advisers registered under the Australian scheme as a result of the TTMRA. Two do not have full New Zealand licences but are registered in Australia with no restrictions. Another seven are practising offshore and would not meet Australian citizenship or residency requirements for registration in their own right.

Immigration advisers licensed by the NZIAA are required to undergo a registration process with the OMARA, but there are different requirements.

A New Zealand-licensed adviser seeking to practice in Australia as a registered migration agent under the TTMRA is required to lodge a section 18 notice with the OMARA. This notice takes the form of a Statutory Declaration.

The effect of the lodgement of the s18 notice is that the person is deemed to be registered as a registered migration agent from the date that the s18 notice is received by the OMARA. The OMARA has one month from the date the s18 notice is received to approve, refuse or postpone a decision on registration. If no action is taken by the OMARA, the applicant's registration is confirmed to have taken effect from the date of notification.

The OMARA also requests applicants to complete an on-line application form as is required for applicants seeking registration under the Act and to pay the prescribed application charge.

The most significant difference between the Australian and New Zealand systems is in relation to registration types. Australia has one registration type: full registration without restrictions. New Zealand has three registrations types:

- Full - where the adviser can provide advice on all immigration matters.
- Provisional - where the adviser can provide advice on all immigration matters but must be supervised by a full licence holder.
- Limited - where the adviser can only provide advice on certain immigration matters.

The Inquiry was advised by the OMARA that, as with Australia, the NZIAA requires initial applicants for registration to successfully complete a specified Graduate Certificate. The current NZIAA requirement was introduced from 1 January 2013. Prior to that, New Zealand entry applications were assessed on a combination of industry experience and study, which could include a paper on Immigration Law and Practice from Massey University in New Zealand or the Australian Graduate Certificate.

Like the Australian Graduate Certificate, the New Zealand programme of study consists of four courses. Unlike Australia, upon completion of the first two courses of the Graduate Certificate, a person may then apply for limited registration by the NZIAA.

New Zealand licenced advisers are now required to demonstrate that they meet English language competency similar to Australian registered agents. However, exemptions in relation to English language testing are different. Specifically, the Australian scheme exempts applicants whose schooling in English occurred within a nominated list of English speaking countries. The New Zealand exemptions only require the schooling to have been in English.

Australia and New Zealand have different citizenship/permanent residence requirements. Australia only registers Australian citizens, Australian permanent residents or eligible New Zealand Citizens (sub-class 444 visa-holders). New Zealand has no citizenship or residence requirements for its licensing system.

Australian registered migration agents are also required to undertake continuing professional development (CPD) as a requirement for repeat registration, including some mandatory CPD activities.

Further, in New Zealand, in order to renew their licence, migration advisers are generally required to undertake at least 20 hours of CPD and provide a statement on what they have learned. However, CPD is not a requirement for Australian-registered migration agents who have gained a New Zealand immigration adviser licence through the TTMA.

Submissions Received

The OMARA

The OMARA provided the Inquiry with the following assessment of its current registration procedures:

The OMARA is positioning itself to streamline the registration process so that it can focus its resources on priority areas of risk. A risk framework has been developed and monitoring activities based on this are under trial. Measures have already been introduced to reduce the administrative burden on both applicants and the OMARA. It is proposed to manage residual risk through a combination of electronic and audit checks. The new IT platform will assist with this strategy.

... the main issue associated with registration is the lack of power the OMARA has to obtain information from other agencies relevant to the question of whether an applicant is not fit and proper or not a person of integrity. As the OMARA is not a law enforcement agency (it has no criminal sanctions or powers to enforce a pecuniary penalty), information held by other agencies is protected by the Privacy Act and other legislation. The OMARA has received criticism for not acting in certain matters to protect consumers yet it has not been able to do so for lack of access to the evidence required.

Migration Institute of Australia

The Inquiry received a very detailed submission from the MIA. Central to the MIA's assessment of the current structure is that the OMARA should not be responsible for the registration of agents. Rather, this role should be outsourced to an independent body like the MIA, thereby allowing the OMARA to focus on issues of discipline and sanction.

The MIA also expresses concerns in relation to the costs of registration, arguing that they are excessive:

At \$1595 per year for commercial agents, the registration fee is considerably higher and out of kilter with those paid by taxation practitioners, auditors, dentists, lawyers, doctors and financial planners.

By way of example, the MIA provides the following comparatives:

Profession	Registration Fee
Tax Agent Practitioner	\$500 for corporate membership which could cover 500-1000 tax agents
Company Auditor	\$166 for single or corporate registration
Dentist	\$289
Lawyer	\$820
Doctors	\$685
Financial Planner	\$72 (authorised representative)
Registered Migration Agent	\$1595

This leads the MIA to recommend that registration fees for migration agents be significantly reduced:

A small migration practice which has 7 employed agents, 4 contract agents and 4 other staff thus employs 15 people has to outlay registration fees of \$17,490. This is extraordinarily high and a huge impost on small business.

In relation to the frequency of registration, the MIA submits:

A significant decrease in re-tape could be achieved by allowing well-established migration agents to be registered for a period greater than one year. This would also achieve a lowering of costs to businesses.

The MIA recommends that the registration period for migration agents of five years standing be for a period of three years.

Dr Christopher R White, Managing Director, Go Matilda

In his submissions to the Inquiry, Dr White expresses concerns in relation to the current fee structure:

The impost on a small business is horrendous. For example, my small business which has 7 employed agents, 4 contract agents and 4 other staff thus employs 15 people has to outlay registration fees of \$17,490.

This is extra-ordinarily in excess of the registration fees for any other small business providing any activity in Australia. It is partly because, unlike other registrations such as Tax Practitioners, Auditors, Financial Planners etc. there is no provision for corporate or business registration as Migration Agents. Migration agents have also been hit with an effective 10 per cent increase as a result of a change to the GST policy in relation to registration fees.

Dr White also submits that the following changes should be made to the current system:

As a way to bring the registration requirements for Registered Migration Agents to be more in line with those of other professionals in Australia it is requested that consideration be given to:

- 1. For Migration Agents of three years good standing that the registration be for a period of 5 years with no increase in fees i.e.: the current annual fee cover the five year period*
- 2. That provision be made for "Corporate Registration" with a 5 year corporate registration for companies with three or more Registered Migration Agents employed and that the Registration Fee be no more than \$500 for a five year registration and \$200 for each additional agent (to cover the costs of recording their details as members of the corporate). Corporate agents with multiple agents employed are far less likely to be rogue operators, they provide the opportunity for new agents entering the profession to be employed under supervision for a qualifying period, and they are more likely to follow quality assured work processes with internal checking and review processes. They provide a very beneficial mentoring role for new agents. Our small business has trained at least 8 agents by employing them post qualification in addition to our current staff for example.*
- 3. That a clear distinction be made between the roles of:*
 - The OMARA as the registration and regulatory body*
 - The MIA/MA as Professional Associations providing support, CPD, training, Code of Conduct and ethical assistance to practicing RMA's*

Ernst and Young

Ernst and Young expresses concerns about the current system's non-application to corporations and other business entities, arguing:

The current legislative and regulatory scheme only applies to natural persons and not to corporations, trusts or businesses run by persons who are not registered migration agents. The clients of these businesses will usually enter into a contract with the business and not the individual agent. However, if a complaint is made against the business, the agent handling the client's matter will be the sole target for investigation and possible sanction rather than the business.

The OMARA does not appear to have referred the conduct of such businesses to the Australian Competition and Consumer Commission (ACCC) or State or Territory Fair Trading authorities for investigation and possible sanction.

It is recommended that the OMARA be required to refer such conduct to the relevant agencies to ensure that its consumer protection obligation is fully supported and meaningfully addressed.

The current legislative scheme places an unrealistic burden on employee agents and curtails the ability of the OMARA to properly protect members of the community who use the services of businesses run by persons who are not registered agents.

The legislation should be amended to acknowledge different business structures and employment arrangements that operate in the commercial provision of migration assistance and the OMARA should be required to devote further resources to ensuring that appropriate agencies, including the ACCC and state and territory Fair Trading authorities, are made aware of the improper conduct of corporations and other business entities operating in the migration advice industry.

Ernst and Young also commends improvements made by the OMARA towards simplifying the initial and re-registration application process, noting in particular that "online lodgement has enabled smoother and faster processing."

Nonetheless, Ernst and Young suggests that the OMARA's performance could improve through recognition of differing types of registration status and further simplification of the registration process:

All persons offering immigration assistance should continue to be registered. EY does not consider that this role needs to be performed by the OMARA as the regulator. The MIA, the national professional association representing registered migration agents, could perform this role as does the Law Society for legal practitioners in each State and Territory. As the registration authority, the MIA would:

- be appointed by the OMARA to handle the registration function and maintain the register of migration agents as specified by a Deed of Arrangement with the Minister;*
- collect registration fees which are deposited into a separate account;*
- disburse to the Commonwealth an agreed portion of the collected registration fees for the purpose of funding the OMARA (or the new Immigration Services Commissioner) as the regulator to carry out its functions on behalf of the Minister.*

Ernst and Young also calls for reduced registration fees for employee and community migration advisers:

Registration fees, particularly for employee and community migration advisers, could be lowered to reflect the commercial realities of practice. Moreover, lower registration fees for these advisers would decrease the cost barriers that may inhibit their employment whilst also lowering the costs faced by business and the community sector when employing staff.

Ernst and Young also suggests that conditional registration be permitted:

The regulator should also have the power to register agents subject to conditions. For example, agents who have been sanctioned may be registered subject to various conditions, including:

- *a condition that they work under the supervision of an experienced migration agent for a certain period;*
- *a condition that they only practice in a prescribed area (e.g. the lodgement of family migration visa applications only) for a certain period; and*
- *a condition that they undertake specific training in a particular discipline or skill.*

These measures would provide an additional layer of consumer protection and enhance the reputation of the migration advice profession.

In relation to the current system's re-registration process, Ernst and Young submits:

The burden associated with annual re-registration could be alleviated whereby agents of "good standing" could avail themselves a faster renewal process relying upon self-declaration rather than the provision of evidence that they continue to meet re-registration requirements. Furthermore, consideration could be given to enabling agents with an unblemished record for a continuous period of five years to be registered for a further period of three years rather than annually thereafter.

Consideration should be given to having all registration applications lodged by a particular date and finalised by a particular date within the calendar year. This would provide further certainty to the registration process and offer cost savings to the OMARA through the prospect of allocating resources appropriately to deal with bulk application caseload processing.

KPMG

Like many of the submissions received by the Inquiry, KPMG also expresses concern that the current regulatory framework treats every practitioner as an individual and does not accommodate agents who operate corporately, although many clearly do:

*It is logical to some extent that agents will operate through corporate structures, however current regulation does not accommodate it. It is not clear, for example, whether a company can invoice for services provided by a migration agent. See *BDS Recruit Pty Limited v Parris and Shah Pty Limited* [2008] NSWSC 614 (19 June 2008). In addition, where a migration agent leaves a firm or even goes on annual leave, significant administrative burdens are added as firms seek to authorise a different agent within the firm (through a Form 956) to handle a specific case.*

KPMG also expressed concern in relation to what it perceives as inflexibility in relation to the requirement that an applicant for registration as an agent register within 12 months of completing the Graduate Certificate. KPMG note:

If someone leaves the profession (to have a family, or work for the Department of Immigration, or spend time overseas), the only way to re-enter the profession is via completing the course again (for those without a practicing certificate). This seems unreasonably inflexible.

Discussion and Recommendations

Registration Fees

The Inquiry notes the concerns expressed by all those who provided an opinion on this issue, the overriding concern being that current registration fees are high when compared to other professional registration fees.

The Inquiry notes that registration fees have not been reviewed since 2005.

The Inquiry notes that it did not receive any submissions or information that adequately justified the current rate for registration fees.

In relation to this issue, the Inquiry recommends as follows.

Recommendation 2

The Inquiry recommends that the current registration and re-registration fees be reviewed to determine if they can be set at a rate comparable to other professional bodies.

Recommendation 3

The Inquiry accepts the concerns raised in relation to the costs imposed on community migration advisors and recommends that a further fee reduction be investigated to cater for the specific financial needs of community migration advisors

Annual Re-Registration Requirements

In relation to re-registration, the Inquiry notes the heavy administrative burden imposed on agents having to register every year. Accordingly, the Inquiry recommends as follows.

Recommendation 4

The Inquiry finds that the burden associated with annual re-registration could be alleviated if agents of “good standing” (i.e. those with an unblemished record for a continuous period of five years) were able to avail themselves of a faster renewal process relying upon self-declaration, rather than the provision of evidence that they continue to meet re-registration requirements. The Inquiry recommends that appropriate amendments be made to ensure that this occurs.

Recommendation 5

The Inquiry recommends that agents with an unblemished record for a continuous period of five years should be registered for a further period of three years, rather than annually thereafter.

Registration Filing Dates

The Inquiry accepts the concerns raised in relation to varied registration dates and recommends as follows.

Recommendation 6

The Inquiry recommends that all registration applications be lodged and finalised by a particular date within the calendar year. This will provide further certainty to the registration process and offer cost savings to the OMARA through the prospect of allocating resources appropriately to deal with bulk application caseload processing.

Corporations and other Business Entities

Like the Hodges Review before it, the Inquiry notes that while a very significant portion of migration agent businesses are operated by sole practitioners, a number of businesses operate under different structures and involves the employment of registered migration agents by other agents or other individuals.

Accordingly, the Inquiry recommends as follows.

Recommendation 7

The Inquiry recommends that, in order to ensure that the clients of all businesses are protected, the relevant legislation, practices and policies that govern migration agents should apply to all business structures.

The Role of the OMARA as the body Responsible for Registration

The Inquiry notes the suggestion that the OMARA be stripped of its role in the regulatory process and the suggestion that either the MIA or the MA be charged with the registration of migration agents, leaving the OMARA to focus its resources on investigation and discipline.

This Inquiry notes that this submission, if accepted, would invite the same conflict of interest concerns that were addressed by the Hodges Review, which found that at least a perception of a conflict of interest exists in the MIA operating the MARA. A number of submissions indicated concerns that actual conflicts of interest existed and had influenced MARA decisions and activities. The Review concluded that these views are of considerable concern and have the potential to, or already have, significantly undermined public confidence in that arrangement.

The Inquiry also finds that this suggestion fails to appreciate that registration cannot be easily segregated from investigation and discipline. The Inquiry notes the concerns expressed above by the OMARA that the main issue associated with registration is the lack of power the OMARA has to obtain information from other agencies relevant to the question of whether an applicant is not fit and proper or not a person of integrity. As the OMARA is not a law enforcement agency (it has no criminal sanctions or powers to enforce a pecuniary penalty), information held by other agencies is protected by the Privacy Act and other legislation. The OMARA has received criticism for not acting in certain matters to protect consumers, yet it has not been able to do so for lack of access to the evidence required.

The Inquiry is not convinced that this issue can be addressed by a body (like the MA and the MIA) that is completely segregated from the Department. Rather, this issue is best addressed by ensuring that the OMARA is better able to access information that is currently not available to it under the current regulatory scheme.

In that regard, the Inquiry recommends as follows:

Recommendation 8

The Inquiry recommends that appropriate legislative measures be implemented to ensure that in determining the appropriateness of a candidate's registration, the OMARA has access to all of the evidence it requires to make such a determination.

The Inquiry also notes Ernst and Young's suggestion that conditional registration be permitted and that the regulator be given the power to register agents subject to conditions. For example, agents who have been sanctioned may be registered subject to various conditions, including:

- a condition that they work under the supervision of an experienced migration agent for a certain period;
- a condition that they only practice in a prescribed area (e.g. the lodgement of family migration visa applications only) for a certain period; and
- a condition that they undertake specific training in a particular discipline or skill.

Again, the Inquiry finds that this too is essentially an investigatory and disciplinary issue. As such (and noting that no submissions received by the Inquiry suggested that investigation and disciplinary jurisdiction should be handed back to the MIA or given to the MA), the Inquiry does not recommend that issues of registration be removed from the regulatory functions of the OMARA.

The Trans-Tasman Mutual Recognition Act (TTMRA)

The Inquiry was greatly assisted by a number of entities and persons in New Zealand. All recognised the complexity of the TTMRA. All also agreed, however, on the need for cooperation and, where possible, consistent standards in both countries.

In the circumstances, the Inquiry recommends as follows.

Recommendation 9

The Inquiry recommends that further analysis be undertaken by the Department and its New Zealand counterpart to ensure that the respective schemes in both countries are applied as closely as is possible so that they reinforce each other's integrity objectives.

5

Continuing professional development

Introduction

Compulsory Continuing Professional Development (CPD) in the migration advice profession was introduced in 1999. Section 290A of the *Migration Act 1958* (Act) provides that all migration agents wishing to renew their registration must meet CPD requirements. If a migration agent fails to meet the set requirements, their application for re-registration is refused and the agent is excluded from applying for registration or practicing for 12 months.

History of Changes to the CPD Framework

The history of CPD in relation to migration agents reveals a period of considerable change and industry progress.

The following chart outlines the role of the OMARA in this process and says much about the considerable gains that have been made since the OMARA assumed an active role in relation to the provision of CPD in 2009.

1999	<p>CPD requirement introduced. In March 1999 it became a requirement to complete CPD activities (with a value of 10 CPD points) for the purpose of re-registration as a migration agent. This was aimed at improving agents' competency and professional standards. The introduction of CPD requirements for re-registration initially reduced the number of agents in the migration advice industry by 15 per cent.</p> <p>The scheme to award CPD points for pro bono work was also introduced in March 1999.</p>
2003	<p>Amended CPD points allocation. On 1 July 2003, in response to Recommendations 5 and 6 of the <i>Review of Statutory Self-Regulation of the Migration Advice Industry 2001 – 2002</i>, the MARA launched a new CPD point allocation methodology. This was developed through a consultation process with educational experts, CPD activity providers, migration agents and other professional education regulators. The new point allocation methodology was intended to provide a more transparent system of allocating points for CPD activities.</p>

2005	<p>Introduction of a levelled CPD scheme. In October 2005, a three tiered CPD scheme was introduced aimed at improving the educational standards of activities being offered to migration agents.</p> <p>The three tiers were:</p> <ul style="list-style-type: none"> • Level 1 - activities designed to cater for larger groups where there are no pre-requisites for participation. • Level 2 - activities designed to give a deep and substantial understanding of migration matters. • Level 3 - activities designed to give a deep and critical understanding of particular aspects of giving immigration assistance. <p>The three tiered model was intended to allow RMAs to choose activities that were suitable for their work and of most benefit to them.</p>
2006	<p>Introduction of mandatory CPD activities. Recommendation 5 of the <i>Review of Statutory Self-Regulation of the Migration Advice Industry 2001-02</i> proposed that some activities, including ethics, business management and migration legislative and procedural change should be made mandatory for registered migration agents during the first year of registration and periodically thereafter.</p> <p>On 1 July 2006, after consultation with CPD providers and in response to the number of complaints related to business management and ethics, the MARA implemented mandatory CPD activities.</p> <p>Unless exempt, agents in their first year of registration were required to complete 4 mandatory activities; agents in subsequent years of registration were required to complete 1 mandatory activity. Those who held current Australian legal practicing certificates or who were members of recognised accounting bodies were exempt.</p>
2007	<p>The June 2007 Horsley Report. A review of the CPD scheme was undertaken in 2007. The report, <i>“Linking Continuing Professional Development to Standards in CPD”</i> was written by Associate Profession Mike Horsley and Dr Debra Costley. There were two main reasons for the Review:</p> <ol style="list-style-type: none"> 1. The MARA wanted to examine ways CPD could enhance the professionalism of migration agents and build upon the graduate attributes and learning outcomes of those migration agents who had completed the new Graduate Certificate in Australian Migration Law and Practice. 2. It was expected that Schedule 1 would be removed from the <i>Migration Agents Regulations 1998</i> and that this would occur in July 2007. The MARA considered a new structure for the CPD scheme and development of professional standards would thus be required. <p>The Review project brief identified the scope and purpose of the Review as follows:</p> <ul style="list-style-type: none"> • So that the profession can feel a sense of ownership of their CPD scheme. • To progress towards a CPD scheme that further develops the careers of existing agents and builds upon the graduate attributes and outcomes at entry into the profession. • To improve the CPD scheme by: <ul style="list-style-type: none"> – simplifying requirements so that Registered Migration Agents better understand their CPD obligations; – giving CPD providers more responsibility and flexibility in the provision of CPD and reducing the MARA's level of involvement; – promoting adult learning principles as a key element in the development and delivery of CPD activities; – providing an easily understood framework for mandatory CPD activities to both raise overall professional standards and address individual agent shortcomings; – improving recognition of prior learning; – determining how to evaluate the success of the CPD scheme; and – easing the complementary continuing education obligations of other professionals (including lawyers) who are also Registered Migration Agents. <p>The project had four separate phases:</p> <ul style="list-style-type: none"> • consultation with key stakeholders on the existing CPD model and opportunities for review; • development of a revised CPD model encompassing professional standards; • validation of revised CPD model with key stakeholders and • implementation plan for a new CPD model.
2007	<p>The Review recommendations related to:</p> <ul style="list-style-type: none"> • establishing balance between provider registration and activity approval processes; • recognising CPD for lawyers, accountants, registered migration agents and other professionals; • simplifying CPD for migration agents; • improving working with the MARA; and • upholding professionalism through standards and competencies for migration agents.

2007	<p>Unlevelled CPD scheme. In response to the findings of the Horsley Report (<i>most submissions regarded tiered levels as representing an unprofessional element in the CPD system</i>) a non-tiered CPD scheme was introduced.</p> <p>Key changes to the scheme included:</p> <ul style="list-style-type: none"> • one CPD point for 1.5 hours for private study activities, seminars, workshops, lectures and conferences; • CPD undertaken in legal and recognised accounting professions awarded four elective CPD points and deemed to have satisfied the mandatory CPD requirement; and • electronic notification from CPD providers to allocate points to agents introduced.
2008	<p>The Hodges Review. The migration advice profession had been the subject of three previous reviews when the <i>2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession</i> was undertaken to assist the government assess the effectiveness of the regulatory scheme, the state of the profession and its readiness for a move from statutory self-regulation to self-regulation.</p> <p>The Review was conducted by the Department under the guidance of an External Reference Group (ERG). The ERG was chaired by the Hon John Hodges. The Review was submitted to the government in May 2008.</p> <p>The terms of reference for the review included an examination of the success of the Continuing Professional Development (CPD) scheme as well as its relevance and accessibility to agents.</p> <p>There were 3 separate phases to the Review:</p> <ul style="list-style-type: none"> • review and evaluate current CPD practice both in Australia and internationally to develop a profile of current and leading practice in the use of CPD in maintaining professional standards; • review and evaluation of the effectiveness and efficiency of the current OMARA CPD scheme to inform the proposed CPD framework, its underpinning principles and structure, performance expectations and evaluation standards; and • develop a new framework and structure for the CPD scheme. This phase was informed by the first 2 stages and by input from the OMARA and selected stakeholders. <p>Recommendations</p> <p>Recommendations in relation to continuing professional development included:</p> <ul style="list-style-type: none"> • that the CPD system be modified to provide more flexibility regarding the activities undertaken; • that the process of approving CPD activities be revised to ensure that more flexibility is provided in the CPD activities that can be undertaken and to address concerns about the onerous nature of the current approval process; • that migration agents with over three years' experience, who have good track records (as determined by the regulator), be able to undertake CPD on an honour basis; and • that CPD activities be developed that involve greater interaction between Departmental staff and migration agents; for example, the provision of presentations by Departmental staff to migration agents and vice versa.
2010	<p>Review of the CPD scheme (<i>The Deakin Prime Report</i>). The OMARA's new Advisory Board agreed at its meeting on 24 November 2009 to undertake a review of the CPD scheme in the first half of 2010 to provide the detail needed to implement the recommendations of the Horsley and Hodges reviews. The review was aimed at recommending improvements to, and developing a framework for, a revised CPD scheme.</p> <p>On 6 May 2010 DeakinPrime was awarded the contract to undertake this review.</p> <p>A survey about CPD was sent to all registered migration agents on 25 May 2010 and closed on 4 June 2010. DeakinPrime presented a report to the Advisory Board at its meeting on 22 June 2010.</p> <p>Recommendations</p> <p>There were 7 key recommendations made by the Review. The Review also identified that, given the shift away from self-regulation and the consequent changes to CPD requirements, resistance to the implementation of a new CPD framework could be expected. With this in mind, the review recommended rigorous and continued consultation with industry stakeholders to be fundamental to implement changes to CPD and entry level requirements.</p> <p>On 27 October 2010, further consultation was undertaken with CPD providers at a workshop chaired by an independent facilitator. Most providers accepted proposed changes to the CPD framework recognising opportunities for competition and improving learning outcomes.</p>

2011	<p>Introduction of new CPD Framework. In February 2011, following the review of the CPD scheme and consultation with key stakeholders, changes to the existing CPD framework were introduced.</p> <p>To increase the learning experience for registered migration agents and to provide greater choice and variety, the changes included:</p> <ul style="list-style-type: none"> • limiting the class size at seminars to 45; • introducing interactive workshops designed for intensive learning, with participant numbers limited to 25; • distinguishing conferences as a separate activity type aimed at larger groups and suitable for information sharing and networking; • introducing mentoring activities to encourage learning and guidance through a structured support relationship with an experienced agent; and • introducing a new category called distance learning that incorporates both private study online and real-time learning online with a facilitator in another location.
2011	<p>Occupational Competency Standards for Registered Migration Agents. In August 2011, in keeping with recommendations of the Linking Continuing Professional Development to Standards in CPD Review (<i>Horsley Report – June 2007</i>), the DeakinPrime Report and changes to the CPD framework, occupational competency standards were implemented for migration agents.</p> <p>The “competency standards for migration agent practice” were developed after:</p> <ul style="list-style-type: none"> • two practitioner workshops – in Melbourne and Sydney; • two focus groups – in Brisbane and Sydney; • critical incident interviews with practitioners – 12 in total; • review of the draft competency standards by the MIA; • review of the draft competency standards by workshop, focus group and critical incident interview participants; and • profession-wide review of the draft competency standards. <p>The occupational competency standards for migration agents were developed to provide explicit statements of what people need to be able to do to practice successfully as migration agents. The occupation competency standards also underpin the knowledge requirements for development of suitable CPD activities.</p>
2011	<p>Practice Ready Programme. Recommendation 5 of the DeakinPrime review was for a Practice Ready Programme (PRP) to be a mandatory component of CPD for all new agents. The CPD provider review of the CPD framework in October 2010 also included a recommendation that a PRP be adopted.</p> <p>The recommendations for the proposed changes to the CPD framework (including PRP) were discussed and approved by the Advisory Board at its meeting on 7 December 2010, pending a brief to the Minister.</p> <p>On 30 March guidelines for the development of a Practice Ready Programme were issued to CPD providers. Applications for this activity closed on 31 May providers were expected to be ready to start delivering the programme in August 2011.</p> <p>On 1 September 2011, the PRP became a mandatory CPD activity for all new agents unless in an exempt category. Agents exempt from having to undertake the PRP in their 1st year of registration include agents holding current Australian legal practicing certificates and accountants with membership to recognised accounting bodies.</p>
2013	<p>Amendment to the CPD Framework. In seeking to provide greater clarity to the CPD requirements for Registered migration agents (as per the recommendations of the 2007-08 Hodges Review recommendations), the OMARA sought approval from the Minister in February 2011 to amend the <i>Migration Agents Regulations 1998</i> to remove the distinction between core and elective activities. Within the context of the new CPD framework, there was no practical difference between core and elective CPD activities. Removing the distinction between core and elective activities simplified the process for selecting CPD activities and provided agents with greater flexibility in choosing CPD that best suited their development needs. The minister approved the proposed amendment to the Regulations on 23 March 2013.</p>

2013 Pro Bono Work

In removing the distinction between core and elective CPD activities, migration agents were able to claim CPD points for all pro bono work undertaken in a registration year. The removal of the cap on the number of claimable CPD points for pro bono work was considered to be an incentive for agents to engage with this type of activity and to strengthen the OMARA's support for the not-for-profit sector.

The table below shows that while the number of agents engaging in pro bono work has (as a percentage of all agents) increased since the change to Regulations, the number of hours reported has decreased (although this could be due to lags in reporting of pro bono CPD activity). It is unclear whether removing the cap on pro bono work affected any change in engagement. Other environmental factors (such as government policy and levels of demand) during the same period may also have had an impact.

Agent Profile - Reported Pro Bono Work

Year	Point	% of CPD	Agents	% of Agents
2009–10	113	0.3	30	1.0
2010–11	288	0.6	59	1.2
2011–12	395	0.9	69	1.1
2012–13	797	1.4	92	1.3
2013–14	329	0.7	95	1.8

2013 The 2012 *RMA CPD Survey Report* (the Andrews Report) noted that the activity of preparing or presenting CPD had low levels of engagement, and recommended that the OMARA encourage experienced agents to engage in these activities. This was echoed by approved providers, who sought a relaxation of restrictions imposed on awarding of points for preparation and presentation of CPD activities.

In addition to the Andrews Report findings, direct feedback from CPD providers and migration agents confirmed that they found it difficult to access or find a willing mentor, and that the current restrictions on preparation and presentation failed to acknowledge the divergent skills involved in each of those tasks.

In 2013, the OMARA undertook an internal review and proposed amendments to the arrangements for these activity types. The amendments were noted by the Advisory Board on 12 March 2013.

Mentoring

Prior to the amendments there had been no engagement with mentoring for CPD purposes.

The review found that the restrictive nature of the mentoring arrangements made it a less attractive CPD type for both mentor and mentee. Key changes to the structure were designed to provide more flexibility to mentoring arrangements and to recognise the value of this CPD type by increasing the number of CPD points that may be awarded.

While individual mentoring agreements remained as a requirement, the previous restriction limiting a mentor to undertaking agreements with no more than two mentees was removed. A maximum of five CPD points may be awarded to both mentor and mentee, an increase from the two CPD points available for the mentor under the previous framework. The precise number of points awarded by the OMARA is dependent on a number of considerations such as duration, frequency of contact or complexity of the skills acquired on completion of the mentoring agreement.

The changes recognised the experience gained by mentors in the preparation and development of a structured mentoring programme to address a mentee's learning needs. The improved flexibility of the new structure provided greater accessibility for RMAs providing scope for group mentoring arrangements, which are offered in some regions.

2013	<p>Preparation and Presentation</p> <p>The internal review found that the key obstacle in relation to engagement with this activity type was the restriction on the number of times an agent could claim for preparation or presentation in a given registration period.</p> <p>It was noted that this restriction contrasts with the CPD requirements of many professional associations and regulatory bodies in Australia, which mostly allow their members to claim CPD for preparing and presenting the same activity.</p> <p>In acknowledging that professional development opportunity diminishes in value when a presenter continues to deliver the same material, the OMARA also noted that repeat presentation would provide variety of perspectives and learning opportunities. The amended structure addressed both of these perspectives by enabling the claiming of CPD points for a capped number of the same or substantially similar repeat presentations, at half the CPD value of the initial presentation, irrespective of activity type or delivery mode.</p> <p>The OMARA also identified the greater imposition of time and expertise required for certain CPD activities such as Programmes of Education and the PRP. In acknowledging the varying requirements for preparation and presentation of different CPD types, a structured approach was implemented which imposed certain conditions and awarded varied CPD points for different activity types. The details for the varying conditions for preparation and presentation of approved CPD activities can be found on the OMARA's website in the OMARA Notices under Miscellaneous activities.</p>
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The OMARA's Current Role

In relation to CPD the OMARA currently:

- considers and decides applications from persons/organisations wishing to become approved CPD providers;
- considers and decides applications for activities to become approved for the purpose of awarding CPD points;
- evaluates the efficacy of particular CPD activities and determines if these activities have been delivered in accordance with the current CPD framework. The OMARA also applies other specific approval conditions and determines if the CPD provider for that activity has acted in accordance with the current Standard Provider Conditions;
- evaluates the general efficacy of CPD offerings and identifies ongoing opportunities for improvement;
- evaluates Approved CPD providers compliance with the current Standard Provider Conditions;
- reports; and
- considers and decides applications from organisations seeking to become Authorised Voluntary Organisations for the purpose of awarding CPD points for pro bono activities.

Under current CPD requirements, all registered migration agents are required to complete approved activities with a minimum value of 10 CPD points per year including one mandatory CPD activity with a minimum value of 1 CPD point per year.

In their first year of registration, all agents (with the exception of those who hold a current practicing certificate or those who are a member of a recognised accounting professional body) are required to undertake the Practice Ready Programme (the "PRP"). This is a practice-oriented workshop designed to provide agents new to the profession with the skills and knowledge needed for practice. The introduction of the PRP was in response to the widely held view that completion of the Graduate Certificate did not fully equip new agents with the requisite skills and knowledge to operate in a competent and professional manner.

What is Required of CPD Providers

The regulation of all CPD approved service providers and CPD course content is governed by the Continuing Professional Development Approved Provider Standard Conditions.

The Inquiry received considerable feedback about the scope of the Conditions and the extent of the OMARA's role in regulating CPD. As such, it is worth providing the Conditions in detail below. It is clear that the Conditions are detailed. Indeed, the Inquiry was not made aware of any other industry or profession that so extensively regulates who can provide CPD and, importantly, how they should do it.

The Conditions provide as follows:

2 Introduction

- 2.1 The Standard Conditions are set out pursuant to the OMARA's authority under Part 3 of the Act and the Migration Agents Regulations. The Standard Conditions set out the minimum standards for the provision of nationally consistent, high quality CPD activities for registered migration agents.
- 2.2 Approved providers are required to comply with the Standard Conditions, and the OMARA is authorised to revoke the approval in circumstances where an approved provider fails to comply with the Standard Conditions or any other conditions specified by the OMARA in the approval.
- 2.3 The Standard Conditions apply to all approved providers. Approved providers may apply for CPD activities to be approved by the OMARA. The activity types are specified in sub regulation 9E(4) of Part 3A of the Migration Agents Regulations and may include the following:
 - (a) a programme of education that is:
 - i) conducted by a person who is, or persons who are, qualified by practical experience or academic qualifications in the subject matter of the course; and
 - (ii) comprehensive or refresher training;
 - (b) distance learning, which:
 - (i) may include the collective or private study of written material or live or recorded material in electronic form; and
 - (ii) may or may not require a facilitator;

Note: Examples for paragraph (b) are:

 - (a) participation in a web-based seminar; and (b) watching live streaming or a recorded event; and
 - (c) participation in video conferencing.
 - (c) attendance at a seminar, workshop, conference or lecture that is conducted by a person who is, or persons who are, qualified by practical experience or academic qualifications in the subject matter of the activity;
 - (d) authorship and publication of an article of at least 1,000 words;
 - (e) preparation or presentation of written or oral material for the purposes of paragraph (a), (b) or (c), or for use in an examination that demonstrates competency as a registered migration agent;
 - (f) authorship, shared authorship or editorship of a book;
 - (g) providing immigration assistance without charge for a voluntary organisation;
 - (h) participation in a suitable mentoring arrangement;
 - (i) any other activity, specified by the OMARA in an instrument in writing for paragraph 9E(4)(i) of Part 3A of the Migration Agents Regulations, for the purpose of meeting continuing professional development requirements.

- 2.4 Where the OMARA approves an activity it may set requirements for the completion of the activity. Examples include, but are not limited to:
- (a) a minimum mark for an examination; and
 - (b) a requirement that the quality of a presentation be certified by qualified persons; and
 - (c) journals in which a publication must appear; and
 - (d) a requirement that the quality of work for an activity be assessed in a particular way; and
 - (e) a requirement dealing with work for an activity undertaken jointly with another person.
- 2.5 The Standard Conditions replace the Continuing Professional Development Registered Provider Standard Conditions and apply to all approved providers with effect from 23 March 2013.
- 2.6 Approved providers will be advised of any changes to the Standard Conditions prior to the change taking effect. A notice for the date of effect of any changes to the Standard Conditions will be communicated to approved providers via electronic form.

3 Administration

- 3.1 Approved providers must:
- (a) ensure the policies and procedures of the approved provider are circulated and implemented consistently throughout the approved provider's organisation,
 - (b) ensure training is provided to staff on policies and procedures of the approved provider to ensure consistent implementation,
 - (c) maintain a working knowledge of the OMARA Policy and Procedures Manual (PPM), the OMARA Newsflash and OMARA newsletters,
 - (d) notify the OMARA of any significant changes to an activity once the activity has been approved by the OMARA (including learning outcomes),
 - (e) inform the OMARA, in writing, of changes to any of the following in relation to the approved provider:
 - (i) the information contained in the 'Company Extract', the certificate of registration of a business name, or certificate of incorporation as an association;
 - (ii) senior personnel;
 - (iii) location and contact details;
 - (iv) principal OMARA contact person and enrolment contact person;
 - (v) the transfer of records of a kind referred to in Part 10 of the Standard Conditions; and
 - (vi) written policies for learning and assessment, quality assurance, complaints, cancellations and refunds.

Within twenty eight (28) days of the change taking effect.

Changes to information specified in paragraphs 3.1(e)(iii) and (iv) above must be made via the approved provider login facility on the OMARA website. Other changes must be communicated by completing the relevant sections of the Application for CPD Approved Provider Registration form and submitting it to the OMARA.

3.2 Approved providers must:

- (a) ensure that adequate staff are available to address enrolment enquiries,
- (b) make available, at time of enrolment, written refund and cancellation policies that are fair and reasonable. It is expected that fees paid in advance will be protected enabling participants to obtain a full refund if the activity is cancelled by the approved provider,
- (c) conduct internal audits at least once annually to ensure compliance with the Standard Conditions, and
- (d) take corrective and preventative action, within a reasonable period of time, where the approved provider has not complied with the Standard Conditions.

3.3 Approved providers must, within a reasonable period of time, inform the OMARA of any instances of non-compliance with the Standard Conditions, and of the corrective and preventative action taken. This will assist the OMARA in the management of issues or concerns raised by participants.

4 Staff/Trainers

4.1 Persons connected with an activity must be of sound character and reputation. The following persons are taken to be connected with an activity:

- (a) a person who conducts, produces, writes or presents materials for it;
- (b) a person concerned in the management of a company or a body of persons that conducts, produces, writes or presents material for it;
- (c) a person appointed as the principal OMARA contact or enrolment contact, or
- (d) a person who has been appointed as a consultant to advise a person mentioned in paragraph (a) or (b) about the activity.

4.2 Developers, trainers, facilitators and/or assessors of material used in any approved activity must be able to demonstrate subject matter expertise exceeding that being delivered or assessed. As a minimum this must include:

- (a) at least 4 years' recent experience as a registered migration agent, or
- (b) at least 5 years' recent subject matter expertise, or
- (c) a senior DIAC officer, or
- (d) a member of a tribunal or judiciary, or
- (e) a person with a combination of the experience described in paragraphs 4.2(a) – (d).

4.3 It is preferred that approved activities are delivered and assessed by trainers/facilitators who:

- (a) hold a Certificate IV in Training and Assessment or are able to demonstrate the satisfactory completion of equivalent competencies; or
- (b) are under the direct supervision of a person who has the competencies specified in paragraph 4.3(a); or
- (c) are able to demonstrate vocational competencies.

5 Policies and Procedures

- 5.1 Prior to a participant commencing an approved activity, an approved provider must make available to the participant (in print or electronic form) current and accurate information regarding the following:
- (a) learning outcomes for a particular approved activity or group of approved activities that form part of a programme of approved activities,
 - (b) fees and charges for an approved activity (including the cancellation and refund policy), and
 - (c) the approved provider's policies in relation to complaints and refunds.
- 5.2 Approved providers must have documented policies and procedures in relation to the following:
- (a) learning and assessment,
 - (b) quality assurance,
 - (c) complaints, and
 - (d) cancellations and refunds.
- 5.3 The policies and procedures in relation to learning and assessment must include a completion policy which provides, as a minimum, that a participant must be present for at least 75 per cent of the duration of an approved activity to be considered to have completed the approved activity.
- 5.4 Approved providers must be able to demonstrate to the reasonable satisfaction of the OMARA that the policies and procedures set out at paragraphs 5.2(a) – (d) above are being implemented.
- 5.5 The policies and procedures must be provided to the OMARA at the time of applying for approval as a CPD approved provider and within 28 days after changes to the policies and procedures occur.
- 5.6 Learning and assessment policies and procedures must address the matters set out in Part 7 of the Standard Conditions, and must incorporate the following requirements:
- (a) selecting an appropriate physical learning environment for face-to-face activities in accordance with clause 7.4 of the Standard Conditions,
 - (b) ensuring learning materials are reviewed for currency (including the effect of upcoming legislative changes) by a member of staff or a consultant with subject matter expertise outlined in clause 4.2 of the Standard Conditions. This should be undertaken prior to issue or re-issue of the materials used in any approved activity,
 - (c) ensuring that a participant has successfully completed an approved activity before electronically notifying the OMARA, and
 - (d) electronically notifying the OMARA of participants who have successfully completed any approved activity. The notification must be in the approved format and be submitted to the OMARA within 14 days of the participant completing the approved activity.
- 5.7 Electronic notification for allocation of CPD points to participants must be sent via the OMARA website. If the website is not functional, confirmation should be sent to cpdpoints@mara.gov.au in the approved rich text format (rtf) or word document format.
- 5.8 Quality assurance policies and procedures must address the matters set out in Part 8 of the Standard Conditions, and must incorporate the following requirements:
- (a) obtaining feedback from participants who undertake an approved activity on whether the objectives of the approved activity were met, and
 - (b) analysing the feedback at least once every twelve months to assess the learning effectiveness of the approved activity and strategies to improve the delivery of the approved activity.

5.9 Approved providers must comply with relevant Commonwealth, State and Territory legislation and regulatory requirements in relation to, but not limited to:

- (a) occupational health and safety,
- (b) workplace harassment, victimisation and bullying,
- (c) anti-discrimination, including equal opportunity, racial vilification and disability discrimination,
- (d) privacy, and
- (e) intellectual property.

6 Marketing and Advertising

6.1 Approved providers must ensure that the marketing and advertising of approved activities is undertaken in a professional manner and maintains the integrity and reputation of approved providers and the migration advice profession.

Approved providers must:

- (a) clearly identify the approved provider's name in written marketing and other material for participants, including when the marketing and other material is in electronic form,
- (b) clearly identify the approved activity number of each approved activity,
- (c) remove advertising and marketing for activities which are not approved activities from the date of notification of revocation of approval of an activity by the OMARA,
- (d) include the duration of an approved activity, and
- (e) not give false or misleading information or advice in relation to:
 - (i) claims of association between approved providers,
 - (ii) the learning outcomes associated with an approved activity,
 - (iii) any other claims relating to the approved provider, its activities or learning outcomes associated with approved activities.

6.2 Approved providers must give the OMARA at least two (2) weeks' notice of the commencement of an approved activity. This information must be communicated via the OMARA website, utilising the Advertising Activities facility, unless other arrangements have been made with the OMARA.

6.3 An approved provider must ensure the marketing and advertising of its approved activities and services complies with the Spam Act 2003, as amended from time to time. In particular, any commercial electronic messages must contain a functional unsubscribe facility.

7 Learning and Assessment

7.1 Each approved activity should:

- (a) have identified learning strategies to achieve the learning outcomes,
- (b) be appropriate and relevant to the work of a registered migration agent,
- (c) define content that clearly supports the delivery of the learning outcomes,
- (d) make participants aware of the social and ethical responsibilities of practice as a registered migration agent, and
- (e) include a planned break period after each 1.5 hours of tuition.

7.2 Activity developers, trainers, facilitators and/or assessors must be given the learning outcomes prior to the commencement of the activity and ensure the activity is focused on the attainment of those learning outcomes by the participants.

- 7.3 Applications for mandatory activities must comprise all the learning outcomes specified for each activity. Additional components or learning outcomes must not be included in the principal 1.5 hour activity. Additional components or learning outcomes must be covered in extra time. Mandatory activities and required learning outcomes are specified on the OMARA website.
- 7.4 The physical learning environment for delivery of face-to-face activities should have:
- (a) adequate seating,
 - (b) minimal external noise,
 - (c) adequate lighting, and
 - (d) appropriate acoustics.
- 7.5 Approved providers must consider, where appropriate, the Disability Standards for Education 2005, formulated under the Disability Discrimination Act 1992, as amended from time to time.
- 7.6 Approved providers must implement effective strategies for the support and monitoring of participants who undertake the following kinds of approved activities:
- (a) a programme of education that is:
 - (i) conducted by a person who is, or persons who are, qualified by practical experience or academic qualifications in the subject matter of the course; and (ii) comprehensive or refresher training;
 - (b) distance learning, which:
 - (i) may include the collective or private study of written material or live or recorded material in electronic form; and
 - (ii) may or may not require a facilitator;

Note: Examples for paragraph (b) are:

 - (a) participation in a web-based seminar; and (b) watching live streaming or a recorded event; and
 - (c) participation in video conferencing.
 - (c) additional assessment tasks required as a condition of an approved activity.
- 7.7 All activity applications must include a copy of all materials used in the activity (seminar papers, PowerPoint slides and handouts).
- 7.8 All activity applications for a programme of education, distance learning or additional assessment tasks must also include a copy of the assessment task(s) and where relevant audio or video recordings.
- 7.9 Activity applications for distance learning must have a minimum of 1.5 hours of learning time. All approved activities for distance learning will only be allocated a maximum of 1 CPD point, even if duration of the activity exceeds the minimum of 1.5 hours.
- 7.10 All assessments offered must:
- (a) assess current subject matter,
 - (b) test the knowledge and skills stated in the learning outcomes for the approved activity,
 - (c) assess a participant's ability to research, form opinions, and use resources. Less emphasis should be placed on speed and memory,
 - (d) be completed individually by each participant and include a signed statement verifying this,
 - (e) be commensurate with the 1.5 hour activity connected to the assessment, and
 - (f) include strategies to ensure the provisions of clause 5.3 are complied with.
- 7.11 Appropriate forms of assessment include: essays, written reports, case studies, projects, short answer questions, presentations, and interviews.

- 7.12 If an assessment includes multiple choice questions (including true/false questions) the required pass mark must be at least 75 per cent, and there must be a minimum of 20 multiple choice questions. All questions must relate to the content of the subject matter covered and assess understanding and knowledge of material presented.
- 7.13 For any assessment offered, individual feedback should be given to participants if requested. Feedback must include guidance in the areas that the participant was unsuccessful. Providing a pass or fail result, or a numerical score, is not considered sufficient feedback.

8 Evaluation and Continuous Improvement

- 8.1 Approved providers must participate in quality assurance processes conducted by the OMARA. Approved providers must supply the OMARA with any information or documentation requested regarding their approved activities and operations.
- 8.2 The approved provider's principal OMARA contact person must provide the OMARA with reasonable access to records and staff as required for the purposes of evaluation and continuous improvement.
- 8.3 Where the OMARA recommends that changes to approved activities or operations are required, the approved provider must implement the changes within the period of time specified by the OMARA, or if no period of time is specified, within a reasonable period of time.

9 Probity and Conflicts of Interest

- 9.1 Approved providers will take all reasonable steps to avoid any conflicts of interest (real or perceived) in connection with its dealings with the OMARA.

10 Records Management

- 10.1 Approved providers must keep the following kinds of records for a period of at least two years from the date an approved activity to which the records relate was completed:
- (a) feedback from participants and other stakeholders on the delivery of the approved activity and whether the learning outcomes were met,
 - (b) original documents relating to a participant completing the approved activity,
 - (c) signed statements from participants who have completed the assessment in an approved activity of distance learning or additional assessment confirming they have completed the assessment independently,
 - (d) the learning and assessment materials which relate to the activity, and dates those materials were used, and
 - (e) electronic notifications sent to and from the OMARA for participants who have successfully completed the approved activity.
- 10.2 The OMARA will rely on electronic notification from approved providers to allocate CPD points to participants, negating the need for certificates to be provided. Approved providers can issue certificates of completion to participants who require them for their own purposes.

It is clear from the above that the OMARA is more prescriptive than most other regulatory bodies in determining the content and role of CPD for registered migration agents.

The OMARA has justified this role on the basis that the migration agent profession is relatively new (both nationally and internationally), particularly when compared with the legal and accountancy professions. It is also a relatively small profession and, as such, does not have the breadth of experience and skills of other professions. The OMARA also notes that as at 30 June 2014 more than 14.0 per cent of all agents were in their first year of practice and almost a third had been registered for less than three full years. Further analysis indicates that most agents leaving the profession have been practising for less than three years. This pattern is similar to the failure rate of small business but is not characteristic of trends typical in many professions such as the law and medicine. Finally, as at 30 June 2014, 43.9 per cent of agents reported operating as sole traders. In this environment, the OMARA submits, peer support is unlikely to be strong.

The question central to the Inquiry's analysis is whether what is clearly an extensive role for the OMARA needs to remain in place or whether the profession has now reached a stage of maturity that allows the OMARA, as the profession's regulator, to assume a less active role.

Submissions Received

The OMARA and the OMARA Advisory Board

It was submitted by the OMARA that the current model could be amended to better take into account different levels of agents' professional experience. It was suggested that an alternative approach to CPD would be a framework that specified different CPD requirements for agents with differing levels of experience and professional competence.

The OMARA suggests that an alternative model could take the following form:

Year 1

Total 12 CPD points, comprising:

- *Practice Ready Programme or approved supervision arrangement with a value of 10 CPD points;*
- *minimum of 1 mandatory CPD activity with a value of 1 CPD point; and*
- *1 additional CPD activity with a value of 1 CPD point*

Year 2 and 3

Total of 10 CPD points comprising:

- *1 mandatory CPD activities with a minimum value of 1 CPD point; and*
- *CPD activities with a minimum value of 9 CPD points*

Year 3 and on

Agents who have been assessed as demonstrating professional practice

Total of 8 CPD points comprising:

- *CPD activities with a minimum value of 8 CPD points with no mandatory activity requirements.*

Year 4 and on

Agents who have been assessed as demonstrating deficiencies in practice

- *Minimum of 10 CPD points or as specified under an enforceable registration condition.*

It is argued by the OMARA that this proposed framework imposes the greatest CPD requirements on agents new to the profession, or those who have demonstrated deficiencies in their practise, but reduces requirements for agents with demonstrated professional practice.

When asked by the Inquiry whether the OMARA should continue in its current regulatory role, the OMARA and members of the OMARA's Advisory Board noted that there is significant variability in the quality and relevance of activities that are submitted for consideration by the OMARA. It was noted that a significant proportion of activities require revision, often substantial, to meet the minimum standard for approval as an activity.

For example, the OMARA frequently receives proposed activities which "include incorrect or out of date information, poor quality, non-relevant and non-revised assessment materials, or subject matter that is not relevant to the profession."

The OMARA advised the Inquiry that there is a risk that should the OMARA no longer have a role in assessing and approving CPD activities, there would be a decline in the quality of a considerable portion of CPD activities.

Two options were advanced by the OMARA as options for improving the current CPD model:

- Option 1** The OMARA continues to consider and decide applications from persons/organisations seeking to become CPD providers and determines the Standard Provider Conditions and continues to consider and approve all CPD activities
- Option 2** The OMARA does not consider and approve all CPD providers and determine the Standard Provider Conditions, however continues to approve all CPD activities.

It was suggested by the OMARA that Option 1 has the advantage of providing continued oversight of the ongoing performance of providers with the aim of maintaining quality and improving standards. However, it was noted that the current policy framework has some deficiencies and an improved policy framework would provide clarity to providers and have the potential to reduce regulatory burden for CPD providers. Under the current legislative and policy framework, for example, the requirements for organisations/persons to become and remain an approved CPD provider lack clarity.

In relation to Option 2, the OMARA submitted that:

Option 2 has the advantage of being a deregulation measure for CPD providers. This option may also broaden the range of CPD activities approved. For example courses in Migration Law currently offered by an Australian University could be easily approved as a CPD activity without the University becoming a CPD provider.

However, there are risks that should be considered before this could be implemented.

Firstly, if the OMARA no longer approves CPD providers, it would probably be necessary to revise and strengthen the CPD framework to incorporate some of the matters currently defined in the Standard Provider Conditions such as suitability of proposed presenters, administration of CPD activities, including reporting and probity and conflicts of interest requirements.

Secondly, it would probably be necessary to revise the relevant policy guidelines to specify the circumstances where the OMARA would no longer accept applications for CPD activities from a particular provider, e.g. where there had been a number of occasions when the OMARA had decided to cancel activities provided by a particular provider for failure to comply with the CPD framework and specific activity conditions.

Finally, in relation to pro bono and CPD, the OMARA submitted:

The professional development framework allows RMAs to gain CPD points by undertaking pro bono work through an Authorised Voluntary Organisation (AVOs) approved by the OMARA. There is no regulatory or policy framework specifying the criterion an organisation must meet to be approved; no ongoing requirements an organisation must meet to ensure consumers are protected; and no basis on which to revoke the approved status of an organisation.

The pro bono policy was introduced as a means of encouraging agents to give back to the community in the ways in which other professions do so. Prior to 2013, CPD recognition for pro bono work was limited to two points in any one registration year. In 2013 the cap was removed and agents can now meet most of their re-registration obligations for CPD by providing pro bono advice, rather than undertaking educational activities.

Removal of the CPD points cap has not increased the amount of pro bono work being reported to the OMARA.

The review could consider whether agents should continue to receive CPD points for providing advice pro bono. Should that be pursued, the risk could be a decline in existing pro bono advice and that vulnerable clients might not be able to obtain advice as easily. The consequence could be that the vulnerable clients seek advice from unregistered and unqualified persons.

If the use of Authorised Voluntary Organisations was to continue and the link between CPD and pro bono was to be maintained, greater clarity and transparency would be advisable around the criteria used to administer this programme.

Ernst and Young

In its submissions to the Inquiry, Ernst and Young notes considerable frustration with the professional development approval process, referring to it as onerous, unnecessarily expensive and too heavily focused on procedure, rather than ensuring that quality CPD options are readily offered to registered migration agents suitable to their level of industry experience or area of expertise:

It is our view that the professional development activity approval process has become unwieldy, partly as a result of the fact that rigidity around CPD requirements evolved as a panacea for the problems arising out of low entry barriers to the profession. Given that the profession has matured and some improvement has been achieved in terms of increasing entry-level qualifications, consideration should be given to relaxing the administrative processes supporting the CPD framework.

In relation to the CPD provider accreditation model, Ernst and Young writes:

In order to simplify the regime, only CPD providers, as opposed to individual activities, should be approved. The approval/accreditation process would involve persons or organisations having to demonstrate to the OMARA their ability and willingness to comply with CPD guidelines in order to become accredited. The registration authority, existing providers and other relevant stakeholders would develop CPD guidelines jointly for the accredited providers. The guidelines would specify the minimum standards for a particular type of CPD provision. For example, minimum standards for:

- *seminar or workshop based CPD provision would include criteria relating to the course content, presenter and organisational capability and experience in delivering CPD seminars or workshops;*
- *practical supervised training in-house would include criteria relating to the content of the training programme and skills of the trainer delivering that programme in places of employment;*
- *private study CPD provision would include criteria for demonstrating the provision of up-to-date private study materials and a system of ensuring that the registered migration agent satisfactorily completes any assessment component; and*
- *pro bono or community-based work would require the registered migration agent to have completed hours of such work with an organisation approved by the OMARA for this purpose.*

Ernst and Young continues:

A CPD provider could apply to become accredited to offer any or all types of acceptable CPD activities. Given that most registered migration agents to date have been meeting their annual CPD obligation through completing seminars and workshops, care should be taken towards setting standards for applicants seeking approval to offer this type of CPD activity. In order to address the varying CPD needs of registered migration agents and the varied service provision capacities of persons and organisations seeking accreditation to provide this popular form of CPD, the model should enable two levels of accreditation status, namely:

- *Experienced Practitioner CPD Provider – seminars and workshops conducted by these providers would be geared towards the needs of practitioners with at least 5 years' experience;*
- *Early Practitioner CPD Provider – seminars and workshops conducted by these providers would be geared towards the needs of those less experienced.*

... Those seeking Experienced Practitioner CPD provider accreditation would be required to demonstrate that course content would be topical, relevant and that the presenters have the capacity to teach experienced migration agents on a broad range of migration subjects in sufficient depth. However, the accreditation process should be sufficiently flexible to allow for "one off" providers (for example, a University offering a single conference on immigration law and policy) to be approved to offer seminars or workshops that would attract CPD points on a "one-off" basis.

Accredited CPD providers would then be entrusted to provide suitable CPD activities within these guidelines. The OMARA would be responsible for auditing accredited providers to ensure compliance with the CPD guidelines. Accredited CPD providers would be liable for sanction if the CPD guidelines have been breached.

The system of sanctions could range from a warning for a minor breach to suspension or cancellation of accredited CPD provider status where a more serious breach of the guidelines has been found. No CPD points could be claimed by registered migration agents who complete activities with a CPD provider while their accreditation has been suspended or cancelled.

In relation to the current CPD requirements and concessions, Ernst and Young submits that the system should continue to allow for some flexibility for extending the period during which a registered migration agent must meet their CPD obligation (e.g. for persons who have taken a period of parental leave, where a person is a part-time employee etc.).

Migration Institute of Australia

In its submissions to the Inquiry, the MIA submits that the setting of CPD requirements for the migration advice profession should properly be the responsibility of the MIA as “the professional association”. The MIA continues:

Any profession’s CPD requirements should be set by those involved in the profession as it is they who properly understand the training and activities required to maintain and improve industry standards, competence and integrity. The migration advice profession does not currently set its own CPD requirements.

The MIA recommends that the responsibility of setting CPD requirements and approving CPD activities should be given to the MIA as the professional association. The MIA should establish a CPD Committee which includes the MIA, the Law Council of Australia, OMARA and an academic with experience in migration law to undertake this role.

In relation to the regulation of CPD providers the MIA states:

The MIA shares concerns of Members about the quality and integrity of certain parties who have been given CPD provider approval. The current system of approving CPD providers is not as rigorous as it should be. The experience and capabilities of providers (both individual and organisations) needs to be more clearly examined, or publicly shown.

The MIA recommends that the criteria for the assessment of the suitability of CPD providers be improved. The MIA should establish a CPD Committee which includes the MIA, the Law Council of Australia, OMARA and an academic with experience in migration law to undertake this role.

The MIA then outlines what it believes to be two problems in relation to the current system of approving CPD courses:

- (i) the Requirements are overly prescriptive; and*
- (ii) the range of approved CPD activities is too limited.*

The MIA then notes and recommends as follows:

The maximum attendance limits for different types of CPD courses (for example, 45 for face-to-face seminars) is arbitrary and lacks flexibility. It does not seem to be based on sound learning principles.

The requirement that people without legal practicing certificates all have to undertake a mandatory CPD each year is not without merit. However, where this system fails is that over the past five years, there have been four mandatory CPDs, which have not changed. It would be more productive and effective, if a mandatory CPD each year be set to meet legislative changes or the implementation of a particular aspect of migration policy, e.g. Public Interest Criterion (PIC) 4020.

The MIA recommends that the limit on maximum numbers attending CPD courses be re-examined with a view to establishing more flexible courses and arrangements. This role should be carried out by the MIA and stakeholders that includes: the MIA, the Law Council of Australia, OMARA and an academic with experience in migration law to undertake this role.

The introduction of the limits on maximum numbers may have been to rein in a situation where large numbers of migration agents were taking the opportunity to do their required annual ten CPD points in the quickest way possible. While this measure may have reduced the numbers doing this at any one time, it has not prevented it.

The concept of continuing professional development, which is so important in an environment of ever-changing migration legislation and policy, may be further reinforced by making it a mandatory requirement that migration agents keep their knowledge current in their areas of practice.

The MIA recommends that the possibility of ensuring professional development is continuing by making it a mandatory requirement that migration agents keep their knowledge current in their areas of practice.

The MIA further believes that consideration should be given to introducing a system of self-certifying (subject to verification) of suitable CPD activities by registered migration agents. This would be similar to the arrangements the law societies have for lawyers.

The MIA recommends that consideration be given to migration agents being able to self-certify that they have undertaken approved CPD activities and that this should be subject to verification.

The MIA recommends that the range of approved CPD activities for registered migration agents be widened.

Dr Christopher White

In his submission to the Inquiry, Dr Christopher White stresses the need for a high degree of professionalism:

Such professionalism should be developed by the body for the body – imposing it from a government agency is the least efficient and least effective way of delivering it and there is no “ownership” of it. The profession needs to set its standards and administer them so they, as a collective group of professionals, “own” it and “protect” it. Dr White stresses that professionalism will develop from:

Appropriate CPD on a tiered structure designed to the members level and standing delivered by professional bodies, appropriate delivery organisations and the education sector eg: universities such as higher level courses eg Masters.

Dr White submits that there is a role for the OMARA in relation to CPD but that it should be restricted to the registration of CPD providers. He stresses that the OMARA should not duplicate or micro-manage education bodies or CPD providers:

... we have a regulated education framework already in Australia we should be able to rely on that process and not have secondary agencies micro-managing or even macro-managing in that area. The courses should be developed and delivered by educationists for the industry and market needs.

Migration Alliance

In its detailed and useful submission to the Inquiry, Migration Alliance submits that consideration needs to be given, independent of the CPD providers, to a wide range of reforms to CPD which may see a reduction in the time necessarily undertaken during the course of CPD to accrue 1 point in concert with the consideration of a requirement to undertake additional CPD as against the standard 1.5 hours = 1 “point” model of 10 CPD points per annum. In short, attendance requirements would be shorter but more units would need to be completed.

Migration Alliance also notes as follows in relation to “approved speakers”:

Migration Alliance is of the view that the current standard for an approved speaker, which turns on a minimum of 5 years registration as an RMA or its equivalent is insufficient to impart knowledge on complex issues and practical skills necessary to resolve complex cases.

Migration Alliance is of the view that if the minimum standard for an RMA CPD teacher/presenter is ‘5 years experience’, that this be expanded to include the requirement of practical client advising experience, not simply the fact of being registered as an RMA for 5 years.

Many RMAs lay dormant and without practical work experience for many years but nonetheless can be approved as CPD presenters, thus in turn not imparting the latest and most fresh information and hence not maximising a positive learning outcome for the RMAs they may teach.

Consideration should be given to a requirement for certification or an evidence-based quality standard to perform the role of a RMA CPD trainer. Accredited Specialists, and Academics would generally meet such requirements without having to meet the above suggested criteria.

Other criteria which might also meet a quality standard to teach other agents might be, but not limited to, 15 years recent practical experience as a client-facing RMA. We believe that the current standard for a RMA CPD ‘teacher/instructor’ is less than sufficient. We believe that the quality of teachers/instructors in the RMA CPD arena are not adequately vetted prior to awarding an organisation ‘approved CPD provider’ status.

We suggest that all RMA CPD providers have their provider agreements reviewed and that the principals of each RMA CPD provider specifically declare, in the form of a statutory declaration, exactly who each of their speakers/teachers will be along with documentary evidence that each presenter /teacher / instructor has the requisite experience / core competencies required to be teaching other professional RMAs. It is not sufficient for CPD providers to use ‘teachers/instructors’ who have not been pre-vetted for the sake of convenience.

This means that CPD providers should aim to have a stable of pre-vetted speakers/teachers at hand. We even go as far as suggesting that teachers / presenters have a special licence to teach RMA CPD. This way, quality and precision of Australian Immigration Law, Policy and other business management topics taught is assured.

We also believe that for each topic /subject / module / paper delivered, that instructors/teachers must be able to demonstrate competency in each topic. An instructor should not be given a blanket approval to teach RMAs because they happen to be competent in one area of Australian immigration law. For example some teachers/instructors might meet the requirements to teach ‘business management’ but may not be suitable to teach the ins and outs of ‘Australian refugee law’, through lack of practical experience and knowledge in that area.

Migration Alliance also believes that persons making the decision to approve or refuse CPD providers and CPD activities should be at the highest level of expertise and competence in the field of migration law and practice. We do not believe that a Department delegate on secondment to the OMARA, with no formal training as a RMA or Immigration Lawyer should be making such decisions.

To raise and maintain professional standards, Migration Alliance believes that profession first need to raise the standards, knowledge and expertise of those who are regulating the profession.

In relation to current limitation on class size, Migration Alliance submits as follows:

The two core components of face-to-face CPD which OMARA takes into consideration are:

- 1. Class size limit*
- 2. Time in a seat*

On occasion there is also extra imposition of the maximum number of CPD points that can be awarded for a certain type of activity per day. For example, a conference must be no more than 3 CPD points over 6 hours in 1 day. We believe that this framework is cumbersome, overly restrictive and that this over-regulates CPD providers. Providers should not have their innovation and diverse teaching styles and methodologies stifled and 'stuffed' into a sausage factory style CPD framework. Not all CPD trainers are the same and not all CPD should be delivered according to OMARA's 'one-size fits all' mode of teaching (class size limit and time in a seat).

What is not demonstrated is the proper basis for the OMARA's decision to limit class sizes for seminars, the allocation of points based on attendance at variable rates and the imposition of 'special' and ad hoc "discretionary" requirements with respect to "Advanced" CPD levels.

It is noted that the provenance of that scheme is said to lay with the Deakin Prime Report, but so far as Migration Alliance can determine there is no scientific or other reasonable basis which would support the conclusion that a limitation on class sizes leads to better learning outcomes.

It is understood that a Victoria University Academic raised concerns about 'no evidence' for limiting class sizes in the CPD Provider workshop prior to the current CPD framework changes. This was ignored by the OMARA which chose to cherry-pick the DeakinPrime report.

One of the recommendations in the DeakinPrime report, and excluded without reason by the OMARA was that RMAs should be doing 20 hours of CPD per annum. This is further evidence of cherry-picking.

The introduction of a regime to award points which in effect link the activity (Seminar, Workshop, Conference) to an hourly attendance "rate" creates artificial barriers which impose additional requirements on the approved providers, rendering certain activities unattractive to both attendees and providers.

The current regime for seminars requires an attendance of 15 hours over a period of 2 days with a class size limitation of 45 (10 CPD points for 10 CPD units delivered over 10 CPD modules of 1.5 hrs each).

The current regime for a conference permits the delivery of the approved conference over a maximum 1 day attendance of 3 CPD points awarded per day of activity (consisting of a maximum of 6 hours physical attendance per day which would require the attendee to attend for 3 days in order to be awarded a total of 9 points. After 3 days of sitting in a seat an RMA still does not have 10 points of CPD required for re-registration purposes.

In relation to conferences, the Migration Alliance further notes:

Conferences have died a slow and steady death since OMARA introduced its new CPD framework. The current CPD framework has increased the number of hours a RMA needs to sit in a seat to obtain a CPD point. In addition, the OMARA have limited the number of points that an RMA may obtain in one day to 3 CPD points.

Before the current framework was introduced, Migration Alliance would hold an annual conference with 465+ migration agents in attendance in Sydney, Melbourne, Brisbane and Perth. This allowed MA to attract high-level speakers both corporate and government. Most high-level speakers want to know how many delegates will be in attendance at a conference before they will commit to speak.

RMAs have become less and less inclined to attend conferences since the introduction of OMARA's current framework. Each year since the introduction of 2 hours for 1 CPD point for a conference there has been a steady decline in numbers of RMAs attending conference activities. RMAs are unwilling to spend 3 days to achieve 9 CPD points (limit of 3 CPD points in a day) to attend an annual conference. CPD providers are unwilling to increase their expenditure on venue costs and speakers so that they can run a conference over a 3 day period (used to be 10 points in 2 days). This is especially so when there is a related decrease in the number of attendances, which means less income for the CPD provider.

The OMARA does not take into consideration any variation to their framework which CPD providers might submit to reduce the number of hours, vary speakers, include an exam or any other interesting learning option. The current CPD framework for conferences is inflexible, unimaginative, and suppresses innovative teaching and learning. It does not allow providers to attract top-level speakers because speakers want to know well in advance that there will be a large numbers of delegates in attendance before they commit (400+ in some cases). The current CPD framework around conferences is, out of all of the CPD types, the biggest 'fail' in the profession.

Annual conferences were traditionally a means by which RMAs could network. Now they are almost dead. Migration Alliance is not running a conference in 2014 as it is not profitable and agents are not interested in sitting for 2 hours to get 1 CPD point. They would prefer to sit at their computer and do 10 CPD points online.

In relation to online classroom/webinars, Migration Alliance argues:

There is some scope in the Regulatory Regime for Webinars but the provider agreement which requires interaction by the participant through, say for example, pressing 'yes' or 'no' on a keyboard, does not constitute a proper 'attendance' in that there is no verification of the identity of the individual who is for all intents and purposes, at the end of a computer at a remote location. This failure to verify has the tendency to undermine the attendance regime and is poorly administered and poorly supervised. It is not mandatory for RMAs to ask questions or do any more than log on, strike a key on the keyboard in response to a prompt or query from the presenter. It would be very easy for an RMA to ask a friend or relative to sit at a computer for them and simply 'interact' when prompted online. This is not a verified attendance and does not lead to a learning outcome.

Discussion and Recommendation

The migration advice profession has progressed and matured significantly since CPD was made mandatory in 1999. The Inquiry finds that this is due largely to the significant work done by the OMARA in lifting educational offerings.

Despite recognising the considerable work done by the OMARA, almost all submissions received by the Inquiry expressed concerns with the proscriptive nature and lack of flexibility of the current CPD model used for migration agents and the OMARA's role in the regulation of how CPD providers should be teaching.

In considering these submissions, the Inquiry agrees that there is significant scope to reduce the level and prescriptiveness of the regulatory framework currently governing CPD provision. There is an ongoing question as to whether the OMARA should continue to determine both:

1. who can (and cannot) offer CPD; and
2. what CPD activities will be approved, how they should look and how they should be taught.

The Inquiry has considered the arguments put before it in detail. It accepts that the current CPD system for migration agents is overly regulated by the OMARA – a body without specialist knowledge in continuing education or the provision of high quality teaching programmes.

The Inquiry accepts the concerns of some who made submissions to it that the OMARA has effectively taken on the role of a micro-manager in an area outside of its core expertise and that the current regulatory system in relation to CPD finds no equivalent elsewhere in Australia or overseas.

While there is clearly a role for the OMARA to play in determining who can offer CPD and what core subject areas should be offered to ensure consumer protection, the Inquiry rejects any suggestion that the OMARA needs to continue micro-managing how CPD programmes are structured, taught and assessed.

The Inquiry is of the view that the system currently used by the OMARA in relation to CPD is anti-competitive and likely to stifle innovation.

A preferred framework would be one whereby the OMARA determines:

- a. who can offer CPD within an open and competitive market of service providers (and when the right to be a CPD provider can be withdrawn); and
- b. the core competency areas that agents should be required to undertake. However, the regulation of those CPD providers (ie, the regulation of how CPD activities should be taught and structured) should be left to market forces.

The Inquiry notes that this is a model used by many of the legal service regulators in Australia.

In Western Australia, for example, the Legal Practice Board determines who is eligible to offer CPD and can withdraw that right at any time.

In Western Australia, practitioners are required to take 10 CPD points per year in three core competency areas as follows:

- Competency Area One: Legal Skills and Practice;
- Competency Area Two: Ethics/Professional Responsibility; and
- Competency Area Three: Substantive Law.

In Western Australia, legal practitioners of less than five years post-admission experience are required to complete a minimum of 4 CPD points from Competency Area One and a minimum of 4 CPD points from Competency Area Two in each 12 month CPD period.

Legal Practitioners of five years or more of post-admission experiences are required to take a minimum of 2 CPD points from Competency Area One and a minimum of 2 CPD points from Competency Area Two.

Legal practitioners in Western Australia are then required to certify that they have met the requirements set out by the WA Legal Practice Board when applying for the renewal of their practicing certificate. Random audits are then conducted by the Board of a percentage of certified practitioners.

Practitioners who are selected as part of the audit process are required to supply a record of attendances for the audit period. Those who fail to comply or who are found to have failed to complete the mandated CPD requirements may have their application for renewal of their practicing certificate denied and/or be the subject of disciplinary proceedings for unsatisfactory conduct.

The Legal Practice Board in Western Australia also has the discretion to vary the CPD requirements within prescribed situations -- for example, if a practitioner has been absent due to parenting leave or illness. The Board also charges all CPD providers an application fee, paid by all CPD providers.

The Inquiry commends the approach to CPD used by the Legal Practice Board in Western Australia and other Australian legal service providers. These regulatory systems allow competent CPD service providers to enter the market and essentially leave it to those who use these services to determine who will succeed in a more competitive and innovative environment.

Accordingly, the Inquiry recommends as follows.

Recommendation 10

The Inquiry recommends the creation of a more open and competitive market-based framework for the provision of CPD. In such a framework, the role of the OMARA will be significantly reduced and generally restricted to:

- a. determining the eligibility of a firm or organisation to provide CPD services – noting that, beyond having to meet defined criteria, the type and number of service providers that can operate should be determined by the market;
- b. setting the requirements for registered agents to complete CPD learnings in core competency areas, noting that this should be structured to allow greater flexibility and variance in the learning offered; and
- c. monitoring compliance by registered agents with CPD requirements, preferably as part of the re-registration process for migration agents.

6

Entry Qualifications

Graduate Certificate in Migration Law

Under section 317 of the *Migration Act 1958* (Act), the OMARA has the power to do all things necessarily or conveniently done for, or in connection with, the performance of its functions.

The functions of the OMARA include dealing with registration applications in accordance with Part 3 of the Act (see section 316 (1) (a)). The OMARA must be satisfied that certain applicants have completed a prescribed course and passed a prescribed examination. The OMARA must also be satisfied of the extent of knowledge of migration procedure of an applicant (as required by sections 289A (c) and 290 (2) (a) of the Act).

Current knowledge requirements for entry to the migration advice profession are specified in section 289A of the Act. Applicants must either hold the prescribed qualifications (an Australian legal practicing certificate), or have completed a prescribed course and passed a Prescribed Exam within a prescribed 12 month period.

Section 290(2)(a) of the Act provides that, in considering whether the OMARA is satisfied that an applicant for registration is a fit and proper person to give Immigration Assistance and is a person of integrity, the OMARA must take into account the extent of the applicant's knowledge of migration procedure.

The OMARA has specified, pursuant to the *Migration Agents Regulations 1998*, a Prescribed Course as an approved activity with a value of five points per unit of study for the purposes of continuing professional development.

For regulation 5(1), the prescribed course is specified at clause 2 of the Instrument as the Graduate Certificate in Australian Migration Law and Practice, as currently offered by:

- Australian National University;
- Griffith University;
- Murdoch University; or
- Victoria University.

For Regulation 5(2), the Prescribed Exam is specified at clause 4 of the Instrument as the common assessment items relating to registration, which form part of the Graduate Certificate. This is the Prescribed Exam for persons who are exempt from the English language requirement. The class of persons specified as exempt from English language requirement is provided at clause 3 of the Instrument.

For regulation 5(3) (for those who are not exempt from the English language requirement), the Prescribed Exam is specified at clause 5 of the Instrument and is made up of two elements.

The first element is the ‘common assessment items relating to registration’, which form part of the Graduate Certificate. The second element is achieving at least a minimum score in a specified English language test.

For regulation 5(5), clause 6 of the Instrument specifies the prescribed period for completion of both the Prescribed Course and Prescribed Exam (first element) as 12 months, and the prescribed period for completion of the second element of the prescribed exam (the English test) as 24 months. The intention is that an individual must apply for registration within 12 months of completing the Prescribed Course and passing the common assessment items. Further, if an English test result is required, the test result must be no more than two years old on the date the registration application is made.

History of the Qualifications Requirements for Migration Agents

The Inquiry was somewhat surprised that there existed no clear overview of where the current educational arrangements for migration agents come from and why the OMARA currently plays the role it plays in regulating entry qualifications.

At the Inquiry’s request, the following chart was prepared by the OMARA.

1948	The provisions set down in the <i>Immigration Act 1948</i> provided that a person could become a registered agent by satisfying certain character requirements. Section 14(H) of the 1948 Act stated that a person who desires to become a registered agent may make an application for registration in the prescribed manner. This was to be supported by evidence of the good fame, integrity and character of the applicant as is prescribed or is required by the Minister or an authorised officer (Department of Immigration and Multicultural Affairs, 1995).
1958	Amendments introduced under the <i>Migration Act 1958</i> removed the practice of issuing agents with certificates of registration. Agents were no longer required to prove their fitness to practice, but instead were licensed upon giving notice to the Secretary of the Immigration Department of their intention to practice. This negative licensing arrangement allowed persons to practice until the Minister established that they were not fit and proper to continue (Department of Immigration and Multicultural Affairs, 1995).
	The 1948 and 1958 schemes emphasized an agent’s fitness to practice. Customer protection was addressed through the penalty provisions prescribing false advertising and overcharging for services. There was no specialist body to monitor or investigate registered agents (Department of Immigration and Multicultural Affairs, 1995).

1989	<p>In 1989, legislative amendments were introduced in response to concerns about the activities of migration agents and the perceived ineffectiveness of the existing regulatory provisions. The <i>Migration Legislation Amendment Act 1989</i> replaced the negative licensing arrangements with penalty provisions directed at the activities of migration advisers. The 1989 Act required that agents not engage in false advertising; provide statements of accounts to clients; and not misrepresent their relationship with the Government and the Department.</p> <p>While these provisions provided for some measure of regulatory control over immigration advisers, reports of unscrupulous and incompetent advisers continued. After 1989 the practice of immigration advisers became more complicated. Stricter provisions concerning illegal entrants were introduced and the consequences of bad advice became more serious for the consumer.</p> <p>It was in this context that the first regulatory scheme was drafted (Department of Immigration and Multicultural Affairs, 1995).</p>
1992	<p>Migration Agents Registration Scheme (MARS)</p> <p>In September 1992, industry regulation – in the form of Government regulation – was introduced through the MARS. Since then, only registered migration agents have been permitted by law to provide ‘immigration advice’ as defined in s.280 of the Act. Migration agents fell into two categories: those who provided immigration assistance for profit (the commercial sector) and those who did not (the non-commercial sector). (Department of Immigration and Multicultural and Indigenous Affairs, 2002).</p>
1996 -1997	<p>In June 1996, the Government commissioned a review of MARS. This was the first regulatory arrangement to be reviewed by the Commonwealth as a party to the Competition Principles Agreement.</p> <p>A key finding of the review conducted in March 1997 was that full regulation had achieved mixed results. MARS had increased consumer protection levels by regulating the activities of agents while not placing undue barriers to entry into the profession. However, its mechanisms for dealing with complaints were expensive, slow and unresponsive to consumer concerns (Department of Immigration and Multicultural and Indigenous Affairs, 2002).</p>
1998	<p>The Migration Agents Registration Authority (MARA)</p> <p>In March 1998, as a result of the MARS review, the Government introduced statutory self-regulation and appointed the Migration Institute of Australia to run the Migration Agents Registration Authority (MARA)</p> <p>In 1998, the entry level knowledge requirements for registration were:</p> <ul style="list-style-type: none"> • a prescribed qualification; or • sound knowledge of migration procedure. <p>The prescribed qualification included an Australian law degree; or admission to practice before the High Court, or the Supreme Court of a State or Territory.</p> <p>Sound knowledge could be evidenced by successful completion of a course in migration law/procedure approved by the MARA; or by passing an examination conducted by the Migration Institute of Australia (MIA). (<i>Note: the MIA had a dual role in respect of being a provider of a recognised examination as well as undertaking the functions of the MARA.</i>)</p> <p>The 1996 review of the Migration Agents Registration Scheme (MARS) recommended that the industry needed to address the content of approved “sound knowledge” courses. To meet the objective of raising industry standards of skill and knowledge, MARA initiated a review in July 1998 of all entry-level training requirements.</p> <p>MARA’s review aimed to define the “sound knowledge” requirements according to industry identified standards, establish benchmarks against which all applicants can be measured and move towards standardisation of training. Over a twelve month period consultations were undertaken with representatives from all sectors of the migration assistance industry.</p> <p>Key findings of the review identified inconsistencies in the standard applied by the approved course providers for the sound knowledge qualification. In response to this, the MARA initiated evaluation processes to ensure a consistent test of an applicant’s knowledge. At the same time, the MARA began to consider whether applicants without a prescribed qualification should be required to complete a standardised written exam.</p>

1998	<p>The MARA initiated consultation with providers and other relevant parties on whether it should require all applicants (with or without a prescribed qualification) to demonstrate the extent of their knowledge of migration law and procedure by:</p> <ul style="list-style-type: none"> • completing a Mock File Examination; • completing a simulated interview; and • showing evidence of appropriate qualifications or experience such as a current Australian practicing certificate as a solicitor or barrister or both.
1999	<p>In December 1999, the MARA finalised its report <i>The Knowledge Requirement for Registration as a Migration Agent: A Review of Current Procedures</i>. The report aimed to define the sound knowledge requirements according to industry identified standards, establish benchmarks against which all applicants can be measured and move towards standardisation of training.</p> <p>Recommendation 10 of the 1999 Review said that the MARA should progress ‘strategies to provide a more consistent basis on which to assess ‘sound knowledge’ requirements at entry to the profession.’ In paragraph 6.3.13 it further stated that ‘further progress should be made on this issue as a matter of priority and that agreed outcomes to the assessment of sound knowledge should also form part of the Deed of Agreement.’</p> <p>Following release of the report the MARA initiated consultation with sound knowledge course providers, the professional associations of solicitors and barristers and other relevant parties with regard to the implementation of its proposals and subsequently invited these parties to nominate individuals to sit on the Entry Level Knowledge Assessment Committee (ELKAC).</p> <p>The committee comprised a cross section of the migration advice profession including representatives from not-for-profit and for-profit organisations and the legal profession, academics and individuals skilled in competency standards. ELKAC provided advice to the MARA on issues relating to standards of knowledge and skill at entry to the profession.</p> <p>Its initial task was to provide recommendations on the definitions of sound knowledge and extent of knowledge and methods of assessment.</p>
2001	<p>Consistent entry-level registration examinations</p> <p>In 2001 ELKAC prepared a report that concerned the entry level training programmes that were available to satisfy entry level knowledge requirements. The report was submitted to and reviewed by the MARA which agreed in part to the Committee’s recommendations.</p> <p>The report recommended a move towards an examination format for entry-level courses as a way of determining that all new registration applicants have covered the same material. It also recommended consistent course content amongst course providers.</p> <p>The MARA, in reviewing the recommendations, agreed that skill was important and should be an essential component of education. The MARA accepted recommendations regarding the introduction of a skill requirement and amended recommendations about knowledge requirements.</p>
2002	<p>The MARA announced its intention to move towards a common knowledge examination following its 2002 review of the entry level knowledge standards and examinations.</p> <p>In line with the ELKAC recommendations that there be consistent course content among Sound Knowledge providers and the MARA’s decision to move towards a common knowledge examination, the MARA provided advice to the existing Sound Knowledge providers regarding the learning outcomes expected of all students. As an interim measure, providers were required to submit copies of their examinations to the MARA to prove that the ten common questions were appropriately included in their examinations</p> <p>The MARA engaged a consultant to administer the procurement of an organisation to manage provision of an Entry Level Knowledge examination for the migration profession (common knowledge examination).</p> <p>The MARA considered that this initiative would support the development of a reputation for integrity, professionalism and precision in the provision of accurate advice to those seeking migration assistance.</p>

2003	<p>Migration Advice Profession Knowledge Entry Examination (MAPKEE)</p> <p>As a result of the 2002 review, in November 2003 the MARA held its first MAPKEE. The MAPKEE was a common examination for those persons who wished to enter the migration advice profession, but did not hold a prescribed qualification.</p> <p>The MARA continued to sponsor the ELKAC, which met regularly during 2003 to provide advice to the MARA on issues relating to standards of knowledge and skill at entry to the profession. A key recommendation of this and previously constituted committees was the development of a curriculum document designed to provide guidance for all providers preparing candidates for the MAPKEE. The MARA subsequently sponsored the ELKAC's development of learning outcomes and performance bands and its work towards the establishment of a curriculum for entry level knowledge courses.</p> <p>During this period the MARA invited all registered Entry Level course providers to make presentations to the Advisory Board on ways to develop a curriculum and course accreditation.</p> <p>The MARA appointed the Australian Council for Educational Research Limited (ACER) to administer the provision of the MAPKEE.</p> <p>To reduce the cost impact on the non-commercial sector the Migration Institute of Australia announced a grant through its MIA MAPKEE Community Grant programme aimed at potential MAPKEE candidates who intend to practice as non-commercial agents.</p> <p>Organisations interested in providing preparatory courses were invited to register their interest, indicating where their courses cover the relevant learning outcomes outlined in the document <i>Advice to Entry Level Knowledge Providers</i>. This information was published on the MARA's website in 2003–2004 for the benefit of candidates wanting to complete a preparatory course prior to the MAPKEE. The entry level courses listed were not endorsed, accredited or approved by the MARA.</p>
Aug 2004	<p>Report from University of Sydney (Mike Horsley)</p> <p>The MARA commissioned the University of Sydney to undertake a report <i>“Exploration of Prescribed Course Options: Consultation Report: Migration Agents Registration Authority”</i> as component of the development of a prescribed course for migration agents.</p> <p>The consultant, Dr Mike Horsley, was asked to prepare a range of options to guide the development of a course structure. Recommendations for underlying course development principles and structures included:</p> <ul style="list-style-type: none"> • that the Graduate Certificate / Graduate Diploma model be adopted as the preferred prescribed course options; and • a mini conference / seminar of the current registered course providers be held to discuss the implications of this recommendation and findings. <p>The exploration was of short duration and as a result, the data gathered was limited. It was the contention of the consultant that the MARA should undertake further research and development so that a fully explicated set of professional standards for migration agents could assist and inform the further development of prescribed courses and entrance tests.</p>
Nov 2004	<p>Report from the Migration Institute of Australia</p> <p>A report on Entry Level Knowledge requirements <i>Managing the change in Institutional Structures</i> in an emerging Profession was prepared by the Migration Institute of Australia in November 2004. The report examined:</p> <ul style="list-style-type: none"> • the shifts since the 1980s in policy and national governance on the regulation of migration agents; • issues confronting stakeholders in the drive towards accepted professional practice in the migration advice industry; • the options for the development of the newly legislated 'prescribed course'; • issues facing education providers in their efforts to increase the professionalism of agents and a literature study of how change might be best approached for the migration advice industry; • specific examples from other professions illustrating the forms of organisational and professional culture that gave rise to their current educational and professional practice; and • the change in recognition status envisaged for migration agents and their experience as a profession.

2004	<p>Legislative Change</p> <p>The Act was amended by Act no 48 of 2004. The amending Act inserted section 289A into the Act and repealed Section 290(2)(b) (dealing with sound knowledge). Section 289A applies to people who have never registered as agents, i.e. entry level entrants. The section also applies to applicants whose registration has ceased for more than 12 months. Section 289A provides for a 'prescribed course', a 'prescribed examination' and 'prescribed qualifications'. Regulation 5 of the Migration Agents Regulations 1998 sets out the meaning of a 'prescribed course' 'prescribed examination' and 'prescribed qualifications'.</p>
2005	<p>Graduate Certificate in Australian Migration Law and Practice</p> <p>The Entry Level Course Advisory Committee (ELCAC), appointed in August 2004, commissioned a report prepared by Nicholas Shipley <i>"Report on the Development of the Prescribed Course Curriculum"</i>. The report and recommendations were presented to the MARA Advisory Board in 2005.</p> <p>The MARA Education Committee provided feedback on the ELCAC report on 4 July 2005 and approved its release with specific limitations. The report was subsequently distributed to key stakeholders including current entry level providers, other education providers, the Department, as well as an external reference group.</p> <p>Following this extensive research and consultation, the MARA determined that the prescribed course should be located within the Australian Qualifications Framework as a Graduate Certificate delivered by the higher education sector. All existing entry level providers were consulted and showed support for this decision.</p> <p>The MARA considered a range of issues when making its decision, including:</p> <ul style="list-style-type: none"> • the requirements for registration as a higher education provider; • expectations for the prescribed course structure and content; • the impact of the Graduate Certificate on the not-for-profit sector; and • the likely student participation in a Graduate Certificate programme.
2005	<p>Implementation Project</p> <p><i>Stage 1</i></p> <p>In July 2005, the MARA engaged PhillipsKPA to assess the delivery and learning requirements of the target student population, outline possible models for the implementation and management of the prescribed course, and identify possible higher education providers. As part of its task PhillipsKPA reviewed the course structure recommended by ELKAC to assess the likelihood of the prescribed course being accepted as a Graduate Certificate by higher education providers.</p> <p><i>Stage 2</i></p> <p>The national nature of the programme called for cooperation between the providers and the MARA on matters relating to course quality and consistency. The requirement for a close working relationship was reinforced by the desire of the MARA to embed items of assessment relating to the registration of migration agents within the normal course assessment processes of providers. Embedded assessment, it was argued, would satisfy the requirements of the prescribed examination while benefiting applicants for initial registration by streamlining the registration process.</p> <p>The MARA set 1 July 2006 as the target date for the first intake of students to the prescribed course. This meant that selection of providers and the finalisation of contracts between the MARA and the providers needed to be completed by February 2006.</p>
2006	<p>Establishment of the Graduate Certificate programme</p> <p>On 8 March 2006, the MARA signed contracts for the delivery of the Graduate Certificate with the selected universities at a signing ceremony. The then Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, the Hon Andrew Robb AO, MP attended, along with representatives from each of the universities, the Department of Immigration and Multicultural Affairs and the MARA.</p> <p>The Graduate Certificate in Australian Migration Law and Practice replaced the MAPKEE on 1 July 2006. The four providers for delivery of the prescribed course and examination were:</p> <ul style="list-style-type: none"> • Australian National University; • Griffith University; • Murdoch University; or • Victoria University. <p>The MARA developed the assessments to ensure a consistent and comparable standard of performance from all candidates as part of the registration process for people who want to become a migration agent.</p>

2006	<p>Advisory Committees</p> <p><i>Course Coordination Committee</i></p> <p>The Course Coordination Committee (CCC) was a joint advisory group established by the providers and the MARA to maintain an overview of directions, outcomes and developments in the prescribed course.</p> <p>It also coordinated operational matters across the contributing providers so that (as far as is practical) students of the prescribed course had a common experience and the MARA had views of the information systems and processes of providers.</p> <p>The CCC role was to provide guidance and make recommendations to both the providers and the MARA on matters relating to the governance and operation of the prescribed course.</p> <p>The Committee comprised:</p> <ul style="list-style-type: none"> • a senior representative from each of the provider institutions; • the MARA's Chief Executive Officer (or nominee); • the responsible project officer; and • a representative of the Department. <p><i>Assessment and Moderation Committee</i></p> <p>The Assessment & Moderation Committee (AMC) was an advisory group established by the MARA to moderate the marking of completed "common" assessment tasks relating to registration (the registration tests).</p> <p>In addition to moderation of the common assessment items, the AMC identified any departures from the processes and standards approved by the MARA for marking registration tests. The AMC also made recommendations to the MARA for matters it considered should be included in the registration test item bank.</p> <p>The AMC comprised academic experts in assessment, individuals with a specialist knowledge of migration law nominated by the Universities, the MARA's Chief Executive Officer (or nominee), and the responsible project officer.</p>
2008	<p>The Graduate Certificate course outline was updated in June 2008 in association with the universities and students to make it more relevant and practical. A revised assessment framework was developed so that the universities created the assessments in accordance with the framework.</p>
2009	<p>Office of the Migration Agents Registration Authority (OMARA)</p> <p>Following the Hodges report, the Government decided to end statutory self-regulation and brought the regulatory function back into government under the Office of the Migration Agents Registration Authority (OMARA).</p>
2010	<p>Establishment of the Migration Agent Registration Entrance Advisory Committee (MAREAC)</p> <p>In July 2010, the universities approached the OMARA with proposed changes to administrative arrangements for the Graduate Certificate programme. In September 2010, the Course Coordination Committee agreed to the proposed future arrangements for a committee chaired by the OMARA to ensure a sufficient degree of uniformity among the providers of the prescribed examination. A Memorandum of Understanding was drafted and the OMARA provided the secretariat function.</p> <p>The inaugural meeting of the MAREAC was held in December 2010. The MAREAC's objectives are to assist the OMARA by providing information in relation to graduates', knowledge of migration procedure for the purposes of section 290(2)(a) of the Act in the event a graduate is an applicant for registration as a migration agent.</p> <p>In delivering its objectives, the MAREAC</p> <ul style="list-style-type: none"> • oversees the direction, outcomes and development of the Prescribed Course; • co-ordinates operational matters across the universities to ensure, so far as is reasonably practical, a consistent standard and educational outcome for students undertaking the Prescribed Course; and • ensures, so far as is reasonably practical, a sufficient degree of uniformity, integrity and standards among the universities with respect to the Prescribed Exam. <p>Membership of the committee is the CEO (or nominee) of the OMARA and one representative from each of the universities, the MIA, the Department and the Law Council.</p>

2011	<p>Occupational Competency Standards</p> <p>To ensure that competencies for entry into the migration agent profession were relevant, clear and transparent, the OMARA announced in 2010 that a review and update of the competency standards (previously set in 2005) would be undertaken. The review would underpin the learning outcomes for the prescribed course and continuing professional development activities.</p> <p>Professor Andrew Gonczi was contracted to undertake the review. The occupational competency standards for migration agents were finalised in August 2011.</p>
2009 - 2014	<p>Review of Entry Level Standards</p> <p>With the objective of improving the knowledge and practical skills of new entrants and creating greater flexibility in registration pathways, while minimising any further impacts on the profession, the OMARA has undertaken reviews and consultations on the entry level standards for migration agents since 2009.</p> <p>These reviews have consistently identified a number of issues adversely impacting on the professionalism of the sector. The findings include that the prescribed course does not adequately address all competency areas and needs a practical component; the structure of the course and assessment focusses on course content rather than on demonstrated learning outcomes; different approaches between providers could reduce the effectiveness of the prescribed examination and have the potential to reduce standards; and there is a lack of flexibility in entry pathways to the profession.</p>

The MAREAC

As noted above, in 2012, the OMARA, the Department, the four university providers and the Migration Institute of Australia signed a Memorandum of Understanding. Clause 5 of that MOU stipulates that the parties may establish an advisory body to the OMARA — the Migration Agent Registration Entrance Advisory Committee (MAREAC) — to assist the OMARA oversee the course and examination prescribed under s.289A of the Act.

The current members of the MAREAC are:

- The OMARA. The OMARA chairs the MAREAC. It does so as the entity that is legislatively responsible for the entry level standards to the profession. Specifically, under s290(a) and 290(2)(a) of the Act, it is prevented from registering persons who are not ‘fit and proper to be registered and, in considering this, must take into account the applicant’s knowledge of migration procedure.
- The Department of Immigration and Border Protection. The Department sits on the MAREAC because it has a policy role in supporting the operations of the OMARA. Further, it administers the Act (except for Part 3 of the Act), often through day to day dealings between officers of the Department and registered migration agents. The Department thereby has a special interest in the competence standards of applicants for registration or re-registration as migration agents with respect to immigration assistance and Migration Procedure.
- The four provider universities. All four universities sit on the MAREAC because they deliver the prescribed course and exam and are directly responsible for the standards students must meet to pass the exam and complete the course.
- The Migration Institute of Australia. The MIA sits on the MAREAC as it is a key representative body and a much respected professional association charged with representing Australian registered migration agents. A vision statement of the Institute is that the professionalism of its members be recognised by all stakeholders.

- The Law Council of Australia. The LCA sits on the MAREAC as it is the peak national representative body of the Australian legal profession, and represents about 60,000 legal practitioners nationwide. The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. Currently, approximately a third of the registered migration agents in Australia have been registered on the basis that they hold an Australian Legal Practising Certificate. As such, the LCA has a special interest in the competence and professionalism of persons admitted to registration as migration agents.

Pursuant to that section 4 of the MOU, course content is described as follows:

4 Course content

4.1 Prescribed Course

- The parties recognise the need for the Prescribed Course to have a common curriculum framework, as approved by the OMARA that:*
 - *outlines the learning outcomes and core content for the Prescribed Course; and*
 - *is the template against which the Universities should develop their respective versions of the Prescribed Course.*
- The current, agreed Curriculum Framework is attached to this MOU as Annexure A.*
- The parties intend that there will be an appropriate review process for the Curriculum Framework, which will serve the interest of maintaining the currency and relevance of the Curriculum Framework.*
- The parties:*
 - *acknowledge that it is not an aim of this MOU that the Prescribed Course will be uniform between the Universities (and any other university or educational institution that may be specified in an instrument under regulation 5(1) of the Migration Agents Regulations 1998 as a provider of the Prescribed Course); and*
 - *acknowledge the need for innovation on the part of each University in their respective teaching methods and continuing development and improvement in their educational processes.*

4.2 Prescribed Exam

- The parties recognise that the Prescribed Exam must assess the knowledge of applicants for registration as a migration agent under Part 3 of the Act.*
- In order to achieve the objective described in paragraph 4.2e), the parties acknowledge that the "Prescribed Exam" should consist of a number of Common Tasks. However, it should also include a number of assessment tasks that are not common between the Universities.*
- The Universities intend that Common Tasks will be developed through agreement by them through MAREAC.*
- The parties recognise the need for the Prescribed Course to have a common assessment framework ("Assessment Map"). The current Assessment Map is attached to this MOU as Annexure B.*

4.3 Changes to the Prescribed Course and Prescribed Exam

- The OMARA recognises that the Universities are self-accrediting organisations and therefore cannot be directed to change their course or examinations by the OMARA.*

- b) *The Universities recognise the OMARA's role in issuing instruments under regulation 5(1) of the Migration Agents Regulations 1998, and it is therefore their intent to, where reasonable in the circumstances:*
 - *consult with the OMARA prior to making any substantive changes to the Prescribed Course or Prescribed Exam; and*
 - *implement changes to the Prescribed Course or Prescribed Exam reasonably requested by the OMARA.*

Also pursuant to the MOU, the MAREAC's objectives, as set out in clause 5.2, are to assist the OMARA by:

- a) *providing information in relation to graduates', of the Prescribed Course taught by each of the Universities, knowledge of migration procedure for the purposes of section 290(2)(a) of the Act in the event a graduate is an applicant for registration as a migration agent;*
- b) *overseeing the direction, outcomes and development of the Prescribed Course;*
- c) *coordinating operational matters across the Universities to ensure, so far as is reasonably practical, a consistent standard and educational outcome for students undertaking the Prescribed Course; and*
- d) *ensuring, so far as is reasonably practical, a sufficient degree of uniformity, integrity and standards among the Universities with respect to the Prescribed Exam.*

The MAREAC's functions are then detailed, pursuant to clause 5.3 of the MOU, as follows:

- a) *to provide guidance and advice to the OMARA with respect to its statutory functions in sections 289A and 290(2)(a) of the Act;*
- b) *to make recommendations to the OMARA and the Universities on matters relating to the governance and operation of the Prescribed Course and the Prescribed Exam;*
- c) *to act as a forum for members to discuss improvements to the Curriculum Framework, and to consider suggestions for improvement and propose to the OMARA actions designed to maintain the relevance and/or enhance the Curriculum Framework;*
- d) *to provide advice to the OMARA with respect to updating the Prescribed Exam, in accordance with the objective described in paragraph e);*
- e) *to moderate Prescribed Exams for the purpose described in paragraph 6.7(b) of this MOU;*
- f) *to advise the OMARA in respect of any changes to the Curriculum Framework;*
- g) *to make periodic reports to the OMARA outlining its operations and proposed future actions to ensure the continuing efficient and effective operation of the Prescribed Course in accordance with the Curriculum Framework;*
- h) *to review course evaluation data, demographic information and other inputs and provide guidance to the Universities and the OMARA on matters relating to the:*
 - *quality of the Prescribed Course delivered by each University;*
 - *comparability of learning outcomes and assessment standards across the Universities; and*
 - *adequacy and appropriateness of the Prescribed Course delivered by each University against the elements set out in the Curriculum Framework;*
- i) *to make recommendations to the OMARA regarding any inconsistencies among the Universities in the marking of the Prescribed Exam for the purpose described in paragraph of this MOU, or departures from processes and standards for the Prescribed Exam agreed between the Universities and the OMARA;*
- j) *to record course dates and co-ordinate course information requirements for the Prescribed Course*

(such as examination schedules), and coordinate the collection of student data and relevant policies, assessment practices and quality assurance processes across the Universities;

- k) to provide information to the OMARA to ensure that the OMARA's website contains up-to-date information on the commencement dates, location and mode of offering by each of the Universities for the Prescribed Course; and
- l) to act as a means for members to share experiences, to assess the overall quality of the Prescribed Course and the Prescribed Exam, and to facilitate communication between:
 - the parties to this MOU, and
 - between those parties and the migration advice profession.

Finally, section 6.2 specifies the following in relation to course content:

- a) Each University recognises the benefit of receiving suggested improvements to its Prescribed Course, and the need to meet the reasonable requirements of the OMARA in respect of the Prescribed Course and Prescribed Exam. Accordingly, they intend to provide MAREAC and the OMARA with all reasonably required information regarding their curriculum and assessment for the Prescribed Course and Prescribed Exam, for example:
 - course schedules;
 - course outline;
 - desired course outcomes and graduate outcomes;
 - course structure including unit outlines;
 - details of its policies regarding recognition of prior learning in respect of the Prescribed Course; and
 - information regarding assessment.
- b) The parties recognise that, as a result of the process described in 6.2a) above, MAREAC may make recommendations to the OMARA.

The MOU also includes two annexures. Annexure A outlines the "Curriculum Framework" to be adhered to by the four university course providers. Annexure B outlines the Course "Assessment Map".

The OMARA advised the Inquiry that the clear intent behind the MOU is to ensure that the OMARA is satisfied that all persons, irrespective of the institution at which they undertake the prescribed course/exam, have the knowledge and professionalism required to give immigration assistance.

The MAREAC operates by consensus, in accordance with the MOU, rather than under legislative powers.

The 2007-08 Hodges Review Report

The Hodges Review found that the Graduate Certificate appeared to be a positive step, but noted concerns that a Graduate Certificate is not a sufficiently robust knowledge requirement for an increasingly complex practice area. The Review also noted concerns in some submissions to it regarding an apparently high attrition rate amongst new migration agents, and noted that more rigorous entry standards might prevent individuals from entering the profession if they are not committed to it and better prepare them for its challenges.

The Hodges Review ultimately found that increased entry requirements were warranted and recommended as follows:

Recommendation

That as soon as practicable, the Graduate Certificate as the knowledge requirement for entry to the profession be replaced with a Graduate Diploma level course.

A restricted practice or required supervision period was also discussed in some submissions to the Hodges Review, whereby newly qualified migration agents practice under the supervision of an experienced agent for a defined period of time. This is akin to what occurs in the legal profession where lawyers are required to complete at least 12 months of supervised practice after completing their LLB.

This leads the Hodges Review to recommend as follows:

Recommendation

That a system of registration be implemented involving a year of supervised practice for newly qualified migration agents.

Submissions Received

Migration Institute of Australia

In relation to non-lawyer migration agents, the MIA expresses significant concerns in relation to the length and content of the Graduate Certificate in Australian Migration Law and Practice:

The Graduate Certificate is too short to adequately teach both migration law and migration practice. The result is that some graduates of this course lack the practical knowledge (or sometimes confidence) to give advice.

The MIA also expresses concerns at the lack of any supervision requirement, submitting:

There is currently no requirement for new migration agents to work under supervision before being registered. The lack of practical knowledge and experience of recent law graduates is overcome for lawyers working in general legal practices by the requirement to work under supervision for three years.

Currently the lack of practical experience of newly registered migration agents is partially resolved by the requirement that migration agents who have completed the Graduate Certificate complete the Practice Ready Programme. The Practice Ready Programme is currently provided by the MIA for all agents and by Fragomen for its own staff.

The Practice Ready Programme is seen by some as an additional burdensome expense in the already expensive initial year of registration. A weakness in the Practice Ready Programme is that it is not mandatory for it to be undertaken at the beginning of the initial year, when it is most needed.

The lack of a scheme of supervised practice for newly registered migration agents is generally accepted to be because the migration advice profession, made up of approximately 80 per cent sole traders, would not be able to service such a scheme.

However, this could be addressed by introducing one or more of the following:

- *a longer entry level course, such as a Graduate Diploma or a Masters, with a larger practical element;*
- *a probationary registration for the first year;*
- *a mandatory system of supervised practice or internships; and*
- *a substantial mentoring system*

Some, or all of these requirements, the MIA argues could be followed by an “assessment of capabilities” — by which the Inquiry assumes the MIA is referring to what is commonly referred to as a capstone or end of study exam (discussed further below).

The MIA then recommends as follows:

The MIA recommends that resources be provided for the MIA as the professional association to establish a working party of suitable stakeholders which includes the MIA, the Law Council of Australia, OMARA and an academic with experience in migration law, to consider an appropriate entry level qualification for registered migration agents.

The MIA recommends that resources be provided for the MIA as the professional association to establish a working party of suitable stakeholders which includes the MIA, the Law Council of Australia, OMARA and representatives from a small and larger practice to consider ways of providing opportunities for supervised work experience for newly registered migration agents.

Ernst and Young

In relation to the Graduate Certificate, Ernst and Young agrees with the MIA that the current offering is too short and fails to ensure that the technical skills and knowledge of newly registered agents is sufficient to protect consumers:

Increasing the length of the qualification to a Graduate Diploma to teach technical areas in more depth will not necessarily result in a “work-ready” migration agent. While we note that the decision to locate the entry-level course within the higher education sector was in keeping with the move towards the industry becoming a profession, the weakness of this has become apparent with the failure of courses to equip newly registered agents with practical skills. Consideration is required in relation to an alternative approach so as to ensure that newly registered agents enter the profession with the requisite qualifications and skills for practice.

EY's approach to the employment of professionally inexperienced migration agents (both lawyers and non-lawyers) as agent-trainees is that the initial employment is in a support role that does not involve client contact or the signing-off of applications in their own name. This approach involves a period of at least 12 months as an agent-trainee and more often for a longer period. Trainees are exposed to a wide variety of migration work and the risks associated with more complex areas of their role and the varying areas of migration practice are highlighted. This quality and risk management approach to training and professional development has proved effective in developing the agent-trainees' practical knowledge and workplace skills (e.g. client liaison skills, application preparation, assembly and lodgement protocols and business communication skills). Progression from agent-trainee to "agent on the record" is based on performance and merit and not on the basis of time served.

Ernst and Young suggests that a preferred pathway to registration would require completion of an appropriate vocational qualification that included a significant practical skills component. In that regard, Ernst and Young suggests looking at the Australian Qualifications Framework, which recently introduced two qualifications into the vocational education and training (VET) sector -- the vocational Graduate Certificate and the vocational Graduate Diploma.

Ernst and Young submits:

Consideration may be given to using the vocational Graduate Diploma as an alternative entry qualification. Locating the entry-level qualification within the VET sector allows for the design of a competency-based course with the benefit that practical competencies can be articulated and monitored. Course content is significantly more structured, and course approval requires consultation with relevant stakeholders.

Ernst and Young suggests that a vocational course such as this would have a significant practical component that could either be conducted:

- *in a classroom environment with case simulations e.g. similar to those conducted as part of the Practical Legal Training programmes undertaken by law graduates at the College of Law in preparation for their admission as a legal practitioner in various states and territories;*
- *as a work placement with an approved employer registered with the OMARA to offer such training e.g. similar to a seasonal clerkship programme undertaken by law graduates in various state and territory jurisdictions; or*
- *as part of a clinical programme in partnership with not for profit community-based organisations.*

It is further suggested that, appropriately designed, this practical component could meet the same objective as a period of supervised practice.

In relation to any required period of supervision, Ernst and Young cautions as follows:

We believe there are a number of issues associated with mandating a period of supervised practice or a work placement that need to be addressed. Particularly significant is the fact that sole practitioners, most of whom lack the necessary infrastructure or experience to provide appropriate training and supervision, dominate the profession. Therefore, careful consideration should be given towards ensuring that only employers of "good standing" with the capability to offer appropriate professional supervision and training be accredited to offer supervised practice and work placements. For example, a supervision model based around a new accreditation framework would see such supervision and training placed in the hands of an appropriately qualified person.

Griffith Law School

In relation to replacing the current six month Graduate Certificate with a 12 month Graduate Diploma, Griffith Law School expresses concerns about the costs this would impose on new students, noting that such a shift would effectively double the cost of the current prescribed qualification.

This, it is noted, might reduce the number of potential applicants. This, in turn, might impact negatively on a course provider's ability to offer the course.

In relation to the administration of the Prescribed Course and MAREAC, Griffith Law School commends the efforts of the OMARA in administering the prescribed course across the four accredited providers but notes that there are some operational issues which can place an undue burden on the service provider's resources:

Presently, through the Migration Agent Registration Education Advisory Committee, all four accredited providers and OMARA are involved in developing and moderating common assessment tasks.

The providers are each tasked with preparing assessment tasks for one particular subject, and moderating another provider's draft assessment for a second subject. After this initial moderation process, the providers amend as necessary, and the draft assessment is sent to all four providers for comment and subsequent amendment. A teleconference is then held with all providers and OMARA present and the assessment is moderated and amended again before a final distribution to all providers.

This process is time consuming and onerous for providers who, as universities, are accustomed to administering assessment for professional and industry programmes alike.

In sum, Griffith Law School suggests adopting a model akin to that used in the regulation of legal education in Australia:

We believe that it would be more efficient to allow the accredited providers to administer the prescribed course individually with the possibility of OMARA auditing to ensure appropriate standards are maintained.

As an example, Griffith Law School is accredited by the Legal Practitioner's Admissions Board to provide the Bachelor of Laws programme for the purposes of admission requirements to the Supreme Court of Queensland. This accreditation is limited to threshold standards of curriculum and the LPAB is not involved in the moderation of assessment. Nor is there common assessment across all accredited providers.

It is submitted that moving forward the essential role of OMARA in relation to the prescribed course could be limited to threshold standards for the curriculum, course accreditation, registration and CPD requirements.

KPMG

In relation to the Graduate Certificate, KPMG expresses concerns about what it refers to as the “highly prescriptive” role of the OMARA in determining and monitoring the structure of courses:

... we expect that universities (in particular) do not appreciate being told how to teach. Given its size, it does not seem to be economic for OMARA to retain in-house educational expertise.

For the universities, it is difficult to construct a course which can meet OMARA requirements and their own educational guidelines. The desire to have uniform assessment items (combined with the pace of change in this field), for example, means that approved assessments are sometimes out of date by the time they are delivered.

The Regulation of CPD Providers and... Universities could be simplified to allow more flexibility of delivery.

In relation to any requirement for supervised practice, KPMG concludes that there is general agreement that agents would benefit from a period of supervised practice, but that the opportunities to do this in a highly fragmented profession are limited, as there are few firms large enough to offer placements. KPMG concludes:

The development of the Practice Ready Programme (PRP) is an attempt to respond to this issue. The PRP is useful, but is not appropriate where a practitioner is already working under experienced practitioners. A more flexible approach might allow alternative streams of supervised practice -- for example:

- *PRP;*
- *participation in an extended mentoring programme; or*
- *supervised practice with some core requirements regarding the requirements for the firm and/or migration agent to be able to offer supervised practice.*

KPMG supplemented these suggestions in a telephone interview with the Inquiry and advised as follows:

Philip Duncan: I lecture in the ANU Graduate Certificate. My perception is that the course does cover the area quite well. The four subjects are essentially: introduction, visas, review and practice. In my experience, the area that is extremely large that does not get a lot of coverage is visas. If the course could be expanded that is where I would like to see it done. However, the real issue is that people struggle with putting this into practice. I do think that the Graduate Certificate produces qualified people but they do find it difficult to get practical experience and if there was greater opportunity for them to get that it would be terrific.

I am not aware of any other course that is so prescriptive in terms of learning outcomes and the examination that must be delivered to students. It is extremely prescriptive and micromanaged and I believe more flexibility would produce better outcomes.

I think OMARA find it difficult. It surprises me that OMARA think that they can have this expertise in-house to manage this process well, and obviously universities do feel they have the expertise to teach people.

Having to work something through the OMARA matrix and then work it through the university matrix is something that requires a great deal of skill.

I don't think the profession is capable of providing supervision. I have been with KPMG a relatively short time and before that I had my own firm. We used to take students who were doing their final unit for a practical placement. It was difficult to give them a meaningful exercise in a small firm and it was difficult to extend it over any decent period.

I see a movement in the industry for some participants to bring on young graduates and use them in a way as very cheap labour, because their urgent need is to learn their craft – so they are prepared to do this – to the extent that it is almost slave labour. It is what people need but the profession is not able to offer it and the profession also needs mentoring people in less formal ways.

There is some mentoring here in Queensland with the MIA and that tends to bring together people on a monthly basis and it brings together people in a community of practice. This is the best model I have seen work. I don't think anything more extensive is possible.

Michael Wall: It would be good for businesses like ours to have an option where for our own internal employment we could run our own Practice Ready Programme. I think the MIA and Fragomen offer this now and I think the opportunity comes around every 2 years to put your hand up to offer this. There is some consolidation happening in the immigration industry, more firms operating, and if there was an option for those firms to provide the equivalent to the Practice Ready Programme it would be good.

Victoria University

Victoria University advises that it is supportive of the prescribed qualification being raised to a Graduate Diploma, instead of the current Graduate Certificate:

... the second subject of the Graduate Certificate, Subject B Australia's Visa System, which involves the examination of substantive visas, should be divided into two subjects as the material that we are covering is extensive. We would also introduce practical components and specialist units in some of the additional subjects to enable students to be ready for practice.

In relation to concerns raised by others about costs, Victoria University states:

We believe that a higher initial entry cost would not severely disadvantage students. Victoria University has in the past sponsored staff from community legal centres and not-for-profit organisations to complete the prescribed qualification and can continue to offer sponsorship arrangements even if the prescribed qualification was raised to a Graduate Diploma.

Dr Christopher Robert White

In his submission to the Inquiry, Dr White also calls for less regulation of the university service providers and greater mentoring opportunities for new agents:

Education – A minimum of a Graduate Diploma in Migration Law and Practice and a base degree. Further education to Masters and higher levels should also be available and be encouraged. The education programmes should be established and run through the Universities in consultation with the Professional Associations and membership bodies. The courses do not need micro-management by other bodies or agencies. Education and Training should be left to the “educationalists” those with the knowledge, know-how and training background and experience using the most contemporary tools and methodologies available.

Internship – This can be traditional, via formal mentoring, or online via communities of practice. It should be for an extended period with a minimum of twelve months for new agents entering the profession with ongoing CPD and training in practice during that period. It will allow for monitoring of agents' integrity and honesty during their early stages of practice and this could be formally reported for re-registration (ie initial registration could be for a twelve month or two year period then revert to the five year model if all pre-requisites are met). The Professional Development Programme currently imposed on new Agents is repetitive of material covered in the Graduate Certificate and little more than an extension of this (again a further (red tape) cost impost with limited benefit) – it should be replaced with a much longer term internship.

The OMARA

The Inquiry was greatly assisted by the OMARA in examining ways to improve current entry qualifications for migration agents.

In relation to the suggestion that the Graduate Certificate be replaced with a Graduate Diploma to increase the standard of new entrants to the profession, the OMARA outlines some reservations:

The disadvantages of this option would include the increase in costs (estimated by universities to double) creating a barrier to entry to the profession. In comparison to the proposed implementation of an independent, external exam, this would maintain the current system of inputs driven focus, rather than the recommended outcomes approach. It may also continue the current intervention by the OMARA in the administration by self-accrediting universities of their courses, and perpetuate the OMARA's lack of visibility over demonstrated graduate learning outcomes.

In relation to the suggestion that the Prescribed Course is too restrictive, the OMARA agrees:

... the parameters of the prescribed course are too restrictive – discouraging higher level learning and creating unnecessary barriers for entry to the profession.

The Graduate Certificate is currently the only prescribed course for the purposes of entry to the migration advice profession. The only other option available to enter the profession is to obtain an Australian legal practicing certificate. This restriction prevents individuals who hold other academic qualifications, which may be relevant and at a similar level, from qualifying for registration. This has the potential to deter highly qualified individuals from seeking to enter the profession. For example, under current requirements, an applicant holding a Masters in Immigration Law, would not be eligible for registration as a migration agent without having to further complete the Graduate Certificate, a lower level qualification.

Additionally, the current requirement that applications for registration must be made within one year of completing the prescribed course is considered unnecessarily restrictive, as it provides insufficient flexibility for applicants to enter the profession at different levels, defer entry or take leave of absence from the profession.

There is a lack of clarity over when the prescribed course is taken to have been completed (what date – that of the last exam, the date the exam was marked, the last date of semester, the date exam results are published or the date the qualification was conferred). Given the serious implications for applicants of missing the date, there has been much controversy around this issue. There is also the question of whether the course has been ‘completed’ and the exam has been ‘passed’ if recognition of prior learning is awarded for work experience, and certain subjects and components of the prescribed exam were never undertaken – current advice is that all subjects must have been completed and all exams completed and passed.

In relation to the value of the current Prescribed Exam, the OMARA advises that it has been considering the possibility of replacing the current Prescribed Exam (the common assessment items) with a stand-alone assessment de-linked from any Prescribed Course.

According to the OMARA, this option would introduce an independent and nationally consistent competency based assessment that applicants for initial registration would need to pass to satisfy the knowledge requirement for registration purposes. This would be a stand-alone assessment, de-linked from the prescribed course, designed to achieve consistency in both the examination conditions and in the marking applied to all candidates. Eligibility for sitting the assessment could be the successful completion of a prescribed course or, alternatively, with a robust exam, the need for completion of a prescribed course could be removed.

To implement this option, the OMARA suggests that it could tender for the development of the stand-alone exam, which ultimately could be prescribed in a legislative instrument. Attaining competency in the assessment would be a requirement for registration purposes. The OMARA suggests that:

To ensure that the assessment would effectively tests competencies, it should be comprised of three different assessment modes, including an invigilated exam, a portfolio of evidence, and simulated interview. It may be possible to have the exam structures so it tests reading writing speaking and listening skills in English, so the need for an English language requirement may be removed.

This may further facilitate de-regulation in that, with the introduction of the external exam which would test practical skills and address all competency standards, the PRP could be removed as a CPD requirement for those who have passed the stand-alone assessment.

A key advantage is that it would enable the OMARA to maintain consistency of processes (including marking and examination conditions), and maintain an outcomes (rather than process) focus. It would also give the OMARA greater control over entry level standards, and remove any incentive for the universities to lower standards for financial reasons. Rather, this would provide incentive for the universities to teach the full curriculum, to give students the best chance of passing the exam, thereby enhancing their reputation and possibly their share of the student market.

The OMARA also suggests that if the prescribed exam was de-linked from the prescribed course, it would be possible to specify additional courses as a prescribed course:

This would facilitate an open market policy, whereby any provider may request accreditation of a relevant course, as a prescribed course. Courses accepted as covering relevant underpinning knowledge included within the Occupational Competency Standards for Migration Agents, August 2011, could be specified as a prescribed course in a legislative instrument.

The specification of additional courses as a prescribed course is dependent on implementation of a stand-alone exam, as the prescribed exam is currently embedded within the Graduate Certificate and is not available separately. It is therefore not feasible to specify additional courses as a prescribed course as they will not contain the prescribed exam, which is otherwise not accessible. As long as the prescribed exam remains embedded in the Graduate Certificate, only individuals who complete the Graduate Certificate will be able to satisfy the registration requirement that applicants have passed the prescribed exam as set out in sub-section 289A(c) of Act.

Courses considered for accreditation would include those at an equivalent or higher level, in disciplines relevant to migration law -- for example, a Masters in Migration Law or a Bachelor degree in commerce with a migration law specialisation.

The OMARA also discusses extending the prescribed period for completion of the prescribed course from one to five years:

Currently, applicants who apply for registration more than one year after completing the prescribed course will not satisfy registration requirements and their applications for registration must be refused. Extending the prescribed period would align the validity period of the prescribed course with normal standards for validity of tertiary qualifications (up to ten years) and provide flexibility for applicants to enter the profession at different levels, defer entry or take leave of absence from the profession. Agents currently affected by this restriction may include those wishing to take more than 12 months parental leave or study leave, or those who wish to defer registration until completion of higher level studies.

Under current arrangements, applications for initial registration need to be made within 12 months of the individual completing the prescribed course. Individuals who do not apply for registration within this time frame, or registered migration agents (not holding a legal practicing certificate) who allow their registration to lapse for more than one year, will need to complete the Graduate Certificate again (including the prescribed exam) in order to satisfy registration requirements. This would involve the equivalent of six months full-time study and tuition fees of up to \$10 000.

This is considered unnecessarily onerous, and that assurance the applicant still meets the knowledge requirement could be achieved by passing the prescribed exam alone. However, as the prescribed exam is embedded in the Graduate Certificate, it is not currently possible to effectively set a different prescribed period for completion of the course to that of the exam.

Extension of the prescribed period for course completion is also dependent on the implementation of a stand-alone exam. That is, if the prescribed exam is not de-linked from the prescribed course and made available as an independent exam, it will not be feasible to specify differing periods for completion of the course and exam because there is only provision for completion of the prescribed exam as part of the prescribed course.

Finally, in relation to the capstone exam, the OMARA notes that a further concern is an apparent conflict of interest inherent in the administration by the universities of both the prescribed course and the entry exam, which has the potential to lower entry standards for the profession:

By setting high standards, a provider university may deter student enrolments, as students seek an easier pathway to registration at other institutions. This outcome may impact on revenue and serve as an impetus for universities to retain standards at a lower, competitive level. These concerns have contributed to the OMARA's view that the prescribed examination be a stand-alone assessment de-linked from the prescribed course.

The OMARA Advisory Board

In a lengthy and very useful telephone interview with members of the OMARA Advisory Board, the issue of replacing the Graduate Certificate with a Graduate Diploma and introducing practical training elicited the following responses:

The difficulty has been that essentially the OMARA staff had to skill up to become educators, learning the difference between a vocational qualification and a tertiary qualification and whether you are an RTO [registered training authority] delivering this or a university and the various ways they become accredited etc and how to do you quality assure. I think a lot of us felt quite frustrated that these considerations overtook trying to get a more rigorous entry standard. There are also considerations about cost and not making it a barrier and consideration about how do you build this in and these are chestnuts that have been rolling around for years and years.

How do you bring in supervisory practice – how do you build in practical skills because the idea was that if you make it into a Graduate Diploma you incorporate more block education and you are not actually going to increase – or you run the risk of not increasing – the attention given to in fact nailing some of those skills around learning how to read and interpret and apply law and Regulations, which has been a real concern. So we have ended up with this pilot attempt – at the professional ready course with the MIA, which is already in now – trying to address some of that and there was to be the capstone exam on top of that. The tertiary providers have all been very articulate and ready to go with issuing a masters so people can market differentiate. I think the challenge that remains is, whether you make it a diploma or a masters, how do you build in those practical skills and I don't think that we have come up with a solution for that because of the size of the profession.

In relation to whether or not the OMARA was too involved in regulating what the four university providers do and how, the Inquiry was advised as follows:

... I think that you could leave it the universities in many qualification frameworks – that's what they are set up to do – there is just this quality assurance in terms of the practical side of it that has been the difficulty. I suppose like the college of law where you have a 6 months professional practice component and so it is how you build in the professional practice component that is the challenge – and I know some of the universities have some pretty innovative ideas around that but I don't know the details – so that is sort of a more dynamic space – and I don't think is necessarily resides with the OMARA.

The practical side is the nub of where the issue is rested and whether it be a cert, diploma or a masters – maybe by the time you go to a masters there would be sufficient academic rigor that it would overcome part of the practical issues that remain active when you have only been through a cert or diploma. I suppose I've come around in my thinking from 4 or 5 years ago when the migration institute was the MARA. We were introducing the grad cert and I was of an attitude at that time that we should just say this is what you do and the MARA get out of it and the universities administer the courses and mark and asses so far often. But, I was disillusioned somewhat with the attitude of some of universities and their approach. Some of them I thought were more focused on the revenue return rather than outcomes and so I was – you know I am still of the view that I don't particularly trust the universities.

I am also of that view – I went to a meeting where I think it was fairly obvious that the universities were all taking a different tack – universities should be able to teach the way they want to – but I think the OMARA should do more to specify what they want because the differences between the way universities work and exam etc. I thought didn't allow the proper assurances across the course – but I would be interested in Andrew's view because he is a lot closer than I am.

My impression having been on the advisory board over the last 3 or 4 years is that we have gone round and round in circles on this for quite a while – I think we have got to get away from the Hodges report view that it is all about the length of the qualification – I think that there is now an agreement that 6 months for a certificate is not in itself sufficient to provide both the theoretical legal background and the practical training.

So we have all come to the conclusion I think that you have got to supplement that with a Practice Ready Programme, which we now have – and really it seems that with that plus the certificate there has been less urgent issue to deal with – do we need a one year diploma or do you need a masters. I think that the universities are pretty open to what type of qualifications there are – a number of them now have got a range – they've got the Graduate Certificate, and heading towards the masters and some have got a component within the bachelor of laws.

To pick up on the comment and from some of the session I've been with the OMARA officials and involving the four university providers – I don't see them working effectively as a group and they need to be given some prescription from a regulatory body. For instance it seems quite clear that some of them have quite different rules about students doing examinations or not doing examinations at the same time – that was one of the concerns for maybe having a capstone exam so there would be some external treatment. I think universities are very good encouraging debate and thinking critically, but in terms of when it comes to some practical training – I think the theoretical component has to have the Practice Ready Programme and potentially a capstone exam to create confidence.

I guess I approach this in a slightly different way and that is what is the vision for the industry and what are the government's intentions with the future of the industry. We have been hearing that the government has pressure on its budget and it is reducing the amount of frontline staff and looking at ways of giving a type of status to agents to do some of the work that its staff may have done previously, that is, having agents as part of the system that makes the government's work easier. I think that we have got to say what education and minimum standards are required for this vision of the industry.

Then I think we have to look at what are the problems in the industry. Earlier today I looked at complaints in the annual report and in the first year of OMARA in 1998, 80 per cent of complaints were about professional standards and today it's about 75 per cent. The first year about 50 per cent complaints were about competence and 20 per cent were about integrity so we have an industry where competence is a bit of flag issue, and integrity is also a bit of a flag issue.

If we've got a future vision of the profession that the government wants to rely on I think the government would then want to have confidence that it is getting high levels of competence from agents. The government has talked about some kind of certification scheme and there are many things that this could be based on but when it comes to entry level standard my preferred pathway is that we have a capstone exam with many pathways to achieve – to complete that exam – you could do the grad cert – you could do the grad diploma and there would be other pathways.

I guess I am starting with what is the vision, what are the problems with the industry and another thing I should mention – we should consider what is the appropriate role of a regulator – I go agree with those who said that it is the role of regulators to set standards – and I think the way in which the regulator can set those standards can be done in a number of ways – and one way is to set the exam and then let the universities and education providers and even RTOs devise programmes to assist people to pass that exam and to meet the entry level standard.

Murdoch University

Murdoch University, one of the four Prescribed Course providers, advised as follows in a telephone interview with the Inquiry:

Murdoch has been delivering the Graduate Certificate since 2000. It is a good course but there hasn't been an evaluation of the outcomes and benefits of the course during this time. I understand that some agents comment that agents drop out of the industry because the course hasn't properly prepared them to set up a business, but I don't believe this is the role of the university.

It could be possible to offer more writing and learning, but this is difficult at the moment as the course is very prescriptive. Originally universities couldn't even determine their own assessment.

I think we need to be clear about what we want and expect of newly qualified migration agents. Students have different expectations of the course and not all their expectations can or should be offered by the university. Universities do provide basic skills.

Murdoch offers one scholarship per semester to agents who wish to work in not-for-profit.

Discussion and Recommendations

The Inquiry finds that the entry qualifications imposed on migration agents are inadequate. The sector services persons who may be socially and legally vulnerable. These persons deserve and require a high standard of professional service. The best way to ensure that this is offered is through the provision of strengthened educational and professional training.

The submissions received by the Inquiry (both written and in face to face or via phone interviews) tend to focus on four areas. These are discussed below.

The adequacy of the current Graduate Certificate in Australian Migration Law and Practice

Numerous submissions to the Inquiry question the professional adequacy of the current Graduate Certificate. Some suggest that the course content and structure do not adequately prepare migration agents for practice in an area that is legislatively and socially complex. Others note the linguistic and cultural vulnerabilities of those most likely to seek the assistance of migration agents and query whether those graduating from a six month preparatory course possess the skills needed to ensure top quality advice and assistance to persons who are often vulnerable. This has lead some to suggest that the current Graduate Certificate should be replaced with a 12 month Graduate Diploma and that there be greater flexibility more generally in relation to how students are taught.

The Inquiry is of the view that a longer, more extensive programme of study will allow address many of the concerns raised throughout this chapter.

The Inquiry sees no reason to question the findings of the 2007-08 Hodges Inquiry and, accordingly, like that Inquiry, recommends as follows.

Recommendation 11

The Inquiry recommends that the current Graduate Certificate be replaced with a Graduate Diploma in Migration Law and Practice.

The Inquiry also accepts that the current requirement that applications for registration must be made within one year of completing the Prescribed Course is unnecessarily restrictive.

Accordingly, the Inquiry recommends as follows.

Recommendation 12

The Inquiry recommends that the time period for registration after completing the Prescribed Course be extended from one year to five years.

The OMARA's monitoring of the Graduate Certificate's Four Service Providers

It was suggested by some making submissions to the Inquiry that the OMARA's role in the provision of the Graduate Certificate programme is too prescriptive and arguably intrusive. It was suggested that while the OMARA should dictate the "type" of subjects that need to be taught to migration agents in training, the way in which those subjects and courses are taught would be best left to those who are experts in the provision of higher education programmes: qualified university academics.

The Inquiry agrees.

The Inquiry accepts the concerns raised by the four university providers that no other industry so extensively regulates not only what can be taught, but more importantly, how that subject matter should be taught. The Inquiry did not receive any information that convincingly made the case that the current university providers will fail to do what was required of them if they are left to teach according to the standards set by their own highly regarded academic institutions.

Recommendation 13

The Inquiry recommends that while the OMARA should continue to determine who should be permitted to offer the Prescribed Course and what core subject areas must be offered, the OMARA should play no role in dictating how those courses are to be run, assessed and structured. Appropriate legislative amendments should be made to ensure that this occurs.

Calls for a Post-Certificate Period of Restricted Practice/Supervision

In addition to calls for reform in relation to the type of entry course required, numerous submissions called for the addition of a period of restricted practice/mandatory supervision for non-lawyer migration agents after they have completed their university entry requirements.

The Inquiry again accepts the findings of the 2007-08 Hodges Report that a period of mandatory supervision will do much to raise the standards of new migration agents.

The Inquiry accepts that the industry will need to take steps to ensure that students are, as much as possible, able to find practitioners who are willing to supervise them and that appropriate safeguards are taken to ensure that these students are not in any way exploited. The Inquiry notes that a similar system exists in relation to legal practitioners.

Accordingly, the Inquiry recommends as follows.

Recommendation 14

The Inquiry recommends that migration agents (non-lawyers) be required to undertake a period of one year mandatory supervision with an already registered migration agent following completion of the Prescribed Course.

Recommendation 15

The Inquiry recommends that during this period of supervision, agents (having successfully completed the Prescribed Course and met any other conditions required for initial registration) must be registered by the OMARA as 'restricted' or 'limited' practitioners.

Calls for a Capstone Exam

Also relevant to the quality and professionalism of new graduates is the suggestion raised in some submissions that graduates who have completed the newly required Graduate Diploma and the required one year supervision period also be required to sit a Capstone Exam covering all areas of migration law and practice.

The Inquiry accepts that this would be a valuable addition to the entry requirements imposed on non-lawyer migration agents.

In that regard, the Inquiry is persuaded by the stand alone assessment model suggested to it by the OMARA. This option would introduce an independent and nationally consistent competency based assessment that applicants for initial registration would need to pass to satisfy the knowledge requirement for registration purposes. It would be a stand-alone assessment, de-linked from the prescribed course, designed to achieve consistency in both the examination conditions and in the marking applied to all candidates. Eligibility for sitting the assessment could be the successful completion of the Prescribed Course and completion of the minimum period of supervised practice.

Attaining competency in the assessment would then be a requirement for registration purposes – the final element for a person qualifying as a fully registered migration agent.

Accordingly, the Inquiry recommends as follows.

Recommendation 16

The Inquiry recommends that the OMARA tender for the development of a stand-alone Capstone Exam, which should ultimately be prescribed in a legislative instrument. This prescribed examination should be a stand-alone assessment de-linked from the Prescribed Course or any of the service providers currently offering the Prescribed Course.

Overall, the Inquiry recommends a significant restructuring of the criteria needed by migration agents prior to final registration. In that regard, the Inquiry recommends as follows.

Recommendation 17

The Inquiry recommends that final registration as a migration agent be dependent on:

- completion of a newly required Graduate Diploma as the Prescribed Course;
- completion of a 12 month period of supervised practice once the Prescribed Course has been successfully completed; and
- the successful completion of a Capstone Exam to be written after the completion of the 12 month period of mandatory supervision.

7

Disciplinary Regime and Sanctions

Introduction

It is clear from the evidence before the Inquiry that the majority of registered migration agents have never had a complaint made against them for wrongful behaviour.

As noted by the OMARA in submissions to the Inquiry, while the number of serious incidents is relatively low, the effect on their clients' lives and the flow-on effect to families can nonetheless be profound if a migration agent acts inappropriately. Further, the risk to consumers is heightened by the high proportion of inexperienced agents in the profession. As at 30 June 2014, approximately 736 (14 per cent) of all migration agents were registered for less than one year. Approximately 40 per cent of agents have practised for three years.

In these circumstances, the ability of the regulator to intervene early to modify behaviour or take corrective action is as important as the ability to impose sanctions after serious misbehaviour has occurred.

Further, when breaches are alleged to have occurred, it is vital that the OMARA has the powers it needs to ensure that remedial action can be taken within a legal framework that affords both complainants and agents against whom a complaint has been made natural justice and procedural fairness. Central to this is the need for clarity in relation to the Code of Conduct for registered migration agents (Code of Conduct) central to agent conduct.

Under the existing framework, investigations of alleged criminal or misconduct may be conducted by either the Department or the OMARA.

The Department

The Department is responsible for the investigation of allegations of unregistered practice (ie, individuals who not registered migration agents but who are offering immigration assistance) and allegations of registered migration agents involved in fraudulent activity. These powers arise under Part 3, Division 2 (sections 280.285) of the Migration Act.

To perform this role, the Department has an Investigations Unit that is comprised of:

- the National Allegations Assessment Team (NAAT Team);
- the National Criminal Investigations Team (NCI Team); and
- the Strategic and Tactical Analysis Team (SATA Team).

These teams variously collate, assess, triage and handle allegations, determining whether and if so what further action is necessary. In broad terms, follow-up action will depend on the character and quality of the evidence and the seriousness of the alleged activity. For allegations assessed to be of a less serious character, the Department may, for instance, decide to issue a warning letter or a Migration Infringement Notice (MIN).

MINs may be issued to unregistered persons in Australia who give immigration assistance in breach of s280(1) of the Act or to registered migration agents whose registration has been cancelled, or who have been barred but continue to provide immigration assistance.

The infringement notice scheme operates as an alternative to prosecuting an offence in court.

For allegations assessed to be of a more serious nature, however, and deemed to have sufficient evidence, the Department will prepare a brief of evidence for the Commonwealth Director of Public Prosecutions (CDPP).

The Inquiry was advised that approximately 90 per cent of cases currently referred by the Department are prosecuted by the CDPP.

The OMARA

The OMARA receives complaints directly from the clients of registered migration agents. The Department also refers complaints it receives relating to an apparent breach of the Code of Conduct by a registered agent to the OMARA. The OMARA does not deal with allegations of unregistered practice.

Professional Standards and Integrity Processes

Within the OMARA, the Professional Standards & Integrity Section (PSI) has responsibility for discipline as follows:

- investigating complaints in relation to the provision of immigration assistance by registered migration agents (section 316(c)); and
- taking appropriate disciplinary action against registered migration agents (section 316(d)).

Legislative Framework

The legislative powers relevant to registered migration agents are set out in Part 3 of the Act. A registered migration agent must conduct himself or herself in accordance with the Code of Conduct (section 314(2) of the Act), which, somewhat unusually, sits in Schedule 2 of the *Migration Agents Regulations 1998* by virtue of section 314(1) of the Act.

A copy of the Code of Conduct is provided as **Attachment D** to this Report.

Officers of the OMARA are delegated by the Minister to make decisions under an Instrument of Delegation – that being Instrument of Delegation OMARA 14/01 dated 5 June 2014. Pursuant to section 303(1) of the Act the OMARA may decide to cancel the registration of a registered migration agent by removing his or her name from the register, or suspend his or her registration, or caution him or her, if the OMARA is satisfied that:

- the agent's application for registration was known by the agent to be false or misleading in a material particular (section 303(1)(d));
- the agent becomes bankrupt (section 303(1)(e));
- the agent is not a person of integrity, or is otherwise not a fit and proper person to give immigration assistance (section 303(1)(f));
- an individual related by employment to the Agent is not a person of integrity (section 303(1)(g)); or
- the agent has not complied with the Code of Conduct prescribed under section 314 of the Act (section 303(1)(h)).

If an agent's registration is cancelled the agent is prohibited from re-entering the profession for a period of five years. In relation to any action to suspend an agent, the OMARA may set a period of suspension of not more than 5 years, or set a condition/s for the lifting of the suspension. Similarly a condition or conditions may be set for a caution.

Before making a decision under section 303(1) of the Act, the OMARA must give the agent written notice under section 309(2) informing the agent of that fact and the reasons for it, and inviting the Agent to make a submission on the matter.

The OMARA may also bar a former agent from being registered (s311A) – again for a period not exceeding 5 years – and must similarly give the agent written notice and the opportunity to make a submission (s311D) of the Act. All disciplinary decisions are made publicly available (ss 306AL/311C).

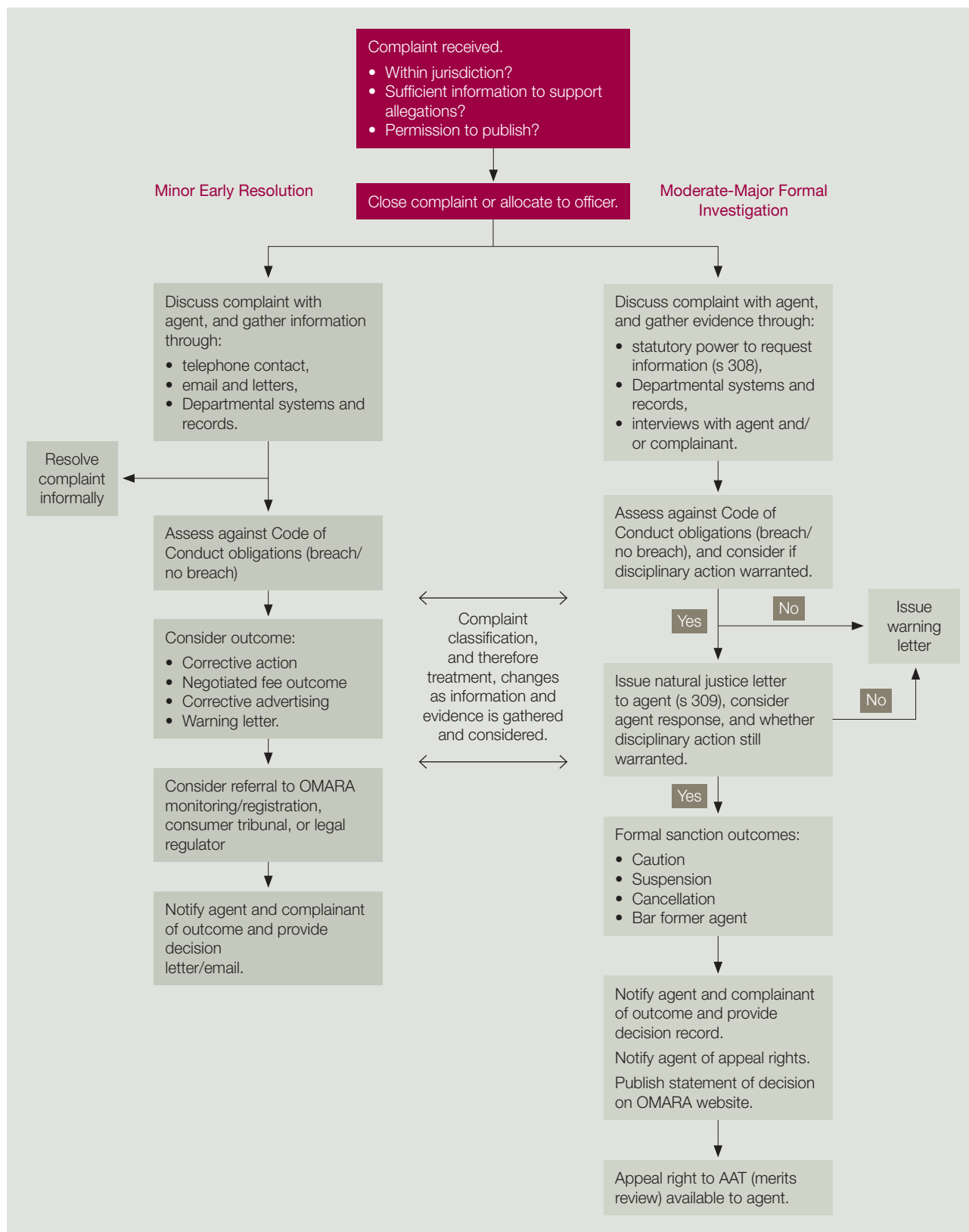
The Commonwealth Ombudsman has oversight of the OMARA's decision-making process and all disciplinary decisions are reviewable by the Administrative Appeals Tribunal (AAT).

Complaint Handling Processes

Complaints are triaged for informal action or investigation depending on the seriousness of the alleged conduct:

1. early or informal resolution: where the complaint is classified as minor and for informal/educative resolution; and
2. formal investigation: where the allegations and likely evidence appear sufficient to attract a legislative sanction (complaints classified as major and some moderate complaints).

The following chart sets out the OMARA's complaints handling process in detail.



Early and Informal Resolution

The Inquiry was advised that officers in the OMARA's Early Resolution Team focus on early and direct engagement with the parties to the complaint with a view to conciliating and resolving issues (as opposed to direct referrals to an independent mediator), and supporting the agent to improve practices in accordance with the Code of Conduct.

Informal action outcomes may include:

- corrective action: recommendation to the agent to correct or improve their practices in accordance with the minimum standards of practice set out in the Code;
- negotiated fee outcome: negotiated outcome for disputes regarding fees charged by the agent in relation to immigration services;
- corrective advertising: recommendation to the agent regarding compliance with advertising requirements only; or
- warning letter: advice to the agent that failure to correct or improve conduct could result in future disciplinary action.

Formal Investigation

Complaints raising serious consumer protection concerns or grounds for disciplinary action are formally investigated by officers in the OMARA's Complex Case Team. The Inquiry was advised that consistency in decisions is provided through guidelines, quality assurance measures, and legal advice.

The OMARA also advised the Inquiry that, when carrying out a formal investigation, the following principles are to apply:

- investigation of complaints should be unbiased and free from prejudice toward or against any party in the complaint (ie. the complainant, the agent or former agent).
- the OMARA should tailor the investigation of the complaint according to the classification of the complaint;
- the OMARA may use its powers under section 305C and section 308 to require information from registered migration agents through provision of documents, statutory declarations or interviews; or
- the OMARA should clearly document the investigation process undertaken.

After investigation, the OMARA undertakes an analysis and consideration of the evidence gathered. The OMARA then forms a preliminary view about whether one of the grounds in paragraphs 303(1)(d) – (h) of the Act is made out — that is:

- the agent's registration application was known by the agent to be false or misleading in a material particular (paragraph 303(1)(d));
- the agent becomes bankrupt (paragraph 303(1)(e));
- the agent is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance (paragraph 303(1)(f));
- an individual related by employment to the agent is not a person of integrity (paragraph 303(1)(g)); or
- the agent has not complied with the Code of Conduct for registered migration agents (paragraph 303(1)(h)).

If the OMARA forms the preliminary view that there are grounds under section 303 to sanction the registered migration agent, the OMARA must give the agent an opportunity to make a submission in relation to the possible decision (section 309). When providing a registered migration agent with an opportunity to make a submission, the OMARA must:

- inform the agent that the OMARA is considering making a decision to caution the agent, or suspend or cancel the agent's registration;
- set out the reasons for this;
- take steps to make the agent aware that the OMARA may apply conditions to a caution or suspension;
- any aggravating factors being considered by the OMARA are clearly identified (but only if the agent does not know about these factors, or could not reasonably be expected to know about them); and
- invite the agent to make a submission on the matter.

If the OMARA receives a submission it must consider it. The OMARA may then either decide the matter or give the agent an opportunity to appear before the OMARA and then decide the matter.

In deciding whether to caution, suspend or cancel, the OMARA advised the Inquiry that it is required to take all information available into account, including any submission or appearance made by the agent. If the OMARA is satisfied that a ground in section 303 is made out, and that legislative sanction is appropriate, it must then decide on a proportionate sanction, including the length of a sanction in the case of a caution or suspension.

In reaching decisions, including reasonableness and consistency as to length of caution or suspension, delegated officers have access to legal support from the Department of Immigration and Border Protection's Legal Division and the Department's legal panel.

If the OMARA decides that the agent should be cautioned or suspended then consideration is given to imposing conditions for the lifting of that caution or suspension. Conditions may include, but are not limited to:

- completion of relevant education programs including CPD activities or private tuition as relevant to the conduct identified;
- providing requested material;
- not acting as an authorised recipient or making representations on a visa applicant's behalf during their suspension period; and
- providing evidence of corrected breach (including payment of refund).

Where a sanction is imposed the agent is given written notice of the decision including written reasons for the decision. The complainant is also notified of the sanction and provided with the written reasons.

A decision to sanction cannot be revisited by the OMARA once made. The agent may, however, seek a merits review from the Administrative Appeals Tribunal.

The OMARA advised the Inquiry that all draft decisions to apply a legislative sanction are quality assured by an independent officer at the Executive level or above before the decision is finalised.

The OMARA is also required to publish any sanction decisions on its website. The OMARA advised the Inquiry that this is done to publicise relevant decisions for the purpose of greater consumer protection. Other avenues include publication in the media (eg. ethnic news channels), publication on the Department's website, advising other relevant agencies (eg. State or Territory legal practitioner regulator if the agent is a lawyer-agent; the relevant Attorney-General's or Justice Department if the agent is a Justice of the Peace), and liaising with the Department where criminal investigation may be warranted.

Limitations on Information Exchange

The OMARA is currently limited in relation to its ability to exchange information with the Department.

Information to and from the Department

Sections 321 and 321A of the *Migration Act* and Regulation 9B of the *Migration Agents Regulations 1998* together regulate the disclosure of personal information between the Department (and the relevant Review bodies – RRT/MRT) and the OMARA.

While s321 allows the Department to provide personal information to the OMARA for the purpose of facilitating or expediting the exercise of the powers, or performance of the functions, of the OMARA, section 321A and regulation 9B limit the disclosure of personal information by the OMARA to the Department in so far as:

- a. Section 321A(1)(a) only allows disclosure to the Secretary or to authorised officers; and
- b. Section 321A(2) only allows disclosures in the prescribed circumstances (set out in regulation 9B and in the context of investigations limited to “investigation for possible offences under the Act”). Regulation 9D has a similar set of prescribed circumstances referable to the RRT/MRT.

The flow of personal information from the Department to the OMARA under s321 of the *Migration Act* is relatively uninhibited when compared to the flow of personal information in the opposite direction (s321A). In particular:

- if the OMARA wishes to disclose personal information to officers of the Department (rather than the Secretary) under section 321A(1)(a), the OMARA must continue with the system of the Secretary authorising officers of the Department in writing for the purposes of section 321A(1)(a), which creates an unnecessary administrative burden; and
- the personal information that can be disclosed to the Department is limited to information about an agent who is currently under investigation for possible “offences under the Act”.
- The OMARA advised the Inquiry that it is unclear whether this includes investigation for administrative sanctions, which is within the OMARA’s function.

Under current legislative requirements, disclosure protocols are required which set out the principals for disclosing and receiving personal information.

Additionally, the disclosure of personal information by the OMARA is subject to the Privacy Legislation (and the Australian Privacy Principles). Under the *Privacy Act 1988* the Department has been granted the exemption applying to an enforcement body and may, in circumstances where it is reasonably necessary for “enforcement related activities”, disclose personal information to other agencies. Due to the current framework it is unclear whether the OMARA is able to apply this exemption in relation to its investigation functions.

Submissions Received

The Inquiry did not receive particularly detailed submissions in relation to investigation and discipline. Those that were received focussed primarily on concerns about “independence” and “transparency” throughout the disciplinary process as a whole.

Migration Institute of Australia

In its submission to the Inquiry, the MIA expresses concern in relation to the Code of Conduct:

Given the complexities of Australian migration legislation and policy and the potentially devastating effect that poor advice can have on individuals it is vital that the migration advice profession is regulated. The MIA believes that such regulation must include a Code of Conduct that specifies minimum professional and ethical standards. This was supported by 63.58 per cent of surveyed members.

The MIA is concerned, however, that the current Code of Conduct is both overly prescriptive and at odds with the normal legitimate business reality of many migration agents.

The overly prescriptive requirements of the current Code include the documentation (quotes, statements of services, agreements, etc.) to be provided to clients and the order in which these are to be provided. Such requirements are certainly unlike the usual practices and procedures used in the commercial world.

A further example of over-prescription is the requirement that the Clients' Account be named exactly that. It is not unknown for a migration agent's registration not being approved until the apostrophe was in the correct place.

The current Code of Conduct contains elements that are unclear and raise confusion and anxiety, especially given the generally prescriptive nature of most of the current Code of Conduct.

For example, a migration agent must display his or her Migration Agents Registration Number (MARN) in advertising. Is a business card an advertisement?

The current Code of Conduct reflects the reality that migration agents have individual registrations. The Code of Conduct does not reflect the reality of the employment situations of many migration agents. Of particular concern to employed migration agents is the ability to comply with requirements concerning the Clients' Account and the keeping of client files.

9.93 per cent of surveyed members working in legal or migration practices reported that they had difficulties in complying with the Code of Conduct. For members employed in non-legal migration organisations, 4.35 per cent reported difficulties in complying with the Code.

Many migration agents work as employees in legal or migration practices or in other commercial organisations such as recruitment or labour hire companies, government agencies and education agencies. In those organisations policies and procedures may be at odds with the Code of Conduct. MIA Members have reported conflict arising between them and their employers over this issue.

This leads the MIA to recommend as follows:

The MIA recommends that the Code of Conduct should be descriptive rather than prescriptive and that further guidance for migration agents should be placed into Practice Notes or Practice Rules.

The MIA recommends that the Code of Conduct be written in Plain English.

The MIA recommends that the Code of Conduct should not impose an unrealistic level of bureaucracy and paperwork on agents.

The MIA recommends that considerations of commercial business realities should be addressed in the Code of Conduct.

The MIA believes that the preparation of a Code of Conduct must be done by those who are practitioners in the profession. Any future modification of the Code of Conduct must involve the MIA as the professional association.

The MIA recommends that modifications to the Code of Conduct should be developed in close consultation with the MIA as the professional association.

The MIA recommends that the Code of Conduct should be reviewed on a regular basis.

Sonia Caton

In a written submission to the Inquiry, Ms Sonia Caton, a member of the OMARA Advisory Board, also expresses concerns in relation to the Code of Conduct:

The Code of Conduct is often repetitive and confusing and fails to reflect current business practice. It needs an overhaul and needs to exist in a form amenable to amendment without a loss of authority for complaint and disciplinary purposes. The Advisory Board has previously made quite detailed recommendations on this issue (it identified two tranches of reform) but legislative reform was never forthcoming.

Ms Caton further notes that the OMARA's powers should be clarified and/or expanded:

Regarding flexibility around disciplinary orders - the OMARA Policy and Procedure Manual makes it clear that there is a good degree of flexibility around orders that might accompany a caution for example, and that compliance with such orders is a relevant consideration upon re-registration. The scheme may benefit from a clear statement that the onus for satisfying the fit and proper person test lies with an applicant for re-registration (including complying with any previous disciplinary orders).

I note that there are plenty of regulatory schemes that MAY close a business down for non-performance with audits and orders (ASQA - operators of small and large private training organisations; CASA-operators of very small and large businesses) in an effort to maintain standards.

As you are no doubt aware, there is a major gap in OMARA powers concerning orders for financial recompense and certain investigative powers and information sharing. This is a good opportunity to address those and thereby strengthen consumer protection and the ability of the OMARA or other agency to be effective in its job.

Law Council of Australia

In its written submission to the Inquiry the LCA expresses concern with the OMARA assuming the role of both investigator and prosecutor, arguing that one option is to:

... allow the OMARA (or a similar body) to continue in its current role of registering and regulating non-lawyer migration agents, including the investigation of conduct complaints, but to provide for the hearing or determination of those complaints by an existing independent body such as the AAT. It is recognized this would require amendments to legislation to provide such bodies with the necessary jurisdiction to hear those complaints.

In relation to the functions of the OMARA, the Law Council recommends reviewing and expanding the powers and functions of the OMARA in order to better protect consumers:

For example, at present, the OMARA does not have power to make orders with respect to the management or disposition of the estates of deceased migration agents, or in respect of monies and other assets held on behalf of clients or former clients, where the migration agent's practice is insolvent, or has been placed in receivership or under external administration.

These are of particular concern, given the high number of migration agents who enter and leave the migration agent profession within the first three years of registration and the correspondingly high number of business failures in the sector.

It is also noted that the OMARA has only a limited capacity to deal with defalcations by migration agents, powers which are intrinsic to the functions of legal profession regulators and essential for adequate supervision of migration agents who receive client monies on trust. In addition, there would be some benefit in requiring registered migration agents to contribute annually to a fidelity fund, administered by the OMARA (or equivalent), to provide protection to clients who are the subject of defalcations by registered migration agents.

Law Institute of Victoria

The LIV expresses concerns with the OMARA's complaints and investigation handling procedures under the Code of Conduct:

Reports from members suggest that investigations by OMARA have been slow to commence and these delays have exacerbated the very issues that were the subject of the misconduct complaint. As a result of these delays, some agents charged with misconduct have fled the jurisdiction before a finding of misconduct or a penalty could be handed down. In another case, a delay in a case officer making contact with a complainant following the lodging of the written complaint and later in keeping the complainant updated on developments resulted in the complainant declining to proceed with the complaint. These delays and deficiencies in the complaint handling process operate to the detriment of affected clients and the reputation of immigration advice industry. The LIV considers that any independent statutory body regulating non-lawyer migration agents must be empowered to conduct robust and efficient investigation into allegations of misconduct.

Fragomen

Like the Law Council of Australia, Fragomen also notes the OMARA's role as both investigator and prosecutor:

The Department is the agency responsible for setting and applying the government's interpretation of migration law, which may differ from that of a particular RMA when presenting an application to the Department for processing. It is unsatisfactory that one side to such a dispute is able to commence disciplinary action against the other side, on the basis of the disputed interpretation of the law. As the Department is also the primary instigator of complaints about RMAs, its role as the regulator means that the Department acts as the complainant, investigator, prosecutor and arbiter in such actions.

Similarly, the Department is the agency which sets policy relating to the regulation of RMAs. The fact that the Department is then also the body for enforcing such regulation means that the Department is fulfilling quasi-legislative, quasi-executive, and quasi-judicial functions, where concepts of natural justice generally require these functions to be separate.

Discussion and Recommendations

In the majority of discussions with stakeholders and interested persons or organisations, the Inquiry was advised that the current Code of Conduct is verbose, unclear and, as a result, problematic.

Having reviewed the Code in detail, the Inquiry agrees. Without a significant re-write, there is a considerable risk that consumers will not be protected from inappropriate behaviour and that agents will not fully understand what is and what is not expected from them.

Accordingly, the Inquiry recommends as follows:

Recommendation 18

The Inquiry recommends that the Department undertake a detailed consultation with interested parties to determine how best to address concerns in relation to the scope and content of the Code of Conduct and, after said consultation, amend the Code as then deemed feasible and appropriate.

The Inquiry also notes the concerns raised about the flow of information between the Department and the OMARA in relation to investigations and alleged poor conduct. The Inquiry agrees with these concerns and queries how consumers can be protected when the OMARA is unable to readily provide information to the Department that might assist the Department investigate serious allegations of misconduct. The current framework inhibits or risks inhibiting much stronger cooperation between the OMARA and other parts of the Department. Both entities are working towards similar ends but the current legislative framework makes this unnecessarily difficult.

The Inquiry thus recommends as follows.

Recommendation 19

The Inquiry recommends a review of the legislative powers that govern the exchange of information between the OMARA and the Department to ensure that consumers are better protected.

The Inquiry was advised that under the current legal framework the OMARA has limited powers to address agent behaviour before serious breaches occur. The powers it does have do not necessarily allow for a proportionate response across the range of behaviours. In less serious matters, the OMARA can counsel or request an agent to change their behaviour but has limited powers to enforce that request. The next option open to the OMARA is the significant step of suspending or cancelling registration. This is less than ideal and has implications for consumer protection because it means that the OMARA has to wait for a serious indiscretion or repeated bad behaviour before moving past an initial response.

Where there is serious non-compliance the OMARA can set conditions on a caution or suspension decision. However, the conditions are only in effect while the caution or suspension is in effect.

In the case of a caution, if the agent does not meet the conditions, the only consequence is that the caution remains in effect on the register but there is no impediment to practice.

In the case of suspension, there is no power to set conditions that persist after re-entry to the profession, for example supervisory arrangements.

While the agent is suspended, they remain on the register and obtain automatic re-entry to the profession once the suspension conditions are met, without further hurdles such as re-registration.

As explained to the Inquiry by the OMARA, the ineffectiveness of these conditions is significant.

Similarly, there is no power for the OMARA to set conditions for entry to the profession upon registration or re-entry on re-registration. This applies not only to serious non-compliance (integrity deficiency, serious and repeated breaches of the Code of Conduct), but also to non-compliance with objective requirements such as the maintaining of a client's account, PI insurance, and a professional library. Currently, the only option is to attempt to resolve the non-compliance informally (if possible) and if not, to issue a natural justice notice and refuse registration. The latter is a burdensome process in terms of evidence and resources, leaving consumers exposed while a matter is resolved and often leaving agents frustrated.

The Inquiry received further evidence that the lack of power to set conditions on registration is particularly acute where an agent has a history of complaints that have been dealt with informally with recommendations of corrective action. In these circumstances, the only way the OMARA can respond to failures to correct practices is through monitoring or another complaint, and then ultimately by issuing a sanction. Until or unless an agent reaches the sanction "tipping point", a growing number of consumers could be exposed to poor practices.

The Inquiry received evidence that in the case of complaints or disciplinary action, the most effective regulatory tool would be a flexible power to impose conditions or requirements that were not dependent on a disciplinary decision such as a caution or suspension. Investigations leading to disciplinary decisions can often be protracted and resource intensive and do not necessarily result in altering behaviour, but are aimed at keeping unfit agents out of the profession.

The Inquiry was advised that for registration a possible model for consideration would be:

- in the case of non-compliance with objective requirements identified through either monitoring or complaints handling activities, to impose an enforceable condition upon the current registration. The condition would require that this deficiency be rectified within a defined period or prior to a subsequent application for re-registration. Should there be no rectification, the next application for re-registration would not be approved on the grounds that the enforceable condition had not been met;

- in the case of serious non-compliance, a condition could be imposed such as requiring supervision by an experienced agent for a defined period, with an obligation to provide a report from the supervisor at the next registration anniversary. At the next registration date the report would help determine whether to continue the supervisory condition, should the agent be re-registered; and
- in the case of repeated and continuing infringements, the cumulative nature of enforceable conditions could trigger a sanction decision in advance of a re-registration consideration.

The Inquiry agrees that changes of the sort proposed above would be beneficial. The power to impose conditions would have the effect of reducing the regulatory burden on the OMARA and on agents by shifting more focus to proactive prevention, rather than reaction to complaints. Such a power would bolster and support monitoring activity by the OMARA. It is expected that over time the use of such powers would limit and reduce the expansion of the complaints/disciplinary caseload and thereby reduce the burden on agents to respond to complaints. It would also raise professional standards and allow the OMARA to respond more promptly and appropriately to consumer concerns.

Accordingly, the Inquiry recommends as follows.

Recommendation 20

The Inquiry recommends that a system of early resolution in relation to complaints be investigated and implemented. It is recommended that this involve providing the OMARA with the power to impose conditions or requirements that may affect registration. Said power should not, however, extend to providing the OMARA with powers in relation to serious disciplinary decisions that might result in a suspension. The Inquiry is of the view that serious disciplinary decisions that might result in a suspension should be the purview of an independent body (see Recommendation 22).

This model could be introduced along the lines of the current system, whereby decisions taken by the OMARA to refuse registrations under section 290 of the Act (which the Inquiry has been advised are rare) are reviewable by the AAT. Adopting such an approach will balance the need for a more agile and calibrated set of regulatory powers with that of accountability, while ensuring that there is an independent review process for those affected by the OMARA's decisions in relation to registration.

The Inquiry notes that the OMARA does not have the power to award costs or order restitution for consumer disputes. This sets it apart from other sectors such as the legal profession for example, where the national reforms allow for binding awards to be made up to \$10,000 for cost disputes and \$25,000 for other matters.

The OMARA can respond where costs are not "reasonable" with a conciliation process that has led to clients being refunded money. However, this is a voluntary process relying on the goodwill of consumers and agents and the OMARA has no power to make binding decisions.

In cases where conciliation is not successful, the OMARA is able to refer consumers with a fee dispute to the state based consumer tribunals allowing them to pursue matters without incurring significant costs. Should a consumer take a case to the state tribunals seeking resolution of a fee dispute, this does not preclude the OMARA from taking action over the related behaviour.

The Inquiry was advised that there is an argument for the OMARA to take on this role on the basis that many consumers are vulnerable and come from a non-English speaking background. It would also provide more of a "one-stop-shop" for consumers.

The Inquiry agrees that this option would better protect consumers. Accordingly, the Inquiry recommends as follows.

Recommendation 21

The Inquiry recommends that necessary changes be made to the *Migration Act 1958* and the *Migration Agents Regulations 1998* to confer on the OMARA the power it needs to award costs, where deemed appropriate.

The Inquiry also shares the concerns raised by stakeholders about the OMARA playing the role of both investigator and prosecutor in relation to more serious breaches that might ultimately result in an agent being stripped of the right to practice for a period of up to five years. The Inquiry has not been made aware of any other professional body with similar powers.

In these more serious cases, the Inquiry considers there to be considerable merit in allowing the Administrative Appeals Tribunal to operate as a disciplinary body first hearing, rather than simply as a review tribunal for decisions in relation to issues of registration.

In that regard, the Inquiry is persuaded that a more transparent and fair system is one akin to the independent tribunal system used by legal service regulators in Australia. Legal regulators in Australia usually refer matters of unsatisfactory professional conduct or professional misconduct to a Disciplinary Tribunal. In Western Australia, for example, while the Legal Practice Complaints Committee initially investigates complaints against lawyers and makes a determination about whether to prosecute a lawyer for misconduct, the hearing of these prosecutions occurs before a Supreme Court Justice in his or her role as President of the State Administrative Tribunal.

While the Inquiry supports the OMARA's continued role as the chief investigator in relation to agent conduct, and has recommended that the OMARA be furnished with more flexible powers in relation to the awarding of costs and the imposition of conditions associated with registration and re-registration, the Inquiry agrees that decisions in relation to serious misconduct resulting in suspension or restricted practice should be heard by an independent legal tribunal like the Administrative Appeals Tribunal.

Accordingly, the Inquiry recommends as follows.

Recommendation 22

The Inquiry recommends that the Department determine what legislative changes are required to invest the Administrative Appeals Tribunal (AAT) with the powers it requires to adjudicate allegations of serious misconduct that might ultimately result in suspension of a migration agent or restricted practice and that the AAT ultimately be given the powers it needs to do so.

Questions of Independence: The OMARA's Relationship with the Department of Immigration and Border Protection

Introduction

As explained earlier in this Report, the OMARA currently sits awkwardly within the Department of Immigration and Border Protection. It is neither entirely independent to the Department, nor entirely situated within it. Rather, as the Inquiry was advised, it operates as a “discrete unit” within the Department.

The Inquiry was also advised that while some of the OMARA's governance requirements are higher than that of some areas of Department, the requirements are less strict in two notable areas:

- the supervision of the CEO; and
- the management of the stand-alone IT system (SIMBA).

The CEO of the OMARA is a Departmental senior executive officer at the Assistant Secretary level. The Inquiry was advised that, under normal Departmental arrangements, Assistant Secretaries are supervised by a First Assistant Secretary. Under the existing arrangements, the CEO of the OMARA reports directly to the Secretary of the Department.

Management controls around the SIMBA system are also lower than the controls around other Departmental IT systems. This gives greater flexibility for a small organisation like the OMARA to respond quickly, but also raises risks. The Inquiry was advised that the system is not performing to initial expectations and issues are developing with the contracted service provider. Further, the controls around access and content to SIMBA and its associated website do not satisfy Department policy requirements. While there is no evidence to suggest this has caused any problems to date, this also raises a risk.

It is clear that had the Departmental governance measures applying to other IT contracts been applied, these issues might not have arisen or might have been addressed sooner.

The Inquiry was also advised that other governance measures including probity reporting, FOI, Privacy and public scrutiny add to the bureaucratic impost on the OMARA and, in some cases, duplicate control applied by the Department, without necessarily being the most efficient means of dealing with these matters.

As detailed in Chapter Seven of this Report, there are also significant issues in relation to information exchange between the Department and the OMARA when dealing with alleged misconduct and discipline.

The Inquiry also received a detailed submission from the Migration Alliance querying the costs of the OMARA as a separate office and seeking clarification on the need for a Sydney-based office with significant staffing costs. There is a clear implication in the MA's submission that if costs can be reduced, costs savings might result in reduced registration fees for migration agents.

There was much discussion in the 2007-08 Hodges Report on how best to regulate migration agents and where the entity responsible for regulation should "sit" in relation to the Department.

Ultimately, it was determined that there was overwhelming opposition to the industry moving to self-regulation and that statutory self-regulation should be discontinued. The end result is a now semi-autonomous OMARA that is still, at least to some degree, integrated within the Department.

This Inquiry did not receive any submissions in favour of self-regulation. It did, however, receive considerable input on the relationship between the Department and the OMARA. The central question posed by many who made submissions to the Inquiry is whether the current arrangement should continue or whether changes can be made to better protect consumers of what is undeniably an important sector within the area of migration law and practice. Some have argued that a completely independent body akin to the Migration Commission model employed in the United Kingdom should be used. Others argue that, as long as concerns in relation to the Department's rather pervasive role in disciplinary matters could be addressed, a more stream-lined OMARA (stripped of many of its current powers in relation to the provision of CPD and entry qualifications and no longer responsible for the regulation of lawyer agents) can comfortably sit entirely within the Department without undermining consumer confidence and protection – the submission being that this will save costs and ensure better lines of information exchange, support and the sharing of expertise.

Submissions Received

Migration Institute of Australia

The MIA is adamant in its submissions to the Inquiry that the OMARA be completely segregated and independent from the Department:

The MIA believes that the organisation that regulates the immigration advice sector must be an independent statutory body.

A large number of respondents provided comments questioning the ability of the OMARA to effectively regulate the industry while it remains a section within the Department of Immigration. Calls for a fully independent regulatory body were strong. Only 4.98 per cent believed Department of Immigration was the correct authority to regulate the profession.

A common response was that the MIA as the professional body should either undertake regulation of RMAs or that the MIA should have a significant role within the process. Either way, an independent body should have the responsibility for the regulation and discipline of migration agents.

The MIA recommends that the OMARA be established as an independent statutory body to work as a co-regulator together with the MIA as the professional association. The new regulatory body would resolve disputes which could not be resolved through the MIA's Dispute Resolution Service and investigate complaints about professional conduct and unregistered practice. The roles could be compared to those currently undertaken by the Law Society of NSW and the Legal Services Commission of NSW.

The MIA believes that any other functions currently undertaken by the OMARA should be the responsibility of the MIA as the professional association. This would be similar to the responsibilities of the state law societies for the legal profession.

Such responsibilities for the MIA should include, inter alia:

- *processing applications for registration;*
- *providing a dispute resolution service for its members and their clients;*
- *setting CPD requirements;*
- *approving CPD activities;*
- *setting entry standards to the profession; and*
- *providing practical guidance to migration agents.*

The majority of responses to the MIA survey supported this view.

The MIA recommends that the non-regulatory and non-disciplinary functions currently undertaken by the OMARA should be the responsibility of the MIA as the professional association.

It is clear from the foregoing comments and recommendations in this submission that the MIA believes that the current regulatory framework and powers of the OMARA involve unnecessary regulatory burden.

The MIA also expresses concerns about the current Advisory Board and the role it plays.

The OMARA has an Advisory Board and the MIA has a representative on that Advisory Board. The MIA believes, however, that the role and function of the OMARA Advisory Board is not well known and needs to be more open and transparent.

76 per cent of the respondents answered the question concerning the OMARA Advisory Board. Of those, a small number indicated they did not know the Advisory Board existed, while the majority indicated they had little idea of what the Advisory Board did and its composition. Only 0.06 per cent of the respondents indicated the Advisory Board was effective, but of these only 0.02 per cent provided responses that indicated they had any real knowledge of the Advisory Board and its activities.

Other responses indicated that some respondents were not discerning the difference between the Advisory Board and the operational section of the OMARA. Lack of presence, minutes or other information releases from the Advisory Board were noted and appeared to account for the lack of knowledge of the existence of the Advisory Board.

The MIA recommends that if the OMARA Advisory Board exists in any future regulatory arrangements, its role and function be made more open and transparent.

Migration Alliance

In addition to its detailed written submissions and a very useful interview with the Inquiry, the Migration Alliance provided the Inquiry with a copy of its publication “Migration Profession Reform: The Case for an Independent Immigration Commission”.

In this document, the MA sets out its argument that the profession requires an Independent Immigration Services Commissioner (IC). Relevantly, the MA:

It is our view that this be established under the Migration Act 1958 (the Act) as an independent, Executive Non-Departmental Public Body (ENDPB).

We believe that the IC should be sponsored by the Department of Immigration and Border Protection. The Immigration Services Commissioner and the Deputy Commissioner would be appointed by the Minister for a fixed term and through that, be accountable to Parliament.

Consumers of immigration advice and services are often among the most vulnerable - and often disadvantaged - members of our society. The IC would have two primary functions.

First, protecting those who seek, or may seek, immigration advice and/or services by ensuring that those who are allowed entry into, and to remain in, the regulatory scheme are fit and competent to operate at their IC authorised ‘Advice Level’ as a Registered Migration Agent.

Second, working with other law enforcement organisations such as the police and Department Investigations and Compliance branches, to identify, deter and, as necessary, take action against those who seek to operate illegally.

The IC would therefore perform an important role in maintaining continued confidence in the Australian immigration advice sector for users, the Government, the judiciary and the public generally.

The Commissioner would have statutory regulatory, ombudsman and law enforcement responsibilities. The latter two are closely allied to, and directly supportive of, the Commissioner’s regulatory duties.

The Commissioner’s main roles would be:

- *to maintain a robust regulatory regime;*
- *operate a complaints scheme;*
- *to seek out and take action against those operating illegally; and*
- *to promote best practice, as far as possible, within the immigration advice sector.*

The IC regulatory requirements would need to be contained in a newly established Commissioner’s Code of Practice and Rules. The IC would assist the public by providing information including a list of Registered Migration Agents, to help them make informed decisions.

As of 30 June 2013 there were 4899 persons registered as migration agents (4.3 increase in number of agents in previous year). As at 30 June 2014 it was reported at the NSW CRG by the CEO of the OMARA, that there are now 5200 migration agents. What is not clear from the OMARA’s annual report is the number of organisations directly involved in the provision of migration advice in Australia.

It is our view that organisations also need to be regulated by the proposed IC. The great majority of these organisations are small and medium sized organisations which play an important role in their respective communities.

The Commissioner would also have regulatory oversight responsibilities for those who are regulated by the Designated Professional Body in New Zealand and require mutual recognition in Australia.

The IC should take a proportionate, risk-based, targeted and transparent approach to its regulatory activities, focusing its finite resources on those areas where clients are at greatest risk.

While the IC would operate independently of government, the IC would need to take special note of the Department's objectives in developing the planned IC.

In relation to the OMARA Advisory Board, MA makes the following submission:

There are advisors appointed (The Advisory Board) but the process of appointment is not public, the matters considered in the selecting of appointees, and the persons who made the selection or recommendations are unknown. This leads to a general lack of confidence in both the appointments and the process.

The advice and recommendations given by the advisors is not public. There is no way to determine if the advice is accurate, representative of community and professional opinion, nor is there any way to determine if the advice has been heeded.

There should be full disclosure of the recommendations made by advisors including the identity of the party preferring the advice. This information should be published promptly. As an example, the minutes of the Reserve Bank board meetings are promptly published and that body is making decisions of momentous importance to Australia. Likewise the board meeting minutes of the advisors and the OMARA which are of great significance to RMAs should be promptly published.

The Law Council of Australia

The LCA submits that while the OMARA has adopted a consultative and reasonable approach in carrying out of its regulatory functions, there is an inherent conflict as a result of the OMARA being part of the Department, which is the primary complainant against registered migration agents and the policy-setting agency for immigration matters and the regulatory scheme for migration agents:

Whether this is an actual or perceived conflict, the Law Council suggests it is inappropriate for the arrangement to continue. In order to perform its functions with the level of integrity and independence appropriate to the Office, it is highly desirable that an independent regulatory body be established to oversee the regulation and disciplining of registered migration agents.

Like the Migration Alliance, the LCA then suggests that the Office of the Immigration Services Commissioner in the UK offers a reasonable model for consideration:

It is acknowledged that the establishment of a new independent body may create some additional cost for the Commonwealth. The Law Council notes that, given the OMARA has separate premises and has had to implement other measures to give the appearance of independence from the Department, such as separation of its computing and information and communications systems, the Law Council considers it should be feasible for the OMARA to continue on a largely self-funded basis, with minimal separate appropriations required.

OMARA Advisory Board (phone interview)

In a telephone interview with the Inquiry, the OMARA Advisory Board provided the following information and opinions:

There's a huge issue, that will immediately arise, that I am sure you have heard about it because it has certainly been raised in every single review in the past – and that is the independence of the complaints handling mechanism – I don't know if there is a model you are looking at whereby complaints handling would still sit apart from the Department and other issues would reside within the Department – I don't know that the Advisory Board has a firm view on this as a Advisory Board – I am a bit cynical I have to say – and I don't have faith that the Department could be trusted to deliver things any better than the OMARA has, and that is just borne out of many years of working with the Department.

I have come full circle, as when the function was returned to the Department under the guise of the OMARA – I was concerned about the independence, but to date I haven't seen any direct experiences or instances where I felt that the Department has tried to exercise control over the OMARA – in terms of controlling agents for Departmental objectives rather than allowing the OMARA to proceed on the basis of its own charter as the independent regulator.

I don't have a big issue with the need for independence, because you know migration agents are to some extent, well they are fully a creature of government regulation and governments directly regulate a lot of sectors and handle a lot of complaints about sectors, so in a way governments are quite independent in terms of being also regulators, so I don't actually have a problem with the Department having a more direct role in regulation, direct regulation of the agents, because there are really three options.

There's regulation directly by government – and if you are talking about a large sector you can set up independent statutory regulators, but these are of the large, systemically important sectors, such as, financial services and what-not and there are co-regulatory models and then there is self-regulatory models. Self-regulatory bodies seem to be reserved for the professions who've got large bodies of learning and high standards of ethics and who are held in sufficiently high regard by the community that they can self regulate and operate because they are held in such high levels of trust – and I think you know – because the migration industry is very close, its relationship with the legal profession, I think that sort of argument has got a bit mixed.

I think that in the early days people felt a bit entitled to self-regulation, but self-regulation sort of fizzled out really, I can't really say it didn't work, it just sort of fizzled out and now all the indicators in the sector, such as now we have two industry associations, all the conditions for self-regulation have gone away and we are in this co-regulation framework, that I think is working reasonably well – but moving the OMARA more back into the Department, you might get some efficiencies of being able to use the Department systems better and has talked at length with us about the problems he has had with the implementation with the IT system, for example. So you might get some efficiencies and I am not really sure you would lose anything by taking it more into the Department and you might get better flows of information and that could be helpful in terms of complaints handling, in terms of – if the government is going to develop this form of quasi accreditation scheme for agents so I guess, I can't say to you that there is a big independence issue that requires it to be an independent agency outside the Department.

Maybe what you could do is have it in the Department but this is sort of a bit of back to the future but when it comes to a high level disciplinary matter you might have a sort of independent panel or three people or one person who might decide the outcome. When the MIA was the MARA they did the investigation in-house and then they had what they call the conduct panel at the time who actually made the decision which was a way of giving it independence.

This “perception of independence” is quite important. It goes along the lines at listening of those with the industry. Although the background papers rightly points out that the Advisory Board is only advisory, clearly our experience is that the OMARA has always been good at preparing papers and seeking advice and comment from the Advisory Board and I think we have appreciated that over the years. The sector clearly appreciates the consultations the education providers have had from OMARA officials. Whether that was different and more bureaucratic wrap up I’m not sure – but it does listen to a whole range of stakeholders.

Sonia Caton

In her written submissions to the Inquiry, Sonia Caton, Advisory Board – Not for Profit, wrote:

I re-iterate my caution concerning transferring the OMARA to the Department and processes becoming more bureaucratised by stealth. Further, I believe a priority should be maintained to have on board staff with legal qualifications and complaints investigations experience, and staff with experience as a registered migration agent.

I re-iterate my belief that all disciplinary functions should be dealt with by an independent body.

Discussion and Recommendations

The existing regulatory model, in which the OMARA is a discrete office attached to the Department, is a legacy of the decision made in 2009 to remove the role of regulator from the industry stakeholder peak body, the Migration Institute of Australia.

This current model was created when the regulatory powers and functions were transferred from the MIA and is, in effect, a hybrid model that sought to position the OMARA between industry self-regulation and government regulation.

The Inquiry finds that the current hybrid arrangement does not deliver the best results for the efficient and effective regulation of the migration advice sector. Nor does it satisfactorily resolve some of the important issues identified by the 2007-08 Hodges Review.

Despite there being little or no support for ongoing industry self-regulation (which all key stakeholders consider to have failed), some submissions to this and the Hodges Review expressed a preference for the creation of an “independent statutory body”.

In relation to this issue, the Hodges Review noted that:

an independent statutory body for the migration advice profession would be regulating a relatively small profession” and “very small organisations have economy of scale issues that can make them unsustainable (at page 25).

This Inquiry agrees with this assessment. Given the relatively small size of the migration advice profession, the creation of an independent statutory body to perform the role of the OMARA would be unsustainable.

Importantly, the Inquiry finds that the economy of scale issues identified in the Hodges Review in 2008 are all the more acute today. The Inquiry notes, in particular, the recommendations made in this Report -- specifically, the recommendations to significantly decrease the size of the sector (removing lawyers from the scheme will reduce its size by around one third) and limit the scope of the activities currently being regulated by the OMARA (for instance, CPD and current entry qualifications).

The Inquiry does not accept calls made by some stakeholders for the creation of an independent statutory body. The Inquiry is of the opinion, however, that the current hybrid model does need to be amended. This is because the operation of the OMARA as a discrete office attached to, but not fully operating as a normal business unit of, the Department has:

- a. only partially resolved the economy of scale issues discussed above; and
- b. maintained certain operational barriers that purport to uphold the OMARA's independence but that, in effect, inhibit the development of more robust consumer protection measures.

Taking these points in turn, the hybrid model has given rise both to duplication of effort for the OMARA for some administrative functions (ie., governance measures including probity reporting, FOI, Privacy provisions) and an inability for the OMARA to capitalise on potential administrative efficiencies by using or leveraging Departmental resources and capacities (such as its IT systems and resources). As a small office, it is inefficient for the OMARA to provide these services by itself.

Equally problematic is the fact that OMARA operates under restrictions the rationale for which is difficult to understand or justify.

Whether considered from the point of view of consumer protection or maintaining public confidence in the integrity of Australia's migration programme, there is a regulatory continuum across the migration advice arena.

The risks faced by consumers in this field need to be identified and mitigated as part of an integrated regulatory strategy. Under the current hybrid model, the division of responsibilities between the OMARA and the Department fragments the approach taken and, in the Inquiry's opinion, risks inhibiting the development and implementation of an integrated strategy.

The Inquiry is aware of cases, for example, where the OMARA has sanctioned a registered migration agent, with the effect of preventing that person from practicing, only to have allegations surface that the same person has continued practicing as an unregistered agent.

This interconnection of risk was acknowledged by the Hodges Report:

the Department currently has responsibility for addressing unregistered practice and criminal conduct by registered migration agents which are often intertwined with complaints investigated by the MARA [which was at that time performed by the MIA] ... there would be value in facilitating greater information exchange and cooperation between the MARA and the Department ...

It is essential for consumer protection outcomes that there be timely and effective cooperation between the OMARA and the different areas of the Department responsible for the investigation of alleged unregistered practice or criminal conduct by registered agents.

The Inquiry finds, however, that the location of the OMARA as a discrete office attached to the Department, and operating under various information sharing restrictions, inhibits or makes it more difficult to develop a strategically-integrated approach to regulating the intertwined risks present within the migration advice sector.

The Inquiry finds that the current hybrid model, which was a compromise framework created to alleviate the concerns of some stakeholder about independence, has given rise to a less than, rather than the most, optimal situation by:

- engendering a lack of clarity for clients, stakeholders and members of the public concerning the roles, responsibilities and functions of the OMARA and the Department;
- preventing the OMARA from fully realising the administrative efficiencies and benefits that should flow from operating as part of a large Department; and
- acting as a dampener on information sharing and the leveraging of capabilities and assets that can be directed at reducing risks in the sector and on its fringes.

A review of all of the submissions received by the Inquiry reveals that when discussing “independence” or “where the OMARA should be located” those querying the effectiveness of the current model seem, primarily, to be concerned with:

- the Department’s role in disciplining migration agents;
- what many perceive as too great a role by the OMARA in relation to issues best left to other entities; and
- whether the Department would play too great a role in the industry were the OMARA more fully integrated into the Department.

The Inquiry has noted in Chapter Seven of this Report that concerns in relation to serious disciplinary matters are valid. Perception does matter and it is less than ideal to have the OMARA both investigating and ultimately hearing and making determinations about serious disciplinary breaches that might ultimately result in an agent being denied the right to practice. The Inquiry has recommended that this issue be addressed by allowing the Administrative Appeals Tribunal to adjudicate serious disciplinary matters after an initial information gathering stage and investigation by the OMARA.

The Inquiry has also accepted that the OMARA plays too great a role in relation to the regulation of CPD and in relation to the regulation of the educational entry qualifications for migration agents. In that regard, the Inquiry has recommended that the OMARA’s role be significantly reduced.

The Inquiry has also recommended that lawyer agents be removed from the current regulatory scheme, such that they now be regulated solely by the relevant legal service regulators throughout Australia.

The Inquiry is of the view that, should these recommendations be implemented, the end result will be a more stream-lined OMARA that can, quite comfortably, sit within the Department. The benefits of such a system can be summarised as follows:

- a centralised system for the sharing of information and expertise;
- an educational structure that allows those persons and entities who are best equipped to provide high quality educational training to do so without unnecessary interference from a government body that was never designed to have expertise in this area; and
- costs savings of the sort that result from a more stream-lined administrative structure, with said costs savings potentially able to be passed on to migration agents via reduced registration fees.

In these circumstances, the Inquiry does not accept that there is need for the adoption of a separate Independent Immigration Commission of the sort adopted in the United Kingdom. This would add a further layer of regulation to an industry that, based on the submissions received by the Inquiry, seems keen to avoid regulation and multiple layers of bureaucracy.

Accordingly, the Inquiry rejects the current hybrid model as either appropriate or efficient and recommends as follows.

Recommendation 23

The Inquiry recommends that the OMARA's position within the Department be fully consolidated so that it is entirely and unequivocally part of the Department.

Finally, in addressing concerns about public perceptions of independence, the Inquiry accepts that the current Advisory Board plays an important role in that regard. The Inquiry believes that the Advisory Board or some similar body can continue to play an important role in the future but that its role should be clarified and better promoted to those who will look to it to ensure that there is significant community input to the OMARA as it seeks to best address the needs of migration agents, while, importantly protecting consumers of this significant branch of Australian migration law and practice.

Accordingly, the Inquiry recommends as follows.

Recommendation 24

The Inquiry recommends that some form of independent reference group continue to play an active role as an advisory body to the OMARA.

Attachment A

Recommendations of the 2007-08 Review of Statutory Self-regulation of the Migration Advice Profession (The Hodges Review)

1. That the Professional Standards and Registration Committee (PSRC) or any future body charged with decision making regarding professional standards, registration and the sanctioning of migration agents comprise representation across a range of interests including the MIA, LCA, community representation and the Commonwealth.
2. That the Board of the new regulatory body should be appointed by the Minister and consist of no more than seven members. The Board should comprise a diverse range of representatives including:
 - a consumer advocate;
 - a community representative;
 - a nominee from the LCA; and
 - a nominee from the MIA.
3. That the government consider addressing any remaining concerns regarding potential or perceived conflicts of interest by establishing the new Board in an independent regulatory body separate from the MIA.
4. That criteria on which the regulatory body will decide to investigate complaints be made publicly available.
5. That all relevant complainants be provided with explanations of why the regulatory body decides not to formally investigate their complaint when a decision of 'No further action' is made.
6. That the regulatory body disclose relevant details of complaints which are being investigated or being considered for investigation to the migration agent in question, as long as such disclosure does not compromise the investigative process.
7. That quality assurance procedures be implemented to ensure consistency in the complaints handling processes of the regulatory body.
8. That an easily identifiable channel for making a complaint against the way the regulatory body handles investigations be developed.
9. That migration agents be made aware of relevant aspects of relevant complaints against them that are not further investigated at that time and requested to take appropriate action to avoid future complaints for similar issues.
10. That options be developed to facilitate the better integration and coordination of the regulatory body and departmental complaints handling functions.
11. That the regulatory body work in partnership with relevant bodies such as the Office of the Legal Services Commissioner (OLSC) and the Australian Competition and Consumer Commission (ACCC) in order to progress the investigation of complaints and to ensure that the results of complaints are known by relevant regulators and that these organisations also take appropriate action.
12. That the regulator review and appropriately revise any existing training program for complaints handling staff or if such a program is not in existence, that it develop a new, appropriately robust training program for these staff.

13. That as soon as practicable, the Graduate Certificate as the knowledge requirement for entry to the profession be replaced with a Graduate Diploma level course.
14. That the regulatory body be empowered to require migration agents who are subject to repeated complaints about their knowledge and those sanctioned for a lack of sound knowledge to undertake some or all of the units that make up the prescribed course prior to sanctions being lifted or being re-registered.
15. That a system of registration be implemented involving a year of supervised practice for newly qualified migration agents.
16. That new and re-registering migration agents be required to prove that they have English language proficiency of at least International English Language Testing System (IELTS) 7.
17. That in order to be eligible for repeat registration, migration agents be required to prove that they meet conditions as determined by the regulatory body.
18. That the regulatory body be able to impose further conditions on migration agents applying for repeat registration after being sanctioned. Such conditions could include that the agent:
 - operates under the supervision of another migration agent;
 - is restricted to a particular type of work; and
 - undertakes specific training.
19. That an independent review of the MARA's communications activities be undertaken and that a comprehensive communications strategy be developed and published electronically. A separate and distinct budget should be allocated for the implementation of the strategy and the expenditure of this budget should be similarly reported separately.
20. That a fidelity fund not be established.
21. That if practicable, migration agents ensure that clients pay Visa Application Charges (VACs) directly to the department.
22. That if it is not practicable for VACs to be paid by clients directly to the department, that migration agents hold funds in trust accounts that are managed according to trust accounting standards.
23. That the regulatory body be granted additional emergency powers including, but not limited to, the power to:
 - suspend a migration agent;
 - retrieve client files;
 - appoint an administrator; and
 - seek a court order to appoint a receiver.
24. That in developing protocols for the use of emergency powers, the following should be considered to ensure there are suitable 'checks and balances on such powers:
 - the tribunals and courts should be consulted;
 - the regulatory body to be indemnified in case tribunals later determine powers should not have been exercised; and
 - an appropriate governance framework be developed to ensure that the decision making process regarding the invoking of emergency powers is impartial and transparent.
25. That the regulatory body be more responsible for legal matters pertaining to its operations.
26. That Part 3 of the Act be simplified with details moved to Regulations where appropriate. In simplifying this legislation, where practicable, previously agreed changes should be effected.

27. That the definition of immigration assistance be amended to remove references to court related work and to ensure that the definition does not lead to the practising of law by migration agents who are not qualified to do so.
28. That the definition of immigration assistance be amended to:
- ensure that it applies to immigration assistance provided to all clients, not just visa applicants or cancellation review applicants;
 - clarify the difference between immigration assistance and migration advice; and
 - define the context in which the client/advisor relationship arises.
29. That consideration be given to enable certain bodies to provide immigration assistance without this assistance being provided by registered migration agents. Decisions on exemptions to be made at ministerial level based on exceptional circumstances.
30. That to help address the issue of unregistered agents acting as authorised recipients, strategies be developed to increase the availability of non-commercial migration agents in the community sector.
31. That the department's Form 956 Appointment of a migration agent or exempt agent or other authorised recipient be revised to clearly distinguish between the appointment of a migration agent and an authorised recipient, to be more client friendly and to include both client and departmental obligations.
32. That with significant input from the profession, the Code should be re-written in simple English, strengthened, and ethical issues dealt with separately. The Code should remain in Regulations.
33. That in revising the Code, consideration be given to including:
- clarification of the role of supervising migration agents;
 - the adoption of trust accounting regulations in relation to the management of client accounts and referral to a comprehensive inspection scheme;
 - acknowledgement of the role of Regional Certifying Bodies;
 - clear conflict of interest guidelines regarding conflicts that may arise from a migration agent's connection with a recruitment or training organisation;
 - a comprehensive definitions and interpretation section;
 - provisions for migration agents working within different business structures; and
 - a set of rules that must be satisfied before a change can be made and a procedure for changing the Code.
34. That the penalty provisions under section 306 be changed to exempt inactive migration agents from the penalty when non-compliance is beyond the agent's control, for example when the agent is incapacitated.
35. That consideration be given to the deletion of Division 5 from the Act except for providing for the need for a registered migration agent to conduct himself or herself in accordance with the Code of Conduct. Details previously provided in Division 5 could then be covered in Regulations.
36. That the definition of 'client' in Regulations be amended to specify the context in which immigration assistance is provided including defining that an individual officially becomes a 'client' when a contract for services is signed.
37. That further guidance be provided on the definition of 'fit and proper person' in section 290.
38. That amendments be made to ensure that provisions apply to all businesses (not just individuals) that are involved in the provision of immigration assistance.
39. That legislation be revised mindful of relevant standards established in ILO Conventions 181 (Private Employment Agencies) and 143 (Migrant Workers – Supplementary provisions) that are consistent with government policy.

40. That the department and the regulatory body continue to make information available to industry associations, labour hire organisations and employers (including small businesses) on the regulatory framework, service charters, fees, and the complaints mechanism.
41. That providers of the Graduate Certificate of Migration Law and Practice, and the MIA as the industry association, investigate the possibility of providing a number of scholarships to students who make a commitment to practice in the non-commercial sector.
42. That the providers of CPD activities be encouraged to offer migration agents operating in the non-commercial sector greater discounts on CPD activity fees.
43. That the department consider providing non-commercial migration agents with further discounts on access to LEGENDcom.
44. That consideration be given to amending the CPD scheme to provide additional incentives for experienced migration agents to provide pro-bono services.
45. That the department consider extending the Immigration Advice and Application Assistance Scheme (IAAAS) to provide funding for advice and application assistance both for onshore and offshore visa applications, including to proposers of offshore humanitarian visas.
46. That lawyer agents continue to be included in a revised regulatory scheme.
47. That complaints about lawyer agents be referred to relevant Legal Services Commission/ Ombudsman for investigation. Resulting decisions from investigations to be subject to review by the migration advice regulator. As the requirement of the migration advice regulator to allocate resources to address complaints about lawyer agents would decrease, that registration fees payable by lawyer agents be decreased as appropriate.
48. That the public register of migration agents provides for all migration agents to have relevant qualifications listed.
49. That the CPD system be modified to provide more flexibility regarding the activities undertaken.
50. That the process of approving CPD activities be revised to ensure that more flexibility is provided in the CPD activities that can be undertaken and to address concerns about the onerous nature of the current approval process.
51. That migration agents with over three years' experience, who have good track records (as determined by the regulator) be able to undertake CPD on an honour basis.
52. That CPD activities be developed that involve greater interaction between departmental staff and migration agents; for example, the provision of presentations by departmental staff to migration agents and vice versa.
53. That a priority processing scheme be implemented that awards priority to complete, decision- ready applications, regardless of who lodges them.
54. That consideration be given to the establishment of a stakeholder committee to identify strategies to further streamline procedures by which departmental offices receive applications and documents from migration agents and provide services to them.
55. Pending consideration of more cost effective options to encourage high quality decision-ready applications, that a rating scheme not be implemented.
56. That the migration advice profession not move to self-regulation.
57. That statutory self-regulation be discontinued.

Attachment B



Australian Government
Office of the Migration Agents Registration Authority



Australian Government
Department of Immigration and Citizenship

MEMORANDUM OF UNDERSTANDING

BETWEEN THE

OFFICE OF THE MIGRATION AGENTS REGISTRATION AUTHORITY

AND THE

DEPARTMENT OF IMMIGRATION AND CITIZENSHIP

IN RELATION TO THE

APPROPRIATE DISCLOSURE AND USE OF INFORMATION

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MEMORANDUM OF UNDERSTANDING BETWEEN THE OFFICE OF THE MIGRATION AGENTS REGISTRATION AUTHORITY AND THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP

1 PARTIES

- 1.1 The parties to this Memorandum of Understanding (the MoU) are the Office of the Migration Agents Registration Authority (Office of the MARA) and the Department of Immigration and Citizenship (the Department).

2 PURPOSE

- 2.1 The purpose of this MoU is to set out the respective roles and responsibilities of the parties with respect to the disclosure and use of information.

3 DATE OF EFFECT

- 3.1 This MoU comes into effect when signed and dated by both signatories.

4 DURATION

- 4.1 This MoU will continue in operation until terminated by either party in accordance with clauses 10.6 and 10.7 of this MoU.

5 DEFINITIONS

- 5.1 **authorised officer** has the same meaning as section 5 of the *Migration Act 1958* (Cth) (the 'Act').
- 5.2 **personal information** has the same meaning as sub-section 6(1) of the Privacy Act 1988 (Cth) (the 'Privacy Act') and means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

6 STATUTORY FRAMEWORK

- 6.1 The Migration Agent Registration Authority has statutory responsibility to do all things necessarily or conveniently done for, or in connection with, the performance of its functions (section 317 of the Act). In accordance with section 316 of the Act, these functions include to:
- (a) deal with applications for registration as a migration agent;
 - (b) monitor the conduct of migration agents in the provision of immigration assistance and immigration legal assistance as defined in the Act;
 - (c) investigate complaints in relation to the provision of immigration assistance by registered migration agents;
 - (d) take appropriate disciplinary action against registered migration agents or former agents;
 - (e) investigate complaints about lawyers in relation to their provision of immigration legal assistance, for the purpose of referring appropriate cases to legal professional associations for possible disciplinary action;
 - (f) inform the prosecuting authorities about apparent offences against Part 3 or Part 4 of the Act; and

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- (g) monitor the adequacy of any Code of Conduct.
- 6.2 The Minister for Immigration and Citizenship has delegated from 1 July 2009 all of his powers and functions as the Migration Agent Registration Authority to staff within the Office of the MARA. The Office of the MARA is headed by a Chief Executive Officer who reports directly to the Secretary of the Department.
- 6.3 The Department, under Part 3 Division 2 of the Act, has statutory responsibility, among other things, for investigation of individuals suspected of providing immigration assistance where those individuals are not registered and are not exempt from registration.
- 6.4 All requests for information made by the Office of the MARA to the Department shall be considered pursuant to section 321 of the Act. Sub-section 321(1) of the Act authorises certain disclosures of personal information for the purpose of facilitating or expediting the exercise of the powers, or performance of the functions, of the Office of the MARA.
- 6.5 The Office of the MARA discloses personal information about a registered migration agent, or an inactive migration agent to the Department pursuant to section 321A of the Act. Such disclosure is restricted to disclosure in prescribed circumstances to the Secretary or an authorised officer.
- 6.6 The prescribed circumstances are set out in Regulation 9B of the *Migration Agents Regulations 1998* (the Regulations) (see [Annexure 1 for the relevant extract](#)).
- 6.7 The authorisation for Office of the MARA staff to disclose information specified in section 321A is set out the Instrument of Delegation OMARA 09/002 or any relevant subsequent Instrument should OMARA 09/002 be revoked (see [Annexure 2 for the relevant extract](#)).

7 KEY PRINCIPLES OF THIS MOU

- 7.1 The parties to this MoU will:
- (a) do all things reasonably necessary to ensure that there is a clear separation between their respective functions;
 - (b) require any officer or contractor who might be required to use personal information relevant to the functions of the Migration Agent Registration Authority to sign a declaration of conflict of interest;
 - (c) maintain and monitor a register of those declarations;
 - (d) collaborate to establish and maintain protocols and procedures to ensure that the use of information does not breach the Privacy Act;
 - (e) only disclose personal information to the other party where express authority exists to make that disclosure under the Privacy Act; and
 - (f) only use personal information for the purpose it was obtained unless that use is otherwise permitted by the Privacy Act;
- 7.2 The disclosure and use of information that is not personal information shall be conducted in accordance with the protocols referred to in clause 9.3 of this MoU as far as this is practicable in the circumstances.

8 PRIVACY

- 8.1 The Information Privacy Principles (IPPs) in section 14 of the Privacy Act set out strict safeguards for any personal information handled by Commonwealth agencies. The IPPs cover the collection, storage, use and disclosure of this information.
- 8.2 While the Office of the MARA and the Department can share information, the use of the personal information provided must be for the purposes for which it was obtained, unless one of the exceptions set out in IPP10 applies.

Principle 10

Limits on use of personal information

1. A record-keeper who has possession or control of a record that contains personal information that was obtained for a particular purpose shall not use the information for any other purpose unless:
 - (a) the individual concerned has consented to use of the information for that other purpose;
 - (b) the record-keeper believes on reasonable grounds that use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person;
 - (c) use of the information for that other purpose is required or authorised by or under law;
 - (d) use of the information for that other purpose is reasonably necessary for enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue; or
 - (e) the purpose for which the information is used is directly related to the purpose for which the information was obtained.
2. Where personal information is used for enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue, the record-keeper shall include in the record containing that information a note of that use.

- 8.3 The Office of the MARA and the Department are obliged to comply with the IPPs and will do so irrespective of any term of this MoU. The understanding recorded by this clause 8.3 will survive after the termination of this MoU.

9 FREEDOM OF INFORMATION

- 9.1 As a discrete office attached to the Department, the Office of the MARA is subject to the same legislation governing its operations as the Department. In particular this legislation includes but is not limited to the *Freedom of Information Act (1982)* (the 'FOI Act').
- 9.2 In accordance with section 11 of the FOI Act, every person has a legally enforceable right to obtain access to a document of an agency, or an official document of a Minister.
- 9.3 The release of documents under the FOI Act is subject to the exemption provisions set out in Part 4 of the FOI Act.

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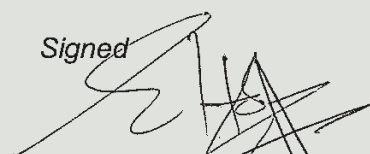
10 ADMINISTRATIVE ARRANGEMENTS

- 10.1 The Migration Agent Section (MAS) within the Visa Services Transformation and Business Support Branch, Migration and Visa Policy Division of the Department is the central coordination point responsible for facilitating the exchange of personal information between the parties in relation to the administration of Part 3 of the Act.
- 10.2 Any requests for information between the Office of the MARA to the Department should be in writing and accordance with the protocols at Annexure 3 (Corporate Services), Annexure 4 (Legal Services), Annexure 5 (Media) and Annexure 6 (Administration of Part 3 of the Act – Information Use).
- 10.3 This MoU may be amended in accordance with any legislative changes which take place after the signing of this MoU.
- 10.4 Either party may request that the other party agree to vary this MoU by giving written notice to Deputy CEO Office of the MARA or Assistant Secretary, Visa Services Transformation and Business Support, or the equivalent positions with responsibilities for registered migration agent issues.
- 10.5 All records of written correspondence between the Department and the Office of the MARA must be maintained in accordance with the *Archives Act 1983*, the *Public Service Act 1999* and the Department's Chief Executive Instruction pertaining to record keeping unless section 24(2)(b) of the *Archives Act 1983* authorises their disposal.
- 10.6 Either party may unilaterally terminate all, or part of, the commitment it has given under this MoU by giving thirty days written notice to the other party.
- 10.7 The termination will take effect at the end of the thirty days unless otherwise agreed to by both parties.



Signed

STEPHEN WOOD
DEPUTY CEO
Office of the Migration Agents
Registration Authority
Date: 16 June 2010



Signed

ELIZABETH HOFFMAN
ASSISTANT SECRETARY
Department of Immigration and
Citizenship
Date: 16 June 2010

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ANNEXURE 1

PREScribed CIRCUMSTANCES

In accordance with section 321A of the *Migration Act 1958* (Cth) (the 'Act'), the disclosure of personal information about a registered migration agent, or an inactive migration agent, to the Department is restricted to disclosure in prescribed circumstances.

Each of the following is a prescribed circumstance, as set out in Regulation 9B of the Act:

- (a) a registered migration agent, or an inactive migration agent, is currently under investigation for possible offences under the Act;
- (b) a client of a registered migration agent, or an inactive migration agent, is currently under investigation for possible offences under the Act;
- (c) the Minister is considering referring a registered migration agent, or an inactive migration agent, to the Authority for mandatory sanctioning;
- (d) the Department is considering making a complaint to the Authority about a registered migration agent, or an inactive migration agent;
- (e) a registered migration agent, or an inactive migration agent, has been sanctioned by the Authority;
- (f) the personal information is required to allow the Secretary, an authorised officer or a review authority to collect information about the conduct of registered migration agents, or inactive migration agents.

This is an extract of Regulation 9(b) of the Act as at May 2010, please check Legend, or like system, for the full circumstances and to ensure that this information is still current.

ANNEXURE 2

AUTHORISED OFFICERS FOR THE PURPOSES OF SECTION 321A

The following departmental officers have been authorised by the Secretary, through the Instrument of Delegation, Authorisation and Appointment (Instrument S1) signed 14 May 2007, to receive personal information about a registered migration agent or an inactive migration agent in the circumstances prescribed.

Department of Immigration and Citizenship s321A Authorised Officers

LEVEL	POSITION NUMBER
EL 2	2578, 5201
EL 1	691, 5046, 5199, 60001069, 60006247
APS 6	1952, 2713, 5320, 8091, 60001930, 60001931, 60003646
APS 5	1156, 1689, 2917, 60000907
APS 4	10592, 60001996, 1590, 60005943
APS 3	1972, 60007645, 60007646, 1687, 2514
APS 2	9773
GRAD	60007862, 60007863, 60007889, 60007890, 60007891, 60007892, 60007893, 60007894, 60007895, 60007896, 60007897, 60007898, 60007899, 60007900, 60007901, 60007902, 60007903, 60007904, 60007905, 60007906, 60007907, 60007908, 60007909, 60007910, 60007911, 60007912, 60007913, 60007914, 60007915, 60007916

Under the Instrument of Delegation OMARA 09/002, the following officers are delegated to disclose information to the Secretary or an authorised officer under section 321A:

Office of the Migration Agents Registration Authority s321A Delegated Officers

CEO	Deputy CEO	Exec 2	Exec 1	APS6	APS5	APS4	APS3
X	X	X	X	X	X	X	

An 'X' in a *Position Classification* column signifies that the 'power' in the *Delegated Power* column has been delegated to each person who holds, occupies or performs the duties of the position classification indicated in the relevant column.

This information was correct as at May 2010 and is provided as a guide only. Both Instrument S1 and Instrument OMARA will change from time to time and therefore should be consulted to ensure currency as required.

CORPORATE SERVICES PROTOCOL

OVERVIEW AND BACKGROUND

While the Office of the MARA is discrete from the Department in its regulatory role for registered migration agents, the Office is supported by the Department in the administration of corporate services.

This protocol outlines how corporate service requests relating to the Office of the MARA will be handled. This document also ensures access to, and timely provision of, corporate services to the Office of the MARA.

Protocol

The Office of the MARA will seek advice and assistance in relation to corporate services directly with the relevant business area of DIAC.

The services will be provided in accordance within the framework of Acts, Regulations and policy guidelines. These include, but are not limited to: the Public Service Act; Financial Management Act; Auditor-General Act; Chief Executive Instructions; Commonwealth Procurement Guidelines; and the DIAC Collective Agreement.

Information reasonably necessary for these purposes will be exchanged between the parties.

Services will be delivered in a timely manner, consistent with relevant Departmental service standards. Escalation of issues in relation to service delivery will be through the Office of the MARA's Director Strategy & Business (Divisional Executive Officer).

Services included under this protocol:

1. Human resources including recruitment; health and safety; HR systems support; pay and conditions.
2. Business planning.
3. Training including learning and development as per the Department's training framework.
 - Induction training for Office of the MARA staff will include information on this MoU and relevant protocols (PSI Recommendation 6.1.6 and 6.4.10).
4. Reporting, including:
 - the Office of the MARA CEO reports directly to the Secretary as required, including a monthly progress report;
 - performance data provided to MAS on a quarterly basis;

- performance data and other information for the purposes of the annual report and portfolio budget statement will be provided to the relevant area of the Department as required.
- operational reports will be provided to Assistant Secretary Visa Services Transformation and Business Support Branch in their capacity as an Advisory Board member.

5. Financial strategy and services including property; financial operations; procurement and contracts; accounting; financial controls; financial reporting.

6. Systems including IT systems access, systems support and IT procurement.

7. Travel.

LEGAL SERVICES PROTOCOL

OVERVIEW AND BACKGROUND

The establishment of the Office of the MARA (Office of the MARA) was based on recommendations in the *2007-08 Review of Statutory Self-regulation of the Migration Advice Profession* (Review).

The Review also recommended that the regulatory body be more responsible for legal matters pertaining to its operations (Recommendation 25).

In the interests of maintaining public confidence pertaining to the independence of the Office of the MARA and its regulatory role for the migration industry, it is important that clear arrangements are in place for the management of legal advice and litigation matters.

The following protocol is based on correspondence between the Governance and Legal Division (GLD) and the Office of the MARA (dated 30 July, 2009, 10 December, 2009 and 14 January 2010 respectively).

The protocol has been developed within the context that the provision of legal advice within the Commonwealth Government is governed by the *Legal Services Directions 2005* ('LSD') which are binding directions made under the section 55ZF of the *Judiciary Act 1903*.

In addition, the provision of legal services within the Department is also governed by the Chief Executive Instruction 31 ('CEI 31') entitled "Legal Services" which is made under the *Financial Management and Accountability Act 1997*.

Amongst other things, the CEI 31 sets out that:

- the Chief Lawyer is authorised to outline the policies and procedural framework for legal services in the Department (Paragraph 4);
- the GLD will determine whether services should be provided internally or referred to an external service provider (i.e. the Legal Services Panel or Attorney-General's Department) (Paragraph 7); and
- external legal advice **must not** be sought without first obtaining authorisation from a designated person within the Legal Division (Paragraph 8).

Triage process for the provision of legal advice services

Any requests for legal advice to the GLD are subject to the following three stage process:

- all requests are prioritised according to importance;
- GLD will make a determination in accordance with CEI 31 as to whether the services can be provided internally or referred to an external legal panel firm; and
- the final decision rests with GLD.

PROTOCOL

Legal Advice

The Office of the MARA will seek legal advice, both internal and external, through the Legal Opinions Section of the GLD.

In order to ensure that the services required by the Office of the MARA are delivered in a timely manner (including urgent advice) either directly or through the Department's legal panel, the following have been put in place:

- The involvement of a small number of legal officers in the provision of legal advice ensuring that expertise is built and retained while also catering for contingencies that might otherwise cause problems if only one legal officer was the point of contact should that person be absent or otherwise unavailable; and
- Written requests will be sent to lohd@immi.gov.au or to the Director, Legal opinions Section, ph (02) 6264 2556. The following escalation processes will apply:
 - where the matter is urgent a phone call should be made to the Director, Legal Opinions prior to the request being sent;
 - where the matter requires some priority but is not urgent *per se*, the relevant time frame should be identified in the request and/or otherwise discussed and negotiated at the time the request is made;
 - in relation to sensitive and/confidential matters, the Director, Legal Opinions Section should be contacted in the first instance to discuss the best way for legal advice to be sought and provided.
 - Legal Opinions Section will make decisions about the appropriateness of requesting external advice for individual matters, taking into account the views of Office of the MARA and in accordance with the triage process described above.

In the unlikely event that concerns are unable to be resolved, these concerns are to be raised directly with the Assistant Secretary of the Litigation and Opinions Branch. This should only occur in exceptional circumstances and after discussion with the CEO or DCEO of Office of the MARA and the Director of the Litigation and Opinions Section has taken place.

Independence of Legal Advice

Conflict of Interest declarations will be completed by new legal officers in the Legal Opinions Section. Conflict of interest letters have been sent to panel firms regarding conflict of interest within the Office of the MARA context. The Assistant Secretary of the GLD has advised that existing contracts between the Department and the panel firms already contain conflict of interest provisions.

Litigation

The contact officer for GLD -Office of the MARA litigation is the Director, Migration and Refugee Litigation Section (02) 6266 4286.

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Training

GLD has offered to provide training on a wide range of topics, which could include a presentation by relevant legal officers on common issues that arise in migration agent - related litigation.

GLD is also able to access a limited amount of free training by panel firms, which could be accessed by the Office of the MARA.

Migration Agents Section

The Office of the MARA will liaise with the Migration Agents Section (MAS) over any policy related legal advice, and will keep MAS informed of any advice on individual cases that has any key policy implications.

April 2010

MEDIA HANDLING PROTOCOL

OVERVIEW AND BACKGROUND

In the interests of maintaining public confidence in the independence of the Office of the MARA and its distinct regulatory role for the migration advice industry, it is important that there are discrete media management processes for the Office of the MARA which are separate to the media functions of the Department.

This document outlines:

- how media requests relating to the Office of the MARA's functions will be handled;
- the relationship between the Office of the MARA and the Department on media issues and interactions; and
- how media requests will be documented and recorded.

The purpose of this document is to ensure timely responses to journalists in addition to public awareness of the Office of the MARA's distinct regulatory role.

MEDIA PROTOCOL

Media enquiries

The Office of the MARA will be responsible for fielding its own media inquiries via a direct contact line (02) 9078 3555 which is available to journalists on its website. The Office of the MARA will deal directly with requests that relate to its key roles, responsibilities and dealings with relevant stakeholders.

In the event that an enquiry relates to matters of government policy, the Department's operations or individual cases, the Office of the MARA must direct journalists to contact the National Communications Section 24-hour media line on (02) 6264 2244 or via email: natcomms@immi.gov.au.

Where a media enquiry crosses over between the Office of the MARA and the Department's responsibilities, the Chief Executive Officer (CEO) or Deputy Chief Executive Officer (DCEO) from the Office of the MARA must call the Department's National Communications Section in order to determine and develop an agreed approach/response to the enquiry.

Any media enquiries relating specifically to the Office of the MARA that are initially lodged through the National Communications Section must be referred to the Office of the MARA's direct media contact number.

Interview requests

Interview requests will be handled as above, with the Office of the MARA limited to discussing issues relevant to its functions and operations rather than the Department's operations, government policy or individual cases.

It is proposed that the CEO and DCEO would be the designated public speakers for the Office of the MARA. Both the CEO and DCEO have completed media training.

Assistance from National Communications Branch

National Communications Section will assist with media handling advice and, where possible and upon request, in the development and/or editing of media material such as press releases and talking points for the Office of the MARA.

The Office of the MARA can directly contact the National Communications Section 24 hours a day on (02) 6264 2244 or via email natcomms@immi.gov.au (email account only checked during business hours).

National Communications Section can also assist with the dissemination of media material (such as press releases) to relevant media outlets. If external service providers such as AAP Medianet are used, any costs incurred will be charged to the Office of the MARA cost centre.

It is envisaged the Office of the MARA will have a relatively low media profile. However, should the Office of the MARA begin to achieve a moderately high profile, the level of support by the National Communications Section will be revisited to determine whether other options, such as the engagement of a Public Affairs position (funded by the Office of the MARA) should be pursued.

Cooperation

The Office of the MARA and National Communications Section will work cooperatively to ensure each is alerted to potentially sensitive media issues as early as possible.

Media monitoring

Morning media clips will be distributed electronically to the Office of the MARA through the CEO and DCEO.

The media clips represent all issues affecting the portfolio on a given day but are not intended to be exhaustive. Office of the MARA staff are encouraged to use the Mediportal, which is available through the Department's intranet site to access media clips :dimanet.immi.gov.au/communication/mediportal. The Mediportal allows for targeted searching of print clippings and electronic media summaries dating back to a period of 90 days.

National Communications Section, as part of its routine daily media monitoring activities, will electronically circulate media clips relating directly to the Office of the MARA business and registered migration agents more generally.

Should transcripts, audio and/or vision be required, these can be ordered through the National Communications Section. Again, if these are sourced from external providers, any costs incurred will be charged to the Office of the MARA's cost centre.

Documentation

The substance of any material conversations with journalists contacting the Office of the MARA media line must be documented by way of a file note. The file note must be stored in the appropriate TRIM folder.

April 2010

ADMINISTRATION OF PART 3 OF THE ACT – INFORMATION USE PROTOCOL

OVERVIEW AND BACKGROUND

As identified in the MoU, the *Migration Act 1958* provides for the exchange of information between the Office of the MARA and the Department in order to enable them to perform their functions. In order to ensure appropriate use of information and transparent processes, discrete processes have been put in as stated below.

This document outlines:

- how information requests between the two parties will be handled;
- the relationship between the Office of the MARA and the Department on the range of information requests; and
- how information requests will be documented and recorded.

The purpose of this protocol is to provide transparency in relation to information use and ensure that both parties are acting in accordance with relevant Privacy Principles.

PROTOCOL

Registration

- S.321 requests to be sent in writing to MAS at agents@immi.gov.au. Responses from MAS are to be forwarded to the Registration Section at agent.queries@mara.gov.au. Copies of the MAS response will be retained on the agent's file.
- Requests for policy advice are to be referred to MAS in writing. Responses from MAS are to be forward to the Office of the MARA in writing. If policy advice relates to the circumstances of a specific case, a copy of the advice should be attached to the agent's file (PSI Recommendation 6.1.7(b)).

Complaints

- S.321 requests for systems checks are referred in writing to MAS at agents@immi.gov.au. Responses from MAS are to be forwarded to the Professional Standards and Integrity Team at professional.standards@mara.gov.au.
- Where the Office of the MARA needs to engage with investigation sections of the Department the matter should be referred to MAS. Following initial contact through MAS, continued engagement may be direct with the relevant investigation section. In these instances MAS should be apprised of any developments.

- Requests for policy advice are to be referred to MAS in writing. Responses from MAS are to be forward to the Office of the MARA in writing. If policy advice relates to a specific case, a copy of the advice should be attached to the agent's file (PSI Recommendation 6.1.7(b)).
- Requests for Departmental files will be made in writing to MAS.
- Where the Office of the MARA receives information in relation to apparent offences against Part 3 or Part 4 of *the Act* it should be referred in writing to MAS.
- Where a Departmental officer approaches the Office of the MARA incorrectly with any query they should be referred to MAS in accordance with the 'Process for Referring Misdirected Queries to Migration Agents Section' Tip sheet ([Annexure 7](#)).
- Complaints from Departmental officers about registered migration agents should be referred to MAS. Where appropriate these would then be forwarded to the Office of the MARA are to be in writing and in the form of the referral template ([Annexure 8](#)).

Integrity

- Where the Office of the MARA becomes aware that a complainant is an unlawful non-citizen, officers should follow agreed procedures ([Annexure 9](#)) on advising the complainant to obtain lawful status and advising the Department (PSI Recommendation 6.4.9).
- S.321 requests from the Office of the MARA to the Department in relation to agent data will be forwarded to MAS. Following initial contact through MAS, continued engagement may be direct with the relevant integrity unit of the Department. In these instances MAS should be apprised of any developments.

CPD

- Requests for policy advice are to be referred to MAS in writing. Responses from MAS are to be forward to the Office of the MARA in writing.

Data Transfers and Systems Back Up

- The Migration Agents Register will be provided to MAS on a weekly basis. This contains public information only and as such can be used by the Department for business purposes.
- All business applications used by the Office of the MARA will be backed up on a mutually agreed regular basis by the Department's System's Division for business continuity and disaster recovery purposes only.

Web Site and All Agent Emails

- Where the Department requires information for their website, any requests should be directed through MAS to the Office of the MARA. The same process applies to

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emails to be sent to all registered migration agents via Office of the MARA systems.

- Where the Office of the MARA requires information for their website, any requests should be directed to MAS. The same applies to emails to be sent to all registered migration agents through Departmental systems.

Senate Estimates

- The Office of the MARA will liaise with MAS to identify which topics are to be properly handled by Visa Services Transformation and Business Support Branch.
- Senate Estimates briefing papers prepared by the Office of the MARA will be made available to MAS upon request.
- Senate Estimates briefing papers prepared by the Department in relation to migration advice issues will be made available to Office of the MARA upon request.

Advisory Board

- Advisory Board papers will be made available to Assistant Secretary Visa Services Transformation and Business Support Branch in their capacity as an Advisory Board member.
- Additional Advisory Board briefing papers will be made available to MAS upon request.
- MAS will provide briefing papers required for Advisory Board meetings in a timely manner to allow for distribution to Advisory Board members.
- Where an Advisory Board paper involves policy matters MAS will be consulted.

Quarterly Reports

- Office of the MARA registration and complaints activity will continue to be made available to MAS upon request.

Monthly Secretary's Report

- Monthly Secretary's report will be made available to MAS upon request.

Statistics

- Ad hoc statistics will be made available to MAS upon request.

ANNEXURE 7

PROCESS FOR REFERRING MISDIRECTED QUERIES TO MIGRATION AGENTS SECTION – TIP SHEET

Premise: Departmental officer contacts Office of the MARA incorrectly with any query (exception: Litigation Section may liaise directly with Office of the MARA for litigation/merits review issues).

If the Departmental officer does not work in MAS or Litigation Section they should be referred back to MAS according to the following protocol:

1.	<p>Advise the officer that in accordance with protocol they should liaise with MAS in the first instance.</p> <ul style="list-style-type: none"> • If the officer wishes to lodge a complaint relating to a <u>registered</u> or <u>unregistered</u> migration agent, the officer should contact a MAS staff member directly or send an email to migration.agent.complaints@immi.gov.au. • If the issue is not a complaint and the officer wishes to raise a <u>policy issues/registration issue or agents gateway issue</u>, they should contact a MAS staff member directly or send an email to agents.mailbox@immi.gov.au.
2.	<p>MAS will respond to the enquiry and, if appropriate, liaise with OMARA to progress/resolve.</p>
3.	<p><i>Reference Card #15: Dealing with Migration Agents</i> provides further guidance for managing client complaints against agents.</p> <ul style="list-style-type: none"> • If a client wishes to lodge a complaint relating to a <u>registered</u> migration agent the matter is the responsibility of the Office of the MARA and should be managed by the Office. • If a client wishes to lodge a complaint relating to <u>unregistered</u> practice the matter is the responsibility of the Department and the client should be referred to the department's dob-in-line ph. 1800 009 623.

ANNEXURE 8

INFORMATION SOUGHT FOR INTERNAL REFERRALS FROM MIGRATION AGENTS SECTION TO THE OFFICE OF THE MARA

1. Agent name & MARN:
2. Client / visa holder's name:
3. Client's current immigration status
 - Onshore / offshore
 - Current visa held:
4. Please provide dates of other internal referrals made by the Migration Agents Section to the Office of the MARA (if any).
5. Does the current referral establish a particular pattern of conduct by the migration agent in question?
6. Please provide a brief summary of the issues raised in the referral.
7. Has the client been advised to lodge a complaint directly with the OMARA?
8. Are there any current investigations (such as criminal or document examination) being conducted by DIAC in relation to the migration agent? If so, please provide particulars.
9. Are you attaching a client files or TRIM or ICSE records? If not, why?

MAS officer name:

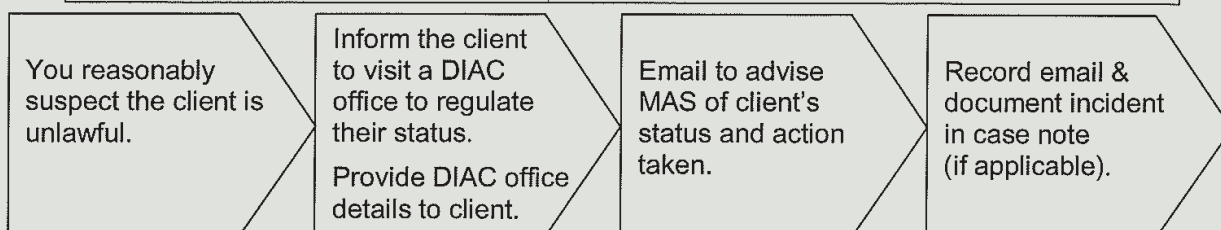
Date of referral:

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ANNEXURE 9

PROCESS FOR ADVISING COMPLAINANTS TO OBTAIN LAWFUL STATUS

Office of the MARA Professional Standards Officer	Information
<p>1. If you reasonably suspect that the complainant or associated person is unlawful.</p> <p><i>Note: It is departmental policy that, in relation to departmental officers:</i></p> <ul style="list-style-type: none"> other officers encountering persons of interest who must or may be detained under s189 of the Act should contact a relevant officer in their State/Territory, for example, a compliance officer or airport officer. 	<p>The law requires that people who have overstayed their visa, or have had their visa cancelled because they did not comply with their visa conditions, be detained and removed from Australia as soon as possible.</p> <p>This action can be avoided if a person voluntarily approaches a departmental office to make other arrangements. The client may be eligible for another visa.</p>
<p>2. Inform the unlawful person that they must regulate their visa status, by presenting themselves to a Departmental office.</p>	<p>Provide addresses of Departmental offices (refer to departmental website for latest contact details)</p>
<p>3. Report unlawful person by emailing the Migration Agents Section (MAS) for further action.</p>	<p>The email should:</p> <ol style="list-style-type: none"> request MAS to refer the matter to the compliance section at the relevant Departmental office; identify which Departmental office you have referred the unlawful person to visit; contain the unlawful person's personal identifiers: <ul style="list-style-type: none"> Full name Date of birth Passport number (if available) ICSE Client ID (if available) include any other relevant information.
<p>4. Record keeping</p>	<p>Folio the email referral to MAS to the complainant's electronic file in the Complaints database.</p> <p>Document event as necessary in a separate case note.</p>



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Attachment C

MEMORANDUM OF UNDERSTANDING ("MOU")

BETWEEN

THE OFFICE of the LEGAL SERVICES COMMISSIONER ABN ("OLSC")

AND

THE OFFICE OF THE MIGRATION AGENTS REGISTRATION AUTHORITY ABN 33 380 054 835 ("Office of the MARA")

Purpose

The parties intend to share information in respect of the *Migration Act 1958* ("MA") and the *Legal Profession Act 2004 (NSW)* ("LPA") on an ongoing basis.

The purpose of this MOU is to establish processes to share information between the OLSC and Office of the MARA and facilitate timely communication and advice on regulatory matters for which each is responsible.

The parties will each nominate a contact officer for the purposes of this MOU.

Consultation

- The OLSC will respond promptly to all requests for information from Office of the MARA.
- The OLSC will liaise with Office of the MARA if it receives information which it believes may be of relevance to Office of the MARA in the discharge of their responsibilities. Examples of such information include:
 - conduct by registered migration agents who are legal practitioners (lawyer agents) in their provision of *immigration assistance*;
 - conduct by lawyer agents in relation to their provision of *immigration legal assistance*; and
 - information about current or former registered migration agents obtained during Board and LSC investigations and enforcement actions.
- Office of the MARA will liaise with OLSC if it receives information it believes may be of relevance to OLSC in their discharge of their responsibilities. Examples of such information include:
 - conduct by lawyer agents which raises concerns about their compliance with the LPA;
 - information about current or former Australian lawyers and Australian legal practitioners obtained during Office of the MARA investigations and enforcement actions, and
 - conduct by lawyer agents which results in a decision to sanction.
- The parties will respond promptly to requests for information.

Co-ordination of investigation and enforcement action

- The parties may agree to co-operate in joint investigations. If that occurs, the parties may provide advice on their respective statutory and regulatory frameworks to assist in any investigation being undertaken.
- The parties will keep each other informed of the progress, proposed actions or concluded actions arising from a joint investigation or enforcement action.

Privacy

- The parties will comply with their respective obligations in relation to privacy.

Legal Status

- This MOU is not a contract and does not create any legally binding obligations.
- The parties may vary the MOU by agreement in writing.

EXECUTED AS A MEMORANDUM:

**SIGNED for and on behalf of THE OFFICE of the
LEGAL SERVICES COMMISSIONER**

on the 20th day of Dec 2011

)
)
)
)


Steve Mark
Legal Services Commissioner

**SIGNED for and on behalf of the Commonwealth of
Australia as represented by the Migration Agents
Registration Authority**

)
)
)
)


Christine Sykes
CEO, Migration Agents Registration Authority
on the 20th day of Dec 2011

Attachment D



Australian Government
Office of the Migration Agents
Registration Authority

Code of Conduct for registered migration agents

Current from 1 JULY 2012

Ethical profession | Empowered consumers | Engaged stakeholders

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The Code of Conduct for migration agents is authorised by the requirements of the *Migration Agents Regulations 1998* No. 53, Schedule 2, Regulation 8 and the *Migration Act 1958* Subsection 314(1).

PART 1

INTRODUCTION

- 1.1 This Code of Conduct (the **Code**) is intended to regulate the conduct of registered migration agents.
- 1.2 The Migration Agents Registration Authority (the **Authority**) is responsible for administering the Code.
- 1.3 A person who wants to operate as a registered migration agent must register with the Authority.
- 1.4 The Code applies to an individual who is listed in the Register of Migration Agents kept by the Authority under section 287 of the *Migration Act 1958* (the **Migration Act**).
- 1.5 To ensure compliance with the Code, the Authority may impose an administrative sanction if a breach of the Code is found to have occurred.
- 1.6 An administrative sanction may range from a caution through to suspension of registration or the ultimate sanction of cancellation of registration.
- 1.7 Accordingly, the Code does not impose criminal sanctions.
- 1.8 However, there are a number of offences under the Migration Act and the *Migration Regulations 1994* (the **Migration Regulations**) that also deal with the kind of activity covered by the Code. These activities include misleading statements and advertising, practising when unregistered and misrepresenting a matter. Provisions of the *Crimes Act 1914*, the *Criminal Code Act 1995* and the *Trade Practices Act 1974* may also apply to these activities.
- 1.9 The Code is not intended to displace any duty or liability that a registered migration agent may have under the common law, or the statute law of the Commonwealth, a State or a Territory, in relation to a matter covered by the Code. The provisions of the Code should be read in the light of this principle.
- 1.10 The aims of the Code are:
 - (a) to establish a proper standard for the conduct of a registered migration agent;
 - (b) to set out the minimum attributes and abilities that a person must demonstrate to perform as a registered migration agent under the Code, including:
 - (i) being a fit and proper person to give immigration assistance;
 - (ia) being a person of integrity and good character;
 - (ii) knowing the provisions of the Migration Act and Migration Regulations, and other legislation relating to migration procedure, in sufficient depth to offer sound and comprehensive advice to a client,

including advice on completing and lodging application forms;

(iii) completing continuing professional development as required by the *Migration Agents Regulations 1998*;

(iv) being able to perform diligently and honestly;

(v) being able and willing to deal fairly with clients;

(vi) having enough knowledge of business procedure to conduct business as a registered migration agent, including record keeping and file management;

(vii) properly managing and maintaining client records;

(c) to set out the duties of a registered migration agent to a client, an employee of the agent, and the Commonwealth and its agencies;

(d) to set out requirements for relations between registered migration agents;

(e) to establish procedures for setting and charging fees by registered migration agents;

(f) to establish a standard for a prudent system of office administration;

(g) to require a registered migration agent to be accountable to the client;

(h) to help resolve disputes between a registered migration agent and a client.

1.11 The Code does not list exhaustively the acts and omissions that may fall short of what is expected of a competent and responsible registered migration agent.

1.12 However, the Code imposes on a registered migration agent the overriding duty to act at all times in the lawful interests of the agent's client. Any conduct falling short of that requirement may make the agent liable to cancellation of registration.

1.13 If a registered migration agent has a contract in force with a client that complies with this Code, but the Code is amended in a way that relates to the content of the contract:

(a) the agent is not in breach of this Code solely because the contract does not comply with the amended Code; but

(b) the agent must do everything practicable to vary the contract to ensure that it complies with the amended Code.

PART 2

STANDARDS OF PROFESSIONAL CONDUCT

- 2.1 A registered migration agent must always:
- (a) act in accordance with the law (including, for an agent operating as an agent in a country other than Australia, the law of that country) and the legitimate interests of his or her client; and
 - (b) deal with his or her client competently, diligently and fairly.
- However, a registered migration agent operating as an agent in a country other than Australia will not be taken to have failed to comply with the Code if the law of that country prevents the agent from operating in compliance with the Code.
- 2.1A A registered migration agent must not accept a person as a client if the agent would have any of the following conflicts of interest:
- (a) the agent has had previous dealings with the person, or intends to assist the person, in the agent's capacity as a marriage celebrant;
 - (b) *[omitted by SLI 2006, 249 with effect from 1/10/2006]*;
 - (c) the agent is, or intends to be, involved with the person in a business activity that is relevant to the assessment of a visa application or cancellation review application;
 - (d) there is any other interest of the agent that would affect the legitimate interests of the client.
- 2.1B If it becomes apparent that a registered migration agent has a conflict of interest mentioned in clause 2.1A in relation to a client, the agent must, as soon as practicable taking into account the needs of the client, but in any case within 14 days:
- (a) tell the client about the conflict of interest; and
 - (b) advise the client that, under the Code, the agent can no longer act for the client; and
 - (c) advise the client about appointing another registered migration agent; and
 - (d) cease to deal with the client in the agent's capacity as registered migration agent.
- 2.1C Part 10 of the Code then applies as if the client had terminated the registered migration agent's instructions.
- 2.1D A registered migration agent who has ceased to act for a client in accordance with paragraph 2.1B(d), must, as soon as practicable, but in any case within 14 days, inform the Department that he or she is no longer acting for the client.
- 2.2 If a registered migration agent:
- (a) gives advice of a non-migration nature to a client in the course of giving immigration assistance; and
 - (b) could receive a financial benefit because of the advice;
- the agent must tell the client in writing, at the time the advice is requested or given, that the agent may receive a financial benefit.

- 2.3 A registered migration agent's professionalism must be reflected in a sound working knowledge of the Migration Act and Migration Regulations, and other legislation relating to migration procedure, and a capacity to provide accurate and timely advice.
- 2.3A A registered migration agent's professionalism must be reflected in the making of adequate arrangements to avoid financial loss to a client, including the holding of professional indemnity insurance mentioned in the regulation 6B for the period of the migration agent's registration.
- 2.4 A registered migration agent must have due regard to a client's dependence on the agent's knowledge and experience.
- 2.5 A registered migration agent must:
- (a) take appropriate steps to maintain and improve his or her knowledge of the current versions of:
 - (i) the *Migration Act 1958*; and
 - (ii) the *Migration Regulations 1994*; and
 - (iii) other legislation relating to migration procedure; and
 - (iv) portfolio policies and procedures; and
 - (b) either:
 - (i) maintain a professional library that includes those materials; or
 - (ii) if the agent's employer, or the business in which he or she works, maintains a professional library that includes those materials - take responsibility for ensuring that he or she has access to the library.
- Note 1:* A comprehensive list of the materials mentioned in subparagraphs (a) (iii) and (iv) may be obtained from the Professional Library page of the Authority's web site (www.mara.gov.au).
- Note 2:* A registered migration agent must satisfy the requirements for continuing professional development set out in Schedule 1.
- 2.6 To the extent that a registered migration agent must take account of objective criteria to make an application under the Migration Act or Migration Regulations, he or she must be frank and candid about the prospects of success when assessing a client's request for assistance in preparing a case or making an application under the Migration Act or Migration Regulations.
- 2.7 A registered migration agent who is asked by a client to give his or her opinion about the probability of a successful outcome for the client's application:
- (a) must give the advice, in writing, within a reasonable time; and
 - (b) may also give the advice orally to the extent that the oral advice is the same as the written advice; and
 - (c) must not hold out unsubstantiated or unjustified prospects of success when advising clients (orally or in writing) on applications under the Migration Act or Migration Regulations.

- 2.8 A registered migration agent must:
- (a) within a reasonable time after agreeing to represent a client, confirm the client's instructions in writing to the client; and
 - (b) act in accordance with the client's instructions; and
 - (c) keep the client fully informed in writing of the progress of each case or application that the agent undertakes for the client; and
 - (d) within a reasonable time after the case or application is decided, tell the client in writing of the outcome of the client's case or application.
- 2.9 A registered migration agent must not make statements in support of an application under the Migration Act or Migration Regulations, or encourage the making of statements, which he or she knows or believes to be misleading or inaccurate.
- 2.9A In communicating with, or otherwise providing information to, the Authority, a registered migration agent must not mislead or deceive the Authority, whether directly or by withholding relevant information.
- 2.10 A registered migration agent must not engage in false or misleading advertising, including advertising in relation to:
- (a) the agent's registration as a registered migration agent; or
 - (b) the implications of Government policy for the successful outcome of an application under the Migration Act or Migration Regulations; or
 - (c) guaranteeing the success of an application.
- Note:* Advertising includes advertising on the Internet.
- 2.11 A registered migration agent must, when advertising:
- (a) include in the advertisement the words "Migration Agents Registration Number" or "MARN", followed by the agent's individual registration number; and
 - (b) if the agent is advertising in a language other than English — include in the advertisement words in that other language equivalent to "Migration Agents Registration Number" or "MARN", followed by the agent's individual registration number.
- Note 1:* Advertising includes advertising on the Internet.
- Note 2:* Clause 2.12, which relates to implying a relationship with the Department or the Authority, also applies to the registered migration agent's advertising mentioned in clause 2.11.
- 2.12 A registered migration agent must not, when advertising, imply the existence of a relationship with the Department or the Authority, for example by using terms such as:
- (a) Australian Government registered; or
 - (b) Migration Agents Registration Authority registered; or
 - (c) Department registered.
- Note:* Advertising includes advertising on the Internet.
- 2.14 A registered migration agent must not portray registration as involving a special

or privileged relationship with the Minister, officers of the Department or the Authority, for example to obtain priority processing, or to imply that the agent undertakes part or full processing for the Department.

- 2.14A A registered migration agent must not represent that he or she can procure a particular decision for a client under the Migration Act or the Migration Regulations.
- 2.15 A registered migration agent must not intimidate or coerce any person for the benefit of the agent or otherwise. For example, a registered migration agent must not engage in any of the following:
- (a) undue pressure;
 - (b) physical threats;
 - (c) manipulation of cultural or ethnic anxieties;
 - (d) threats to family members in Australia or overseas;
 - (e) untruthful claims of Departmental sanctions;
 - (f) discrimination on the grounds of religion, nationality, race, ethnicity, politics or gender.
- 2.16 A registered migration agent with operations overseas may indicate that he or she is registered in Australia, but must not create an impression that registration involves accreditation by the Commonwealth Government for work overseas for the Commonwealth or for a client.
- 2.17 If an application under the Migration Act or the Migration Regulations is vexatious or grossly unfounded (for example, an application that has no hope of success) a registered migration agent:
- (a) must not encourage the client to lodge the application; and
 - (b) must advise the client in writing that, in the agent's opinion, the application is vexatious or grossly unfounded; and
 - (c) if the client still wishes to lodge the application - must obtain written acknowledgment from the client of the advice given under paragraph (b).
- Note:* Under section 306AC of the Act, the Minister may refer a registered migration agent to the Authority for disciplinary action if the agent has a high visa refusal rate in relation to a visa of a particular class.
- 2.18 A registered migration agent must act in a timely manner if the client has provided all the necessary information and documentation in time for statutory deadlines. For example, in most circumstances an application under the Migration Act or Migration Regulations must be submitted before a person's visa ceases to be in effect.
- 2.19 Subject to a client's instructions, a registered migration agent has a duty to provide sufficient relevant information to the Department or a review authority to allow a full assessment of all the facts against the relevant criteria. For example, a registered migration agent must avoid the submission of applications under the Migration Act or Migration Regulations in a form that does not fully reflect the circumstances of the individual and prejudices the prospect of approval.

- 2.20 A registered migration agent must:
- (a) find out the correct amount of any visa application charge and all other fees or charges required to be paid for a client's visa application under the Migration Act or the Migration Regulations; and
 - (b) give the client written advice of the amount of each fee and charge; and
 - (c) if the agent is to pay an amount for the client - give the client written advice of the date by which the amount must be given to the agent so that the interests of the client are not prejudiced; and
 - (d) give the client a written notice of each amount paid by the agent for the client.
- 2.21 A registered migration agent must not submit an application under the Migration Act or Migration Regulations without the specified accompanying documentation. For example, in a marriage case, threshold documentation would include a marriage certificate and evidence that the sponsor is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, without which assessment of the case could not proceed (unless the agent has a reasonable excuse or the client has requested the agent to act despite incomplete documentation).
- 2.22A A registered migration agent must, when providing translating or interpreting services, include on a prominent part of the translated document the following sequence:
- (a) the name of the migration agent;
 - (b) followed by the words 'Migration Agent's Registration Number';
 - (c) followed by the agent's registration number.
- 2.22B A registered migration agent must:
- (a) notify the Authority, in writing, of any changes to the registration details of the agent in relation to any of the following matters:
 - (i) the agent's full name;
 - (ii) any business names of the agent or the agent's employer;
 - (iii) the business address for the agent;
 - (iv) the telephone number for contacting the agent;
 - (v) any of the matters mentioned in paragraphs 3V (a) to (da) of these Regulations; and
 - (b) notify the Authority:
 - (i) in advance; or
 - (ii) not later than 14 days after the change or changes if advance notice would be unreasonable in the circumstances.
- 2.23 A registered migration agent must take all reasonable steps to maintain the reputation and integrity of the migration advice profession.
- 2.24 This Code is a responsive document that will change from time to time to meet the needs of clients and to ensure the delivery of relevant, up to date advice.

PART 3

OBLIGATIONS TO CLIENTS

- 3.1 A registered migration agent has a duty to preserve the confidentiality of his or her clients.
- 3.2 A registered migration agent must not disclose, or allow to be disclosed, confidential information about a client or a client's business without the client's written consent, unless required by law.
- 3.2A Once a registered migration agent had agreed to work for a client, but before commencing that work, the agent must:
- (a) provide the client with a copy of the *Consumer Guide*; and
 - (b) make a record that the copy has been provided.
- Note: Consumer Guide is a document produced by the Authority with information about the migration advice profession, the functions of the Authority, the legislation regulating the profession, what a client can reasonably expect from a registered migration agent, and complaint procedures.*
- 3.3 A registered migration agent must inform clients that they are entitled to receive copies of the application under the Migration Act or Migration Regulations and any related documents if they want copies. The agent may charge a reasonable amount for any copies provided.
- 3.4 A registered migration agent must have an address and telephone number where the agent can be contacted during normal business hours.
- 3.5 If a registered migration agent changes his or her address, telephone number or any other details that are recorded on the Register of Migration Agents, the agent must give a written notice to the Department, the Authority, any review authority and all current clients of the agent:
- (a) in advance; or
 - (b) not later than 14 days after the change or changes if advance notice would be unreasonable in the circumstances.
- 3.6 A registered migration agent must ensure that clients have access to an interpreter if necessary.

PART 4

RELATIONS BETWEEN REGISTERED MIGRATION AGENTS

- 4.1 Before accepting immigration work, a registered migration agent must consider whether he or she is qualified to give the advice sought by the client. If the agent is unsure, he or she must seek the appropriate advice or assistance, or refer the matter to another registered migration agent.
- 4.2 A referral may be made, for example, if a registered migration agent is asked for advice on matters for which he or she does not regularly provide immigration assistance.
- 4.3 A registered migration agent must not encourage another agent's client to use the first agent's services, for example by denigrating other agents or offering services that the first agent cannot, or does not intend to, provide.
- 4.4 A registered migration agent must not take over work from another registered migration agent unless he or she receives from the client a copy of written notice by the client to the other agent that the other agent's services are no longer needed.
- 4.5 A registered migration agent must act with fairness, honesty and courtesy when dealing with other registered migration agents.
- 4.6 A registered migration agent who gives a written undertaking to another registered migration agent must make sure the undertaking is performed within a reasonable time, if possible.

PART 5

FEES AND CHARGES

- 5.1 There is no statutory scale of fees. However, a registered migration agent must set and charge a fee that is reasonable in the circumstances of the case.
- 5.2 A registered migration agent must:
- (a) before starting work for a client, give the client:
 - (i) an estimate of charges in the form of fees for each hour or each service to be performed, and disbursements that the agent is likely to incur as part of the services to be performed; and
 - (ii) an estimate of the time likely to be taken in performing the services; and
 - (b) as soon as possible after receiving instructions, obtain written acceptance by the client, if possible, of:
 - (i) the estimate of fees; and
 - (ii) the estimate of the time likely to be taken in performing the services; and
 - (c) give the client written confirmation (an **Agreement for Services and Fees**) of:
 - (i) the services to be performed; and
 - (ii) the fees for the services; and
 - (iii) the disbursements that the agent is likely to incur as part of the services; and
 - d) give the client written notice of any material change to the estimated cost of providing a service, and the total likely cost because of the change, as soon as the agent becomes aware of the likelihood of a change occurring.
- 5.3 A registered migration agent:
- (a) must not carry out work in a manner that unnecessarily increases the cost to the client; and
 - (b) must, if outside expertise is to be engaged and the client agrees, fully inform the client of the likely extra cost; and
 - (c) must, especially if a solicitor or barrister, warn clients of possible delays and likely cost involved in pursuing a particular course of action before tribunals and in the courts, for example:
 - (i) any need to engage and pay expert witnesses;
 - (ii) the need to meet legal costs if a case were lost;
 - (iii) the need to pay Departmental fees and charges;
 - (iv) the need to pay translation and interpreter fees and charges.

5.4 A registered migration agent must give clients written advice of the method of payment of fees and charges, including Departmental fees and charges.

5.5 A registered migration agent must be aware of the effect of section 313 of the Act, and act on the basis that:

(a) the agent is not entitled to be paid a fee or other reward for giving immigration assistance to a client unless the agent gives the client a statement of services that is consistent with the services, fees and disbursements in the Agreement for Services and Fees mentioned in clause 5.2.

Note: The statement of services may be an itemised invoice or account. See clause 7.2 and 7.4; and

(b) a statement of services must set out:

- (i) particulars of each service performed; and
- (ii) the charge made in respect of each such service; and

(c) a client is entitled by the Act to recover the amount of a payment as a debt due to him or her if he or she:

- (i) made the payment to the agent for giving immigration assistance; and
- (ii) did not receive a statement of services before making the payment; and
- (iii) does not receive a statement of services within 28 days after a final decision is made about the visa application, cancellation review application, nomination or sponsorship to which the immigration assistance related.

PART 6

RECORD KEEPING AND MANAGEMENT

- 6.1 A registered migration agent must maintain proper records that can be made available for inspection on request by the Authority, including files containing:
- (a) a copy of each client's application; and
 - (b) copies of each written communication between:
 - (i) the client and the agent; and
 - (ii) the agent and any relevant statutory authority; and
 - (iii) the agent and the Department regarding the client; and
 - (c) file notes of every substantive or material oral communication between:
 - (i) the client and the agent; and
 - (ii) the agent and an official of any relevant statutory authority; and
 - (iii) the agent and the Department regarding the client.
- 6.1A A registered migration agent must keep the records mentioned in clause 6.1 for a period of 7 years after the date of the last action on the file for the client.
- 6.2 A registered migration agent must keep all documents to which a client is entitled securely and in a way that will ensure confidentiality while the agent is giving services to the client and until the earlier of:
- (a) 7 years after the date of the last action on the file for the client; or
 - (b) when the documents are given to the client or dealt with in accordance with the client's written instructions.
- Note:* On the completion or termination of services, all documents to which a client is entitled are to be dealt with in accordance with Part 10.
- 6.2A For clause 6.2, the documents to which a client is entitled include (but are not limited to) documents that are:
- (a) provided by, or on behalf of, the client; and
 - (b) paid for by, or on behalf of, the client; such as passports, birth certificates, qualifications, photographs and other personal documents.
- 6.3 A registered migration agent must respond to a request for information from the Authority within a reasonable time specified by the Authority.
- 6.4 A registered migration agent must act on the basis that the agent's electronic communications are part of the agent's records and documents.

PART 7

FINANCIAL DUTIES

- 7.1 Subject to clause 7.1B, a registered migration agent must keep separate accounts with a financial institution for:
- (a) the agent's operating expenses (the *operating account*); and
 - (b) money paid by clients to the agent for fees and disbursements (the *clients' account*).
- 7.1A The words 'clients' account' must be included in the name of the financial institution account mentioned in paragraph 7.1(b).
- 7.1B If a registered migration agent is operating as an agent in a country other than Australia that does not allow, under its law, the use of a clients' account as described in paragraph 7.1(b):
- (a) the agent is not required to keep a separate account of that name; but
 - (b) the agent must:
 - (i) keep an account for money paid by clients to the agent for fees and disbursements in a way that is as similar as practicable to the requirements in this Part; and
 - (ii) comply with this Part as far as practicable in relation to keeping records of the account and making the records available for inspection.
- 7.2 A registered migration agent must hold, in the clients' account, an amount of money paid by a client for an agreed block of work until:
- (a) the agent has completed the services that comprise the block of work; and
 - (b) an invoice has been issued to the client for the services performed in accordance with the Agreement of Services and Fees mentioned in clause 5.2, showing:
 - (i) each service performed; and
 - (ii) the fee for each service.
- 7.3 The registered migration agent may, at any time, withdraw money from the clients' account for disbursements that are required to be paid to the Department, or any other agency, for the client.
- 7.4 A registered migration agent must keep records of the clients' account, including:
- (a) the date and amount of each deposit made to the clients' account, including an indication of the purpose of the deposit and the client on whose behalf the deposit is made; and
 - (b) the date and amount of each withdrawal made in relation to an individual

client, and the name of each recipient of money that was withdrawn; and
(c) receipts for any payments made by the client to the agent; and
(d) statement of services; and
(e) copies of invoices or accounts rendered in relation to the account.

7.5 A registered migration agent must make available for inspection on request by the Authority:

- (a) records of the clients' account; and
- (b) records of each account into which money paid by a client to the agent for fees and disbursements has been deposited.

7.6 If a registered migration agent provides a service to a client on the basis of a conditional refund policy, a 'no win, no fee' policy or an undertaking to similar effect:

- (a) the agent must have sufficient funds available to be able to cover any amount that the agent may become liable to pay to the client under the policy or undertaking; and
- (b) the agent must meet that obligation by:
 - (i) keeping funds in the clients' account; or
 - (ii) keeping a security bond; or
 - (iii) maintaining adequate insurance.

7.7 Nothing in clause 7.1, 7.1A, 7.2, 7.3, 7.4 or 7.6 affects the duty of a registered migration agent, who is also a legal practitioner and who acts in that capacity, to deal with clients' funds in accordance with the relevant law relating to legal practitioners.

PART 8

DUTIES OF REGISTERED MIGRATION AGENTS TO EMPLOYEES

- 8.1 A registered migration agent has a duty to exercise effective control of his or her office for the purpose of giving immigration advice and assistance.
- 8.2 A registered migration agent must properly supervise the work carried out by staff for the agent.
- 8.3 All immigration assistance must be given by a registered migration agent unless the assistance is permitted under section 280 of the Migration Act.
- 8.4 A registered migration agent must make all employees, including those not involved in giving immigration assistance (for example receptionists and typists), familiar with the Code, for example by:
 - (a) displaying the Code prominently in the agent's office;
 - (b) establishing procedures to ensure that employees become familiar with the Code including supplying employees with copies of the Code.
- 8.5 A registered migration agent must ensure that his or her employees are of good character and act consistently with the Code in the course of their employment.

PART 9

COMPLAINTS

- 9.1 A registered migration agent must respond properly to a complaint by a person (whether or not the person is a client) about the work or services carried out by the agent or the agent's employee.
- 9.2 A registered migration agent must submit to the procedures for mediation as recommended by the Authority about handling and resolving complaints by the client against the agent.
- 9.3 If the Authority gives a registered migration agent details of a complaint made to the Authority about:
- (a) the work or services carried out by the agent or the agent's employees; or
 - (b) any other matter relating to the agent's compliance with this Code —
- the agent must respond properly to the Authority, within a reasonable time specified by the Authority when it gives the details to the agent.

PART 10

TERMINATION OF SERVICES

- 10.1 A registered migration agent must complete services as instructed by a client unless:
- (a) the agent and client agree otherwise; or
 - (b) the client terminates the agent's instructions; or
 - (c) the agent terminates the contract and gives reasonable written notice to the client.
- 10.1A For paragraph 10.1(c), a written notice must state:
- (a) that the agent ceases to act for the client; and
 - (b) the date from which the agent ceases to act; and
 - (c) the terms of any arrangements made in respect of appointing another registered migration agent.
- 10.1B Within 7 days of giving the written notice, the agent must:
- (a) update the client's file to reflect the current status of each case or application undertaken by the agent for the client; and
 - (b) deliver all documents to which the client is entitled to the client or to the appointed registered migration agent; and
 - (c) ensure that all financial matters have been dealt with as specified in the contract.
- 10.2 A client is entitled to ask a registered migration agent (orally or in writing) to return any document that belongs to the client. The agent must return the document within 7 days after being asked.
- 10.3 Australian passports, and most foreign passports, are the property of the issuing Government and must not be withheld.
- 10.4 A registered migration agent must not withhold a document that belongs to a client, as part of a claim that the agent has a right to withhold a document by a lien over it, unless the agent holds a current legal practising certificate issued by an Australian body authorised by law to issue it.
- 10.5 On completion of services, a registered migration agent must, if asked by the client, give to the client all the documents:
- (a) given to the agent by the client; or
 - (b) for which the client has paid.

10.6 If the client terminates the instructions, a registered migration agent must take all reasonable steps to deliver all documents quickly to the client or any other person nominated by the client in writing. If the agent claims a lien on any documents, the agent must take action to quantify the amount claimed and tell the client in a timely manner.

Note 1: Only registered migration agents who hold a current legal practising certificate issued by an Australian body authorised by law to issue it are able to claim a lien on any client documents.

Note 2: A **document** includes an application, nomination, sponsorship, statement, declaration, affidavit, certificate or certified copy. See *Acts Interpretation Act 1901* s25, Migration Regulations regulation 5.01.

PART 11

CLIENT AWARENESS OF THE CODE

- 11.1 A registered migration agent must ensure that at least 1 copy of the Code is displayed prominently in:
- (a) any waiting room or waiting area that is:
 - (i) at the agent's place of business; and
 - (ii) used by clients; and
 - (b) any office or room in which the agent conducts business with clients.
- 11.2 A registered migration agent must ensure that a client who asks to see the Code can be supplied immediately with 1 copy for the client to keep.
- 11.3 Each contract made between a registered migration agent and a client must:
- (a) include a statement about the existence and purpose of the Code; and
 - (b) guarantee that the client can obtain a copy of the Code, on request, from the agent.
- 11.4 A registered migration agent who has an Internet web site must provide a link to the copy of the Code that is displayed on the Authority's web site.

Notes to the *Migration Agents Regulations 1998*

Note 1

The *Migration Agents Regulations 1998* (in force under the *Migration Act 1958*) as shown in this reprint comprise Statutory Rules 1998 No.53 amended as indicated in the Tables below.

Table of Statutory Rules

Year and number	Date registered in <i>Gazette</i> /FRLI	Date of commencement	Application, saving or transitional provisions
1998 No. 53	1 Apr 1998	R. 6 and Schedule 1: 21 Jan 1999 Remainder: 1 April 1998	
1999 No. 69	7 May 1999	1 July 1999	
2000 No. 64	4 May 2000	1 July 2000	
2000 No. 309	23 Nov 2000	23 Nov 2000	
2001 No. 143	20 June 2001	1 July 2001	
2002 No. 229	26 Sept 2002	1 Nov 2002	
2002 No. 346	20 Dec 2002	1 Mar 2003	
2003 No. 92	22 May 2003	1 July 2003	
2004 No. 129	18 June 2004	1 July 2004 (see r. 2 and <i>Gazette</i> 2004, No. GN23)	
2004 No. 391	23 Dec 2004	Rr. 1-3 and Schedule 1: 2 Apr 2005 Remainder: 1 July 2005	
2005 No. 131	20 June 2005 (see F2005L01500) ^	Rr. 1-4 and Schedule 1: 1 July 2005 Remainder: 1 July 2006	R. 4 [see Table A] *
2006 No. 158	26 June 2006 (see F2006L01877) ^	1 July 2006	
2006 No. 249	25 Sept 2006 (see F2006L03044) ^	1 Oct 2006	
2011 No. 250	12 Dec 2011 (see F2011L02650) ^	1 Jan 2012	
2012 No. 106	19 June 2012 (see F2012L01244) ^	1 July 2012	

^ Denotes the date of registration on the Federal Register of Legislative Instruments (FRLI)

* Refer to the Commonwealth Consolidate Regulations on the AustLII website (<http://austlii.edu.au>) for more information

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Schedule 2	am. 1999 No. 69
Schedule 2	am. 2000 No. 64 & 309
Schedule 2	am. 2001 No. 143
Schedule 2	am. 2002 No. 346
Schedule 2	am. 2004 No. 129 and 391

Schedule 2	am. 2005 No. 131
Schedule 2	am. 2006 No. 249
Schedule 2	am. 2011 No. 250
Schedule 2	am. 2012 No. 106

Clients of Registered Migration Agents should be aware of the following provisions of the *Migration Act 1958*.

Section 313 Persons charged for services to be given detailed statement of services.

- (1) A registered migration agent is not entitled to be paid a fee or other reward for giving immigration assistance to another person (the assisted person) unless the agent gives the person a statement of services.
- (2) A statement of services must set out:
 - (a) particulars of each service performed; and
 - (b) the charge made in respect of each such service.
- (3) An assisted person may recover the amount of a payment as a debt due to him or her if he or she:
 - (a) made the payment to a registered migration agent for giving immigration assistance; and
 - (b) did not receive a statement of services before making the payment; and
 - (c) does not receive a statement of services within the period worked out in accordance with the regulations.
- (4) This section does not apply to the giving of immigration legal assistance by a lawyer.

Section 314 Code of Conduct for migration agents

- (1) The regulations may prescribe a Code of Conduct for migration agents.
- (2) A registered migration agent must conduct himself or herself in accordance with the prescribed Code of Conduct.

Regulation 71 of the *Migration Agents Regulations 1998*

For paragraph 313 (3)(c) of the Act, the period is 28 days after the decision, in relation to the immigration assistance, is made about:

- (a) a visa application; or
- (b) a cancellation review application ; or
- (c) a nomination or sponsorship application; or
- (d) a request to the Minister to exercise his or her power under section 351, 391, 417 or 454 of the Act.

SCHEDULE 2: CODE OF CONDUCT

(regulation 8)

Migration Act 1958, subsection 314(1)

**THIS CODE OF CONDUCT SHOULD BE DISPLAYED PROMINENTLY IN
THE REGISTERED MIGRATION AGENT'S OFFICE.**

If a client believes that a registered migration agent has acted in breach of
this Code of Conduct, a complaint can be made in writing to:

Migration Agents Registration Authority
PO BOX Q1551
QVB NSW 1230

Contact the Office of the MARA

For more information, contact the Office of the MARA in any of the following ways:

- Website: www.mara.gov.au
- Email: info@mara.gov.au
- Phone: 1300 226 272 or +61 2 9078 3552
- Fax: +61 2 9078 3591
- Street address: Level 10, 111 Elizabeth Street
Sydney NSW Australia
- Postal address: PO Box Q1551
QVB NSW 1230

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